

FILED  
Court of Appeals  
Division III  
State of Washington  
1/16/2019 8:00 AM  
36031-8-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JOLENE MENEGAS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S 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*.

## **II. ISSUES PRESENTED**

1. Is the defendant's claim of instructional error a manifest constitutional error that may be raised for the first time on appeal?
2. Did the trial court commit reversible error when it instructed the jury separately as to the State's burden of proof regarding the elements of assault and its burden to disprove self-defense, where our Supreme Court has specifically rejected the argument that the to-convict instruction must include, as an element, the lack of self-defense?
3. Where defendant proposed a separate instruction on the State's burden of proving the absence of self-defense, is any instructional error in this regard invited?

4. Was trial counsel ineffective for failing to object to the to-convict and self-defense instructions where our Supreme Court has approved of separate instructions as were given in this case?
5. Should this Court order the criminal filing fee to be stricken pursuant to *State v. Ramirez*, where the defendant's case was pending on appeal when the legislature amended the criminal filing fee statute?

### **III. STATEMENT OF THE CASE**

On April 4, 2017, the defendant was charged by information with third degree assault against a family or household member in the Spokane Superior Court. CP 3. Her case proceeded to trial.

On March 31, 2017, Michael Menegas travelled from Moscow, Idaho, to Spokane, Washington, to pick up his two children for his court-authorized, week-long, visitation during spring break.<sup>1</sup> RP 116, 118, 119, 126. When the boys resided in Spokane, they lived with their mother, Jolene Menegas. RP 115-117, 121.

Mr. Menegas arrived at Ms. Menegas' home sometime between 3 and 5 p.m., and although her vehicle was in the driveway, no one answered the door when Mr. Menegas knocked. RP 120, 131.

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<sup>1</sup> Mr. Menegas had court-ordered visitation four days a month, and on various holidays. RP 117-118.

Mr. Menegas left to get something to eat and returned approximately 30 to 45 minutes later. RP 120, 131. Ms. Menegas' car was still parked at the house. RP 121. Mr. Menegas knocked on the door, and Ms. Menegas informed him that he could not pick up the kids. RP 121, 131. Ms. Menegas opened the door, shouted at Mr. Menegas, and slammed the door in his face. RP 122, 132. Ms. Menegas told Mr. Menegas that he needed to leave. RP 122. Although Mr. Menegas attempted to remain civil, Mrs. Menegas yelled obscenities at him. RP 122, 132. Mr. Menegas told her that he would be forced to involve law enforcement if she did not cooperate. RP 135. Mr. Menegas knocked again, and as the door opened, Ms. Menegas' arm appeared and she sprayed Mr. Menegas with pepper spray, irritating his skin and lungs. RP 123. His eyes were unaffected because he was wearing sunglasses. RP 123. Mr. Menegas returned to his vehicle to call law enforcement. RP 123-124.

Mr. Menegas called the police at approximately 5:59 p.m. RP 162. An officer spoke with Ms. Menegas who told him that Mr. Menegas had a court order authorizing him to pick up the children on that date, that she was aware of the order and had been served with it, but that it had been "falsely procured." RP 175-176. She also told law enforcement that her children did not want to go with Mr. Menegas. She agreed that there had been an argument, and stated that Mr. Menegas had pounded on the door,

she had opened the door five or six times, and then warned him she was going to mace him if he did not leave, and then she did so. RP 176, 183. Mrs. Menegas claimed she felt threatened by Mr. Menegas and feared that he might have tried to push his way past the door which was closed. RP 177.

At trial, Ms. Menegas claimed that Mr. Menegas was not on time to pick up the children. RP 220. She stated that both children told Mr. Menegas that they did not want to go with him for spring break. RP 221. Ms. Menegas claimed that it was Mr. Menegas who escalated the situation, by pounding with his fist on the door causing the door to shake, and that she felt threatened. RP 222-223. Ms. Menegas, who suffered from PTSD,<sup>2</sup> stated she was anxious about the situation, and felt as though she was backed into a corner with no escape. RP 224-225. She did not call the police because she was not thinking clearly and, in her opinion, it was not beneficial to call them. RP 225. Ms. Menegas told Mr. Menegas “there’s no legal purpose for you to be here. You need to take this up in a courtroom. This is not the way to do this. This is what the police have told you.” RP 224. She told him three times to leave her property or that she would spray him with the pepper spray. RP 224. She claimed that she feared for her safety and the safety of her children, and that she panicked when he put

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<sup>2</sup> Ms. Menegas claimed verbal and physical abuse by Mr. Menegas, although he had never been convicted of abusing her. RP 229, 233.

his hand on the door next to the door handle. RP 226, 228, 232. As a result, she sprayed him with the pepper spray. RP 229. Because of her “amazing self-control” it took her 45 minutes to pepper spray Mr. Menegas, even though he immediately began to escalate the situation. RP 241.

