SUPREME COURT NO. 92149-1
COA NO. 71948-3-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PENEUETA,

Petitioner.

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

The Honorable William Downing, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

A. IDENTITY OF PETITIONER

Michael Peneueta asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Peneueta requests review of the decision in State v. Michael Peneueta, Court of Appeals No. 71948-3-I (slip op. filed August 27, 2015), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether submission of an aggressor instruction to the jury that was unsupported by the evidence constitutes manifest constitutional error that can be raised for the first time on appeal under RAP 2.5(a)(3)?

2. Whether defense counsel provided ineffective assistance in failing to object to the aggressor instruction because no legitimate tactic justified the lack of objection and the failure undermines confidence in the outcome?

D. STATEMENT OF THE CASE

The State charged Peneueta with first degree unlawful possession of a firearm and three counts of second degree assault while armed with a firearm, committed against Theresa Strutynski, Amrico Flight and Donald Massey. CP 12-13. Evidence a trial showed a shooting occurred on Rainier Avenue South in the Rainier Valley area of Seattle. 2RP 4-5, 10;

3RP[1] 105. The owner of a marijuana dispensary at that location testified two men he knew as "Rico" and "Messy" came into his shop before the shooting. 3RP 103, 105-06. They left after making a purchase and stayed in Rico's car, a silver Crown Victoria, for five minutes before driving off. 3RP 108, 110-11. The shop owner then heard gunshots. 3RP 111. He looked out and saw someone wearing dark clothes and another person wearing a light top running away. 3RP 111, 114-17.

Ms. Strutynski was driving her Lexus when she saw two African Americans, one in a dark shirt and one in a white shirt, walking towards the street. 4RP 25-26, 32. She heard a popping noise behind her. 4RP 27. She saw the person in the white shirt holding a gun in an outreached manner. 4RP 28-29. She heard what sounded like her tire blowing out. 4RP 29. She noticed a hand with a gun placed out the passenger side of the window of a black Mercedes that was driving slowly in front of her. 4RP 29-30. She heard "two more popping sounds coming from that direction." 4RP 30. The Mercedes sped away. 4RP 34. She believed the person in the white shirt fired before the person in the Mercedes, and was shooting towards her location. 4RP 30-31.

---

[1] The verbatim report of proceedings is referenced as follows: 1RP – 3/10/14; 2RP – 3/11/14; 3RP – 3/12/14; 4RP – 3/13/14; 5RP – 3/17/14; 6RP – 5/2/14.

Surveillance video showed a silver Crown Victoria driving off, followed shortly by a black Mercedes. Ex. 13; 3RP 52. Strutynski's car can be seen driving directly behind the Mercedes. Ex. 13; 3RP 53-55, 78-79. Two people are seen running across the street, one of them firing a handgun. Ex. 13; 3RP 46, 54. The shooter wore a white t-shirt, dark jeans, and a cap. Ex. 13; 3RP 47. The other person wore a black jacket and dark jeans. Ex. 13; 3RP 47-48.

Police located James Perkins hiding in the backyard of a nearby residence. 2RP 49, 53; 3RP 40-41; 5RP 34. He wore a white t-shirt and dark colored jeans. 3RP 41. A black North Face jacket belonging to Perkins was found in the backyard. 2RP 49-50; 3RP 39-40; 5RP 24, 33-34. A gun was found nearby. 2RP 48-49; 3RP 43. Police also found a green and yellow hat on a garbage can in the vicinity. 2RP 49, 52, 64-65; 3RP 37. It was Peneueta's hat. 5RP 24, 33.

Officer Lee, responding to the shots fired report, contacted Peneueta nearby. 3RP 135-40. Peneueta said "he had heard some shots being fired over on Rainier" and was running from the scene. 3RP 139. He described seeing a Crown Victoria, "the occupants shooting at a black Mercedes Benz." 3RP 140. Peneueta later told a detective "I was returning to my house, on South Dawson, and we drive by and I turn around and I see this car and they hop in their car and they drive slow past

us and they stop, hang out the window, and start saying something. And then shots fired." 3RP 68. He was with Perkins. 3RP 68. The car was a Crown Victoria. 3RP 68. The driver looked at them. 3RP 69. Peneueta did not recognize the driver, but the driver appeared to recognize Peneueta. 3RP 70. The car drove off. 3RP 70. Peneueta and Perkins walked to the marijuana dispensary. 3RP 70. Once there, they saw the car again, followed by a black Mercedes. 3RP 70. Peneueta was sure the cars were together "because the Mercedes was the one that pulled the gun." 3RP 71.