The children also testified at trial. Both stated they did not want to go with their father, and that Ms. Menegas pepper sprayed him when he would not stop banging on the door.<sup>3</sup> RP 206, 208, 213, 216. The children were not frightened by Mr. Menegas or by the pounding on the door.<sup>4</sup> RP 208-209, 210, 217.

The defendant claimed she acted in self-defense, arguing that her use of force was reasonable because she feared for her safety and the safety of her children. RP 327-328, 330-331. The jury disagreed, finding the defendant guilty as charged. Because she had no prior felony history, the court sentenced her to a first-time offender waiver with credit for time served of 4 days confinement and 12 months of community custody, and legal financial obligations of \$500 for the crime victim’s compensation

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<sup>3</sup> The children denied that Mr. Menegas was yelling. RP 207, 214.

<sup>4</sup> A neighbor witnessed the event as well. At trial, she claimed that she heard Mr. Menegas knocking on the door “pretty loud” for five to ten minutes. RP 272. During cross-examination, she conceded that she told law enforcement that Mr. Menegas knocked on the door “in a civil manner.” RP 275.

fund, \$200 for the criminal filing fee, and \$100 for the DNA collection fee. CP 55, 57-58; RP 361. The defendant timely appealed.

#### IV. ARGUMENT

Defendant makes three claims on appeal. First, she claims the “to convict” instruction for third degree assault omitted an essential element – that the assault was not in self-defense; she argues that the separate self-defense instruction, which states that the absence of self-defense must be proved by the State beyond a reasonable doubt does not suffice and conflicts with the to-convict instruction. Second, the defendant claims ineffective assistance of counsel for counsel’s failure to request that the to-convict instruction also state the law of self-defense. Lastly, she requests that the court strike the criminal filing fee which was imposed at her sentencing.

**A. THE DEFENDANT FAILED TO OBJECT TO THE SPECIFIC JURY INSTRUCTIONS AT ISSUE ON APPEAL; IT WAS NOT A MANIFEST CONSTITUTIONAL ERROR FOR THE COURT TO GIVE BOTH A TO-CONVICT INSTRUCTION AND A SEPARATE INSTRUCTION ON SELF-DEFENSE; MOREOVER, NO ERROR OCCURRED AS OUR SUPREME COURT HAS APPROVED OF SEPARATE TO CONVICT AND SELF-DEFENSE INSTRUCTIONS; LASTLY, ANY ERROR WAS INVITED.**

1. The defendant may not raise an alleged error in the “to convict” instruction because it is not a manifest constitutional error and was not objected to below.

A criminal defendant may not raise a challenge to a jury instruction for the first time on appeal, unless the alleged error is a manifest error

affecting a constitutional right. RAP 2.5(a). It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013).

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

*Strine*, 176 Wn.2d at 749-50. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever

they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Thus, to establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.”

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclan*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

As this Court observed in *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff’d and remanded on other grounds*, 174 Wn.2d 707, 285 P.3d 21 (2012): “[T]he general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),<sup>5</sup> requiring that timely and well stated

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<sup>5</sup> CrR 6.15(c) states:

Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms.

objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’”

In determining whether a claimed error is manifest, this Court views the claimed error in the context of the record as a whole, rather than in isolation. *Scott*, 110 Wn.2d at 688. Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). Instructional error is not automatically constitutional error, even when instructional error relates to the law of self-defense. *O’Hara*, 167 Wn.2d at 103; *Guzman Nuñez*, 160 Wn. App. at 159.