The person from the Crown Victoria and the passenger in the Mercedes went up to the dispensary. 3RP 71. Upon leaving, one of them said something like "what you looking at?" 3RP 71. Then he drove off and "then the black car behind him took out a gun and then shots were fired." 3RP 71. The passenger in the Mercedes fired the gun. 3RP 71-72. Peneueta and Perkins ran off. 3RP 72. Peneueta denied having a gun during the incident. 3RP 73. He did not see Perkins with a gun. 3RP 73. Peneueta had a on a white t-shirt and dark colored pants. 3RP 73.

Amrico ("Rico") Flight and Donald ("Messy") Massey are affiliated with the East Union Street Gang. 4RP 70-72. Their gang was in conflict with the Down With The Crew (D-Dub) gang, with retaliatory violence ongoing. 4RP 54-57, 60. Peneueta is affiliated with D-Dub. 4RP 78. The Rainier Avenue South area is considered D-Dub territory.

4RP 60, 62-63. If a gang member is found in another gang's territory, it is cause for violence. 4RP 57-58. Rival gang members typically announce their gang affiliation before doing violence. 4RP 65.

Perkins testified that he and Peneueta were walking to the marijuana dispensary when they saw a vehicle driven by Rico. 5RP 16-19. Peneueta told Perkins, "If I see him again, I'm going to shoot at him." 5RP 22. When Peneueta later saw Rico coming out of the dispensary, he yelled "D-Dub," which Perkins took to mean an announcement that this was Peneueta's turf. 5RP 22-23, 25. Rico walked to his car, a Crown Victoria, and started driving north on Rainier Avenue. 5RP 24-25, 40. Rico stopped the car a few seconds later, rolled down the window, and pointed a gun at Peneueta and Perkins. 5RP 26-27. Perkins thought they were going to be shot. 5RP 39. Perkins thought Rico shot first. 5RP 26. Perkins waffled toward the end of his testimony, saying he did not know if Rico actually shot the gun.[2] 5RP 42. Peneueta started shooting at Rico. 5RP 26. Perkins and Peneueta then ran off. 5RP 30.

The jury was given self-defense instructions in relation to the assault counts. CP 41-42. The court also gave a first aggressor instruction to the jury, which read:

---

[2] In an earlier interview with the detective, Perkins did not say anything about Rico shooting a gun. 5RP 29-30.

> A person may not, by an intentional act of physical aggression which is reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor and that his acts or conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 43 (Instruction 11).

In closing argument, the prosecutor exhorted the jury to reject Peneueta's self-defense claim because he was the first aggressor. 5RP 78-79. The prosecutor told the jury self-defense was not available if Peneueta shot first. 5RP 79. Defense counsel argued the State failed to prove Peneueta was the shooter. 5RP 79. Counsel also argued the State failed to prove Peneueta did not act in self-defense. 5RP 79, 82, 83-84.

The jury found Peneueta guilty of unlawful possession of a firearm and the assaults against Strutynski and Flight. CP 21-24. The jury did not reach a verdict on the assault count involving Massey. CP 21; 5RP 92.

On appeal, Peneueta argued the court committed reversible error in giving the aggressor instruction or, in the alternative, defense counsel provided ineffective assistance in failing to object to the instruction. Brief of Appellant at 8-19; Reply Brief at 1-10. The Court of Appeals held the instructional error could not be raised for the first time on appeal because it was not "manifest" under RAP 2.5(a)(3), and that defense counsel

provided effective assistance in not objecting to an instruction that undermined Peneueta's self-defense claim. Slip op. at 1-2, 7, 12-13.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' MANIFEST CONSTITUTIONAL ERROR ANALYSIS CONFLICTS WITH SUPREME COURT PRECEDENT.

The Court of Appeals distorted the manifest constitutional standard under RAP 2.5(a)(3), using it in a way that unfairly prevents a serious constitutional error from being reviewed on appeal. It covertly imported a form of harmless error analysis into the manifest error analysis as a means to refuse review. The Supreme Court has repeatedly warned against doing this, but the Court of Appeals did it anyway. Under the proper standard for showing manifest constitutional error, the erroneous aggressor instruction given in this case passes the gatekeeping threshold for review. Review is warranted under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with Supreme Court precedent on the manifest error standard, especially State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

a. The aggressor instruction error is manifest because it resulted in actual prejudice and was obvious.

Before the merits of an unpreserved error under RAP 2.5(a)(3) are reviewed, two questions are asked: "(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the

party demonstrated that the error is manifest?" State v. Kalebaugh, __Wn.2d__, __P.3d__, 2015 WL 4136540, at *3 (2015). The requirements under RAP 2.5(a)(3) must not be confused with a harmless error analysis. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

"To determine if the error is of constitutional magnitude, we look to see whether, if correct, the claim would implicate a constitutional interest." In re Welfare A.W., 182 Wn.2d 689, 700 n.10, 344 P.3d 1186 (2015). The Court of Appeals appropriately found the instructional error was of constitutional magnitude. Slip op. at 8.

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984); O'Hara, 167 Wn.2d at 105. The aggressor instruction rendered Peneueta's self-defense claim unavailable if the jury determined he was the first aggressor, thereby preventing the jury from considering whether the State proved beyond a reasonable doubt that he did not act in self-defense. Slip op. at 8. The improper instruction, by short circuiting Peneueta's self-defense claim, also violated his right to defend against the

State's allegations by presenting a complete defense. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI and XIV; Wash. Const. art. 1, §§ 3, 22.

The asserted error is also manifest from the record. Under RAP 2.5(a)(3), manifestness "'requires a showing of actual prejudice.'" O'Hara, 167 Wn.2d at 99. "To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). "[T]o 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." Id. at 100. But the determination of whether there is "actual prejudice," and, therefore whether an error is manifest under RAP 2.5(a)(3), "is a different question and involves a different analysis as compared to the determination of whether the error warrants reversal. 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." Id. at 99-100.

The error at issue here is an aggressor instruction given to the jury that was not supported by the evidence. "[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." State v. Riley, 137 Wn.2d 904, 912, 976 P.2d 624 (1999). In keeping with that principal, the provoking act cannot be the actual assault. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948, 951, review denied, 173 Wn.2d 1003, 271 P.3d 248 (2011); State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990); State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

The evidence shows Peneueta pointed and fired his gun. 3RP 46, 54; 4RP 25-30; 5RP 25-27; Ex. 13 (camera view four at 10:49:18-20). But there is no evidence that someone reacted to the threat of force between the time Peneueta drew the gun and fired it. There is no evidence that Peneueta first drew his weapon, provoked a rival gang member to point a gun at him, and then fired his gun. Peneueta yelled out his D-Dub gang affiliation to a rival gang member before the shooting. 5RP 22-23, 25. But words alone, including gang taunts, do not constitute sufficient provocation to warrant the instruction. Riley, 137 Wn.2d at 909-11.

The error is obvious on the record. The record shows Peneueta's provoking act was the shooting, i.e. the assault itself. His gang remark cannot constitute the provoking act as a matter of law. The Court of Appeals did not dispute the instructional error was obvious in the record. The Court of Appeals did not acknowledge this essential aspect of the manifest error standard at all. Slip op. at 7-11.

"To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). In the guise of "previewing" the merits under the manifest error standard, the Court of Appeals engaged in a harmless error analysis but without treating the constitutional error as presumptively prejudicial and without holding the State to its burden of showing the error was harmless beyond a reasonable doubt. Instead, the Court of Appeals discounted testimony that supported the claim of self-defense and, from that, held the evidence overwhelmingly showed Peneueta did not act in self-defense and therefore the instructional error was not "manifest." Slip op. at 9-11.

The Court of Appeals thus concluded "overwhelming evidence establishes that Peneueta did not have a reasonable belief of imminent harm" and therefore "he fails to show that he was actually prejudiced by

the jury's inability to consider his self-defense claim." Slip op. at 9. According to the Court of Appeals, Perkins's testimony that Flight pointed a gun at Peneueta first was unworthy of belief because "[a]ll of the other evidence presented at trial including the statements of Perkins and Peneueta given shortly after the shooting, contradicted Perkins's testimony." Id. The Court of Appeals also found it "significant that Peneueta's primary theory of defense at trial was one of mistaken identity, not self-defense," defense counsel attacked the credibility of the only witness to suggest that Peneueta acted in self-defense, and counsel failed to argue the claim to the jury in any meaningful way. Id. at 10.

This is, in substance, a harmless error assessment. The question of whether guilt is overwhelming is a question for harmless error analysis. See State v. Finch, 137 Wn.2d 792, 859, 975 P.2d 967 (1999) (constitutional error is harmless "if the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached"). The effect of closing argument on an error is also a matter of harmless error analysis. Maicke v. RDH, Inc., 37 Wn. App. 750, 754, 683 P.2d 227 (1984) (finding harmless error where improper evidence was minimal and not referenced in counsel's argument to the jury).

Conducting a harmless error analysis under the guise of determining whether a constitutional error is manifest is an improper use

of the manifest error standard. Under a harmless error analysis, constitutional error is presumed prejudicial and the State bears the burden of showing that it was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). By clothing its harmless error analysis in a manifest error analysis, the Court of Appeals effectively avoided treating the constitutional error as presumptively prejudicial and one that the State must prove is harmless beyond a reasonable doubt to avoid reversal. Under the Court of Appeals' approach, the State gets the benefit of a warped harmless error analysis.