There is nothing in defendant’s claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized that, in the absence of an objection to the instructions as proposed by the State and as prepared by the court, the “to convict” instruction was inadequate, especially where the self-defense instruction directed the jury that the absence of self-defense

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The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

must also be proven by the State beyond a reasonable doubt. To the contrary, the instructions, when considered as a whole, were a correct statement of the law, were based upon Washington Pattern Jury Instructions, comported with Supreme Court precedent (as discussed below), and instructed the jury as to every essential element of the of third degree assault and the law of self-defense. Therefore, the defendant's claims here are not manifest, and therefore, may not be raised for the first time on appeal.

2. The “to convict” and self-defense instructions correctly set forth the law, were not misleading, and allowed the parties to argue their theories of the case.

On appeal, challenges to jury instructions are reviewed de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). “Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Both the Federal and State Constitutions require that a jury be instructed on all essential elements of the crime charged. U.S. Const. amend. VI; Const. art. 1, § 22. A jury instruction which *omits* an *essential element* of a crime relieves the State of proving each element of the crime charged beyond a reasonable doubt and is a violation of due process.

*State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007). Therefore, “a ‘to convict’ [jury] 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.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). The court does not look to other jury instructions to supply a missing element from a “to convict” jury instruction. *Id.* at 262-63. However, even if a jury instruction “omits an element of the charged offense or misstates the law,” it does not necessarily require reversal, and “is subject to harmless error analysis.” *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

As charged in the information in this case, RCW 9A.36.031 provides the elements of third degree assault. It states:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree ... (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

Although not defined by statute, Washington recognizes three common law definitions of “assault”: “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and

(3) putting another in apprehension of harm.” *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

The approved Washington Pattern Jury Instruction on the elements required to convict a defendant third degree assault by criminal negligence and substantial pain, as charged in the information states:

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 (date), the defendant caused bodily harm to (name of person),
- (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 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.

WPIC 35.24 (emphasis added).

In this case, the elements instruction given by the trial court comported with the WPIC. CP 37. The jury was also informed that an assault is an “intentional touching ... with unlawful force.” CP 36.

Once the issue of self-defense is properly raised, the absence of self-defense “becomes another element of the offense which the State must

prove beyond a reasonable doubt.” *State v. McCullum*, 98 Wn.2d 484, 493–94, 656 P.2d 1064 (1983). In this case, the jury was instructed on the law of self-defense by the use of WPIC 17.02. CP 34. In that instruction, the jury was charged that its duty would be to find the defendant not guilty of third degree assault if it found that the State had not proved the absence of lawful force (or self-defense) beyond a reasonable doubt. CP 34.

Our Supreme Court has, in at least two cases, approved of instructing the jury separately on the law of self-defense and its duty to acquit the defendant if it found the State had not met its burden to prove the absence of lawful force beyond a reasonable doubt.

In *McCullum*, the Court reiterated the rule from *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977):

If evidence is presented which is deemed sufficient by the court to raise an issue as to the question of possible justification, that element should be treated in the same manner as any other. *The jury should be instructed as to the pertinent aspects of the law of justification in homicide cases and then simply informed that the State has the burden to prove absence of self-defense beyond a reasonable doubt.*

98 Wn.2d at 490 (emphasis in original).

In *McCullum*, the Court directed that the best-practice approach to handling burden of proof issues regarding self-defense is for a trial court to provide instructions framed in language that is unmistakably clear. 98 Wn.2d at 499-501. It did not require, however, that the burden of proof

instruction for self-defense also be included in the to-convict or elements instruction for the substantive crime.

In the later case of *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991), the consolidated defendants argued that the self-defense instructions must be part of the to-convict instruction which sets forth the elements of the crime. Our high Court disagreed, stating that it perceived “no error” where the jury was instructed to consider the instructions as a whole and the separate self-defense instructions properly informed the jury that the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. *Id.* at 109. The Supreme Court recognized that the trial court’s separate instructions on the elements of the crime and the burden of proof with respect to self-defense followed the method for instructing juries recommended by the Washington Supreme Court Committee on Jury Instructions. *Id.*

The defendant has failed to distinguish (or even cite) *Hoffman* or *McCullum*. Her claims simply redress the arguments made and rejected in *Hoffman*. This Court is bound to follow our Supreme Court’s precedent and must, likewise, reject her claim.<sup>6</sup>

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<sup>6</sup> Numerous unpublished Court of Appeals cases have since rejected the same argument. *See, e.g., State v. Alden*, 2016 WL 901027, 192 Wn. App 1070 (Div. 3, 2016) (unpublished opinion) (rejecting arguments that (1) elements instruction should include burden to disprove

In this case, the jury was instructed as to the elements of the crime of third degree assault, the elements of self-defense, and the State's burden of proof with respect to both. Those instructions, when considered as a whole, allowed the defendant to argue her theory of the case and were not misleading,<sup>7</sup> and the manner in which the court instructed the jury has been approved by our Supreme Court in *Hoffman* and *McCullum*. No error occurred in this regard.