The Court of Appeals decision conflicts with the manifest error standard enunciated in O'Hara. O'Hara is particularly relevant because it addressed the manifest constitutional error in relation to self-defense instructions. O'Hara, 167 Wn.2d at 100-04. The asserted error in that case was a jury instruction that incompletely defined "malice" in relation to the self-defense standard. Id. at 104. The Supreme Court held the trial court's failure to provide the full statutory definition does not constitute manifest error because "[t]he challenged instruction . . . does not relieve the State of its obligation to prove the elements of the crime and disprove O'Hara acted in self-defense." Id. at 108. The instructions given still required the jury to determine whether O'Hara reasonably believed the other man was

engaging in malicious conduct. Id. It would not have been obvious to the trial court that the omission in the instruction constituted error because the instructions that were given allowed the jury to use circumstantial evidence, thus making the omitted portion of the instruction duplicative of what was already stated. Id. at 109.

The Supreme Court in O'Hara did not sift through the evidence or counsel's closing argument to conclude the claimed instructional error had no practical effect on the verdict under the manifest error standard. It did not dismiss the error as having no practical and identifiable consequences by looking to whether there was overwhelming evidence of guilt. But that is what the Court of Appeals did in Peneueta's case.

The aggressor instruction satisfies the manifest error set forth in O'Hara. Unlike the instructions in O'Hara, the aggressor instruction here relieved the State of its obligation to disprove Peneueta acted in self-defense. See Riley, 137 Wn.2d at 910 n.2 ("an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt."). The misleading aggressor instruction, if applied by the jury, deprived Peneueta of fully arguing his theory of the case that he acted in self-defense. Cf. O'Hara, 167 Wn.2d at 107 (citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) as a case where an ambiguous self-defense instruction was a manifest

constitutional error because it deprived the defendant of his ability to argue his theory of the case).

The trial court, meanwhile, could have avoided the instructional error based on simple awareness of established law in Riley (words alone do not justify the aggressor instruction) and cases such as Bea and Kidd (the assault itself does not justify the instruction). The issue can be raised for the first time on appeal because an unwarranted aggressor instruction is a constitutional error that is clear in the record.

Other recent Supreme Court cases illustrate how far astray the Court of Appeals went with its manifest error analysis. In Kalebaugh, an erroneous preliminary instruction on reasonable doubt was manifest under RAP 2.5(a)(3) because the instruction was a misstatement of the law that the trial court should have known, and the mistake was apparent from the record. Kalebaugh, 2015 WL 4136540, at *3. Nothing more was needed to show manifest error. The aggressor instruction error is likewise apparent from the record and the trial court should have known that instruction was unsupported by the law as applied to the facts of the case.

In Lamar, an erroneous instruction to a reconstituted jury to deliberate together on whatever remained to be decided "had practical and identifiable consequences in Lamar's trial because if followed, its effect was to bar the reconstituted jury from deliberating together on all aspects

of the case against him." Lamar, 180 Wn.2d at 585. The error was reviewed because "[t]he record shows the claimed error and that it was apparent at the time it occurred." Id. at 586. Applying the same analysis to Peneueta's case, the erroneous aggressor instruction had practical and identifiable consequences at trial because, if followed, its effect was to bar the jury from considering the self-defense claim altogether.

b. The error was not harmless beyond a reasonable doubt.

As a constitutional error, the improper aggressor instruction is presumed prejudicial and the State bears the burden of showing that it was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588. Evidence showed Peneueta had a good reason to fear violence because Flight and Massey were rival gang members. 4RP 70-72, 78. The two gangs had been fighting for years in a never-ending cycle of retaliatory violence. 4RP 54-57, 60. Perkins testified Flight pointed the gun at them first. 5RP 26-27, 39. Peneueta told police that someone in the Mercedes "pulled the gun" and then shots were fired. 3RP 71-72. Strutynski saw someone in the Mercedes put a gun out the window. 4RP 29-30. From this evidence, reasonable jurors could find Peneueta acted in self-defense in shooting, but conclude from the aggressor instruction that they could not acquit him because he shot first or was otherwise the aggressor. An improper

aggressor instruction is prejudicial because it guts a self-defense claim. Birnel, 89 Wn. App. at 473; Brower, 43 Wn. App. 902.

The Court of Appeals contended other evidence contradicted Perkins's testimony that Flight pointed a gun first, suggesting the jury would not have found his testimony on this point credible. Slip op. at 9. In assessing whether an error was harmless beyond a reasonable doubt, appellate courts ordinarily do not make credibility determinations. State v. Maupin, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). Moreover, the Court of Appeals' contention is inaccurate. A contradiction would be that Perkins and Peneueta told police that Peneueta pulled the gun first. Neither said that. The two did not claim to police one way or the other who pointed a gun first. 3RP 68-73, 139-40; 5RP 29-30. Further, defense counsel did not emphasize the self-defense claim in closing argument, but he did argue it. 5RP 79, 82, 83-84. Regardless, there is no authority for the proposition that the jury must have ignored or rejected the self-defense claim because defense counsel did not emphasize it in closing argument. The State cannot meet its the burden of showing this presumptively prejudicial error was harmless beyond a reasonable doubt.

c. In the alternative, defense counsel was ineffective in failing to object to the first aggressor instruction.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Counsel has a duty to research the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Based on cases such as Bea and Kidd, counsel should have known the shooting itself could not justify the first aggressor instruction. Based on Riley, counsel should have known provocative words, such as gang taunts, do not alone justify an aggressor instruction. Competent counsel would have objected to the aggressor instruction on those grounds.

The Court of Appeals believed the failure to object was a legitimate trial tactic because counsel viewed the theory that Peneueta was not involved in the shooting as his strongest defense. Slip op. at 12. Yet the trial court gave self-defense instructions at counsel's request. Slip op. at 1. Defense counsel sought to put the burden on the State to prove the absence of self-defense (3RP 145) and ultimately argued the self-defense

claim in closing argument. 5RP 79, 82, 83-84. Counsel presented alternative theories to the jury, which made sense because the video evidence showed a man matching Peneueta's description pointing and shooting the gun as he ran across the street. The theory that Peneueta was not involved in the shooting could not be squared with the video evidence.

The aggressor instruction undermined Peneueta's alternative defense and assisted the State in arguing its case. The jury having been instructed on self-defense, there was no point in permitting the jury to disregard the self-defense theory by permitting an instruction that essentially told the jury that the defense was unavailable. The only purpose of an aggressor instruction is to remove self-defense from the jury's consideration. Having ultimately argued that defense, there was no legitimate tactical reason for counsel not to object to the instruction that took it away.

There is a reasonable probability the outcome might have been different but for counsel's failure to object. Contrary to the Court of Appeals' conclusion, the evidence against Peneueta on his self-defense claim was not overwhelming. There was conflicting evidence on who *shot* first. 3RP 71-72; 4RP 30-31; 5RP 26-27, 39, 42. No evidence contradicted Perkins's testimony that the rival gang member was the first to draw a gun on Peneueta.

Had counsel objected to the aggressor instruction, the trial court would have been required under the law and the evidence to reject it. The

jury then at least would have needed to evaluate the self-defense claim fully. There is a reasonable probability the outcome of the trial would have been different because, as discussed above, a reasonable jury could have concluded Peneueta's fear was reasonable. Because counsel did not object, however, the aggressor instruction went to the jury and permitted a finding (which was urged by the prosecutor) that Peneueta provoked the incident and was thus not entitled to his claim of self-defense. This error undermines confidence in the outcome of the trial.

F. CONCLUSION

For the reasons stated above, Peneueta requests that this Court grant review.

DATED this 26th day of August 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 71948-3-I
	)	DIVISION ONE
v.	)	
MICHAEL PENEUETA,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: July 27, 2015

SPEARMAN, C.J. — Following a gang-related shooting in which no one was injured, the State charged Michael Peneueta with first degree unlawful possession of a firearm and three counts of second degree assault against three victims, one bystander and two alleged to be involved in the shooting. At the defense's request, the trial court instructed the jury on self-defense. The court also gave a first-aggressor instruction sua sponte. Neither party objected to these instructions. The jury found Peneueta guilty of unlawful possession of a firearm and two counts of second degree assault. Peneueta claims for the first time on appeal, that the court erred in giving the first aggressor instruction. He also claims that defense counsel provided ineffective assistance of counsel when he failed to object to the first aggressor instruction. Because Peneueta fails to show that giving the first aggressor instruction constituted manifest constitutional error,

we decline to review the claim on appeal. We also reject his claim of ineffective assistance of counsel.

FACTS

On May 3, 2015, around 11:00 a.m., Michael Peneueta and James Perkins were walking toward a medical marijuana dispensary on Rainier Avenue South when they saw a silver Crown Victoria driven by Amrico Flight. Flight was a known member of the East Union Street Hustlers (Union Street), a central district gang and known rival of Down With the Crew (D-Dub), a south end gang with which Peneueta was affiliated. Union Street's territory is in Seattle's central district, around Union Street. D-Dub's territory is south Seattle, including the area of Rainier Avenue South between 42nd Avenue South and Dawson/39th Avenue South. Gang members understand the boundaries and generally live within them. As they were walking, Peneueta told Perkins, "If I see him again, I'm going to shot at him." Verbatim Report Proceeding (VRP) (3/17/14) at 22.