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self-defense and (2) that elements instruction and self-defense instruction conflicted because defendant proposed the same self-defense instruction and invited instructional error); *State v. Thomas*, 2015 WL 3852937, 188 Wn. App. 1024 (Div. 1, 2015) (unpublished decision) (argument rejected because alleged error not preserved and not a manifest constitutional error and the to-convict instruction did not stand alone – the jury was also instructed by the use of WPIC 17.02); *State v. Drahold*, 2015 WL 4522915, 189 Wn. App. 1003 (Div. 1, 2015) (unpublished decision) (trial court did not err in rejecting defendant's proposed to-convict instruction which included the State's obligation to disprove self-defense; court stating that *Hoffman* is binding on the Court of Appeals); *State v. Kayser*, 2015 WL 9274260, 191 Wn. App. 1049 (Div. 1, 2015).

GR 14.1 provides a party may cite to an unpublished opinion if the opinion was filed after March 1, 2013. Such citations are non-binding but may be accorded such persuasive value as the court deems appropriate.

<sup>7</sup> Defendant's claim that the to-convict instruction and the self-defense instruction conflict with each other is also foreclosed by *Hoffman*, as our Supreme Court has expressly approved of giving separate to-convict and self-defense instructions where the defense is properly raised.

3. The defendant invited error, if any.

The defendant specifically requested that the court instruct the jury on the law of self-defense by the use of WPIC 17.02.<sup>8</sup> RP 264 (Defense counsel indicating her proposed self-defense instructions had “no deviation from the standard WPIC”). There is no evidence, whatsoever, that she also requested the jury be instructed on the State’s obligation to disprove self-defense in the to-convict instruction. Under the doctrine of invited error, even where constitutional rights are involved, this Court will not review jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). The doctrine of invited error precludes a criminal defendant from seeking review of an error she helped create. *State v. Studd*, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999), *as amended* (July 2, 1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Because the defendant requested a separate WPIC on self-defense and did not request the elements instruction also include the requirement that the State disprove self-defense beyond a reasonable doubt, any error in this regard is not only waived by defendant’s failure to object, it is also invited. *But see, State v. Hood*,

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<sup>8</sup> Although not contained in the clerk’s papers because the instructions were apparently not filed by the court, defendant prepared proposed instructions and presented them to the trial court. RP 263 (“I resubmitted my jury instructions this morning...”).

196 Wn. App. 127, 133-134, 382 P.3d 710 (2016) (where defendant did not propose his own instructions, invited error doctrine did not bar review of jury instruction, but alleged error was not a manifest constitutional error that could be raised on appeal absent objection below).

**B. COUNSEL WAS NOT INEFFECTIVE FOR REQUESTING THE APPROVED WPIC REQUIRING THE STATE TO DISPROVE SELF-DEFENSE; DEFENDANT FAILS TO DEMONSTRATE DEFICIENT PERFORMANCE.**

To demonstrate ineffective assistance of counsel, Ms. Menegas must show both deficient performance by her attorney and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). If a defendant fails to satisfy either prong, this Court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, Ms. Menegas must demonstrate there is a probability that, but for counsel’s deficient performance, “the result of the proceeding would have been different.” *McFarland*, 127 Wn.2d at 335. There is a strong presumption of effective assistance, and the defendant also bears the burden of

demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Ms. Menegas argues that her trial attorney was ineffective for failing to request that the to-convict instruction include as an element the State's burden to disprove self-defense. In *Studd*, *supra*, our Supreme Court addressed and rejected a similar argument<sup>9</sup> – that trial counsel was ineffective for failing to propose proper jury instructions on self-defense, even though the instructions provided at the defendant's trial and proposed by defense counsel comported with then-existing law.<sup>10</sup> Rather than framing his argument that the self-defense instructions requested by him and given at trial were deficient, entitling him to relief, he claimed that he suffered ineffective assistance of counsel, for counsel's failure to propose proper self-defense instructions. The Supreme Court observed, "by framing his argument this way, Bennett avoid[ed] one thicket [(the invited error doctrine)] only to become entangled in another [(ineffective assistance of counsel)]." *Studd*, 137 Wn.2d at 551. The Court held that the defendant could not demonstrate that his counsel's performance was deficient because