A short time later, Flight and another man, identified by the dispensary owner as Donald Massey, went into the dispensary. They remained inside for a few minutes and then left.

Perkins and Peneueta were crossing the street on Rainier toward the dispensary when Flight and Massey were leaving. Peneueta saw Flight and, according to Perkins, yelled "D-Dub" as they were walking across the street from the dispensary. Perkins understood this to be an assertion that Flight was on Peneueta's turf. Perkins testified that, after this initial contact, Flight walked to his

car, a Crown Victoria, and started driving north on Rainier Avenue. Jennings also saw Flight and Massey drive northbound on Rainier Avenue after sitting for a few minutes in Flight's car.

According to Perkins, at some point Flight stopped the car, rolled down the window, and pointed a .38 or .380 gun at them. Peneueta then drew his own gun and opened fire at Flight. Perkins was not expecting Peneueta to pull out a gun from his pants pocket. Perkins stated that, though Flight was the first to pull out a weapon, he was unsure whether Flight actually fired his gun or whether Flight or Peneueta shot first. In a statement to Detective Damon Deese of the Seattle Police Department, given shortly after the shooting, Perkins did not state that Flight ever drew or shot a gun.

Meanwhile, Theresa Strutynski, who had been driving northbound on Rainier Avenue behind Flight's Crown Victoria and a black Mercedes, saw two men, later identified as Peneueta and Perkins, walk into the middle of the street. Strutynski drove past them and was looking straight ahead when she heard gun shots coming from behind her car. Prior to hearing the gun shots behind her, Strutynski did not hear or see any gunshots in front of her. Nor did she testify to seeing a person with a gun in the cars in front of her. After she heard the gun shots behind her, Strutynski turned around and saw Peneueta with a gun in his hand. Strutynski then heard a popping noise and looked forward again. At this point, she noticed a hand with a gun reaching out of the passenger side window of the black Mercedes driving slowly in front of her. She heard two more popping

sounds coming from the direction of the Mercedes. Strutynski testified that she believed Peneueta fired his gun before the person in the Mercedes.

The surveillance video showed a silver Crown Victoria driving off, followed by a black Mercedes. Strutynski's car, a tan Lexus, can be seen driving directly behind the Mercedes. Two males are seen running across the front of the marijuana dispensary, one of them firing a handgun.

After the shooting, police were dispatched to the scene to look for suspects. Based on descriptions given by Jennings, Strutynski, and another witness, Maria Harris, police located Perkins, who fit the description of one of the suspects, hiding in the backyard of a nearby residence. A .45 caliber gun was found underneath a bucket nearby. The gun was the same caliber as the shell casings recovered from the street after the shooting and the recovered magazine would have fit the gun had it not been damaged.

Police officers also contacted Peneueta as a potential suspect. According to Officer Jason Lee, during this initial contact Peneueta appeared calm, but was sweating profusely. Officer Lee testified that Peneueta saw occupants of a silver Crown Victoria shooting at a black Mercedes, but was not otherwise involved. After this initial contact, Officer Lee released Peneueta because none of the witnesses could positively identify him as a suspect.

Three days after the shooting Detective Deese, contacted Peneueta again. During their telephone conversation, Peneueta gave the detective a slightly different account of the events of May 3. He told the detective he had

been walking from his grandmother's house to the marijuana dispensary on Rainier Avenue with a friend, James Perkins, when he saw a driver in a Crown Victoria look at them suspiciously. Peneueta stated he had not recognized the driver, but the driver appeared to recognize Peneueta. According to Peneueta, the car drove off and he and Perkins continued on their way. Peneueta stated that when they arrived at the dispensary, they saw the Crown Victoria again, followed by a black Mercedes. He believed the cars were together, though he had not recognized anyone in the Mercedes. He saw the driver of the Crown Victoria and a passenger from the Mercedes go inside the dispensary. On their way out, one of the two men asked Peneueta and Perkins, "what you looking at?" VRP (3/12/14) at 71. Then, as the men drove off, the passenger of the Mercedes pulled out a gun and fired at Peneueta and Perkins. Peneueta and Perkins ran off. Peneueta denied having a gun during the incident and denied seeing Perkins with a gun.

Police eventually located Flight and Massey, but were unable to identify the black Mercedes or any individuals that were inside.

The State charged Peneueta with first degree unlawful possession of a firearm and three counts of second degree assault against Strutynski, Flight, and Massey. At trial, Peneueta initially advised the court that he did not intend to argue, that he acted in self-defense, but later asked the court whether a self-defense instruction would be available on the facts of the case. The trial court reserved ruling on the issue, but ultimately decided to instruct the jury on self-

defense and also, sua sponte, gave a first aggressor instruction. Peneueta did not object. The instruction provided:

> A person may not, by an intentional act of physical aggression which is reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor and that his acts or conduct provoked or commenced the fight, then self-defense is not available as a defense.

Clerk's Papers (CP) at 43.

Based on this instruction, the State argued in closing that self-defense was not available if Peneueta shot first. In his closing remarks, Peneueta relied primarily on a theory of mistaken identity. He argued that Perkins was the likely shooter and because Perkins had a motive to blame Peneueta for the shooting, he was not a credible witness. Peneueta argued self-defense only in passing when he asserted that the State had not met its burden of disproving self-defense beyond a reasonable doubt. Significantly, in so doing he did not concede that he ever held or fired the gun.

The jury found Peneueta guilty of unlawful possession of a firearm and two counts of second degree assault as to Strutynski and Flight. The State dismissed the remaining assault charge. Peneueta timely appeals the judgment and sentence.

DISCUSSION

RAP 2.5

Citing RAP 2.5(a), the State contends that Peneueta waived any claim of error as to the first aggressor instruction because he failed to object to the instruction at trial. The State argues that because he cannot show that any error in giving the instruction constituted manifest constitutional error, his claim is not subject to review under RAP 2.5(a)(3). Peneueta concedes that he did not object to the first aggressor instruction below, but argues review is proper under RAP 2.5(a)(3). We agree with the State.

An appellate court may refuse to review any claim of error not raised in trial. RAP 2.5(a). An exception exists, however, for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). To determine whether an error affecting constitutional rights is manifest, the reviewing court first makes a cursory determination as to whether the alleged error in fact suggests a constitutional issue. If so, then the court determines if the error is manifest. To decide this issue, the court must determine whether there is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). Stated differently, a constitutional error is manifest only where the appellant can show "actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). (citing State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)). We conclude that

while Peneueta raises a constitutional issue, he fails to establish that any error was manifest.

Due process requires the State to prove every element of the charged offense beyond a reasonable doubt before a judgment of guilty may be entered. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). Once a claim of self-defense is asserted, the absence of self-defense becomes an element of the crime that the State has the burden to disprove beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 493-494, 656 P.2d 1064 (1983). In this case, however, the jury was instructed that if it determined Peneueta was the first aggressor then his self-defense claim was not available. Such an instruction prevents the jury from considering whether the State has proved beyond a reasonable doubt that the defendant did not act in self-defense. State v. Gordon, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); O'Hara, 167 Wn.2d at 105. Therefore, the first aggressor instruction, if erroneous, implicates a defendant's constitutional rights.

The next question is whether Peneueta has made a plausible showing that the asserted error had practical and identifiable consequences on his self-defense claim. Appellate courts analyze unpreserved claims of error involving self-defense instructions on a case by case basis to assess whether the claimed error is manifest constitutional error. O'Hara, 167 Wn.2d at 104. We conclude that Peneueta has not made the requisite showing.

A jury may find that a defendant acted in self-defense based on evidence that the defendant reasonably believed that he or she was in danger of imminent harm, even if not in actual danger. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), abrogated by O'Hara, 167 Wn.2d 756. Here, overwhelming evidence establishes that Peneueta did not have a reasonable belief of imminent harm. Accordingly, we conclude that he fails to show that he was actually prejudiced by the jury's inability to consider his self-defense claim.

The only basis for Peneueta's self-defense claim arose during Perkins's testimony that Flight was the first to draw a gun and that Peneueta fired at Flight in response. All of the other evidence presented at trial including the statements of Perkins and Peneueta given shortly after the shooting, contradicted Perkins's testimony. Although Peneueta did not testify, two statements he gave to police following the shooting were admitted into evidence. In neither statement did Peneueta assert that he was in fear of imminent harm and acted in self-defense. On the contrary, he denied even having or shooting a gun. Perkins stated to Detective Deese and also testified at trial that when Peneueta first saw Flight he said "If I see him again, I'm going to shoot him." VRP (3/17/14) at 22. When Peneueta saw Flight again, he yelled "D-Dub," which Perkins understood to be a declaration that Flight was on his turf. Id. at 22-23, 25. Almost immediately following that declaration, Peneueta fired his gun at Flight. Perkins acknowledged in his testimony that in his statement to Detective Deese, he never mentioned

that at any time during the incident Flight pointed or shot a gun at Peneueta or any other person.

On this evidence, we conclude that Peneueta has failed to make a plausible showing that the first aggressor instruction, even if erroneous, had any practical and identifiable consequences on the trial. The evidence is overwhelming that Peneueta's did not have a reasonable belief that he faced imminent harm when he fired the gun at Flight, and therefore he did not act in self-defense.