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<sup>9</sup> Multiple cases were consolidated in *Studd*.

<sup>10</sup> It was not until after the defendant's trial that the Court decided *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996), which changed the manner in which juries were to be instructed on the law of self-defense.

“deficient performance is not shown by matters that go to trial strategy or tactics.” *Id.* The Court declined to fault trial counsel as ineffective for requesting a “then-unquestioned WPIC.” The Court did not reach the second *Strickland* prong or analyze whether the defendant was prejudiced, because it declined to find that trial counsel had made any unprofessional error meriting a finding of deficient performance.

The same is true here. Even if this Court were to hold that the to-convict and self-defense instructions in this case were erroneous, but the error was invited, it should also decline to find that counsel’s proposal of those instructions, which comport with pattern jury instructions that have been approved by both the appellate court and Supreme Court of our state, was deficient performance. Such performance did not fall below an objective standard of reasonableness – under most circumstances, it is not unreasonable for trial counsel to follow the law as it existed at the time of trial. This claim fails.

**C. THE STATE AGREES THAT THIS COURT SHOULD ORDER THE CRIMINAL FILING FEE TO BE STRICKEN PURSUANT TO RAMIREZ.**

The defendant lastly argues this Court should order the trial court to strike the imposition of the \$200 filing fee, imposed at sentencing under RCW 36.18.020(h). CP 70. The State agrees. In 2018, House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h), to

prohibit courts from imposing the \$200 filing fee on indigent defendants. Laws of 2018, ch. 269, § 17 (2)(h). As of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; Laws of 2018, pg. ii, “Effective Date of Laws.” In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), our high Court addressed the 2018 amendments to RCW 43.43.754 and held that the amendment is applicable to cases pending on direct review and not final when the amendment was enacted. *Id.* at 747.

In the present case, the defendant was sentenced on April 19, 2018, and was pending direct review at the time of the legislative amendments. Thus, this Court should order the \$200 court cost be stricken from judgment and sentence; this may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (a ministerial correction does not require a defendant’s presence).

## V. CONCLUSION

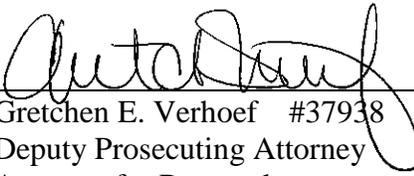
It was proper for the trial court to instruct the jury with separate instructions on the elements of third degree assault and the State’s burden to prove the absence of self-defense. Even if error, the error is not a manifest constitutional error that may be raised for the first time on appeal; it was invited by the defendant in proposing a separate instruction on the

State's burden to disprove the use of self-defense; and it does not support an ineffective assistance of counsel claim.

The only claim entitling the defendant to relief is her claim that the criminal filing fee should be waived due to her indigency. This Court should direct the trial court to strike that financial obligation from Ms. Menegas' judgment and sentence.

Dated this 15 day of January, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Gretchen E. Verhoef #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JOLENE MENEGAS,

Appellant.

NO. 36031-8-III

CERTIFICATE OF MAILING

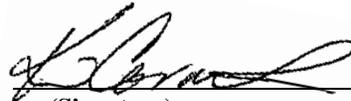
I certify under penalty of perjury under the laws of the State of Washington, that on January 16, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

E. Rania Rampersad

[rampersadr@nwattorney.net](mailto:rampersadr@nwattorney.net); [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net)

1/16/2019  
(Date)

Spokane, WA  
(Place)

  
(Signature)

# SPOKANE COUNTY PROSECUTOR

January 16, 2019 - 8:00 AM

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**Appellate Court Case Title:** State of Washington v. Jolene Summer Menegas  
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