Moreover, we find it significant that Peneueta's primary theory of defense at trial was one of mistaken identity, not self-defense. In closing argument, Peneueta attacked Perkins as an incredible witness to the extent it put Peneueta at the scene at all, let alone shooting a gun. Indeed, he pointed to evidence that the gun actually belonged to Perkins and argued that Perkins "clearly had a motive to not tell the truth, as indicated on the stand. Obviously if he admitted that he was the one holding the gun, then he'd be charged with assault too, so there's a very good reason for him to try to pin the blame on someone else. . . ." VRP (3/17/14) at 80-81. He also argued that "all the factors point to [Perkins] being the one with the gun and being the shooter. Just to try and take the blame off himself, he blamed Mr. Peneueta." Id. at 83. Peneueta made only one passing reference to self-defense in his closing remarks:

> So getting back to the lawful force, if you're defending yourself from someone who's pointing a gun at you, then the use of a handgun also is lawful under those circumstances. And again it's the State who has to disprove that the actor was acting in self-

> defense and the burden of that proof is beyond a reasonable doubt. You have to find beyond a reasonable doubt that there was no self-defense that occurred here."

Id. at 82.

In light of Peneueta's arguments belittling the credibility of the only witness to suggest that he acted in self-defense and his failure to argue the claim to the jury in any meaningful way, the giving of the first aggressor instruction, even if erroneous, did not cause him actual prejudice in the trial. We conclude therefore, that the first aggressor instruction, if erroneous at all, was not manifest error affecting a constitutional right. Accordingly, the claimed error is waived and we decline to consider it on appeal.

Ineffective Assistance of Counsel

Peneueta claims he received ineffective assistance of counsel when his lawyer failed to object to the first aggressor instruction. We review such claims de novo. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). A lawyer is ineffective when (1) his or her performance is so deficient that it falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) the deficient performance prejudiced the defense, i.e. there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Regarding the first prong, scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness. Id. In addition, to succeed on a claim that

counsel's performance was deficient, the burden is on the defendant to show that there were no tactical or strategic reasons to justify counsel's challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Here, there is strong evidence that counsel's decision not to object to the first aggressor instruction was strategic. He initially informed the court that Peneueta did not intend to argue self-defense at all. It is apparent from the record that defense counsel viewed the theory that Peneueta had not been involved in the shooting as his strongest defense. This was a logical choice given that the gun was found in the vicinity of Perkins at the time of his arrest. In addition, evidence of self-defense was virtually non-existent, except for the testimony of Perkins, whom Peneueta intended to blame for the crime. In light of these circumstances, defense counsel chose not to focus on the issue of self-defense in either examining the witnesses or closing argument. It is entirely conceivable that defense counsel also chose to disregard the first aggressor issue because it was immaterial to the main thrust of the theory of defense. Thus, the failure to object was a decision consistent with counsel's trial strategy and we will not find counsel ineffective if the actions complained of go to the theory of the case or to trial tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

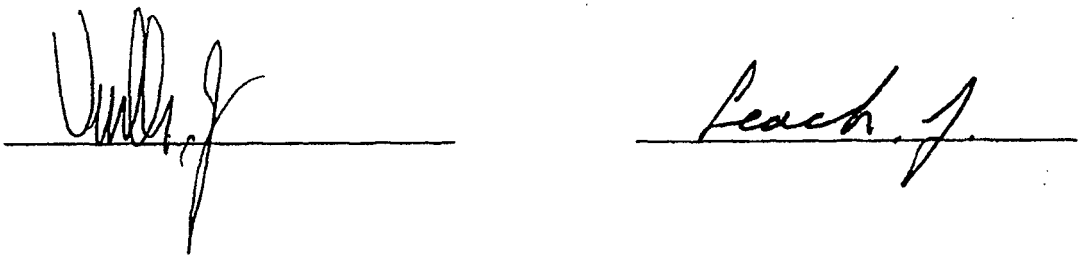
Peneueta's ineffective assistance of counsel claim also fails because he cannot show prejudice. As discussed previously, there was overwhelming evidence that Peneueta did not act in self-defense. Accordingly, even assuming

the instruction was error, there is no reasonable probability that the outcome of the trial would have been different had defense counsel timely objected to it.

Because Peneueta fails to establish both deficient performance and prejudice, we find his ineffective assistance claim without merit.

Affirm.

WE CONCUR:



IN THE SUPREME COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL PENEUETA, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 71948-3-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF AUGUST, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL PENEUETA
DOC NO. 374778
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF AUGUST, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 26, 2015 - 3:36 PM

Transmittal Letter

Document Uploaded: 719483-Petition for Review.pdf

Case Name: Michael Peneueta
Court of Appeals Case Number: 71948-3

Party Respresented:

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

paoappellateunitmail@kingcounty.gov
stephanie.knightlinger@kingcounty.gov