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Division I
State of Washington

NO. 73217-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent/ Cross-Appellant,

v.

DAWN SULLIVAN,

Appellant/ Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT/ CROSS-APPELLANT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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2. In imposing sentence on the deadly weapon enhancement, the trial court erred in granting the defendant credit for time served in a community program that was not total confinement.

B. ISSUES PRESENTED BY CROSS-ASSIGNMENTS OF ERROR

1. RCW 9.94A.533(4) provides that every sentence for a deadly weapon enhancement is mandatory and must be served in total confinement. Did the trial court err in ordering a twelve-month sentence for a deadly weapon enhancement be served in a community program, not in total confinement?

2. RCW 9.94A.680(3) prohibits the grant of credit for time attending a community program against a sentence for a violent offense. Sullivan was convicted of second-degree assault, a violent offense. Did the trial court err in granting the defendant credit for

time served in a community program that was not total confinement?

C. ISSUES PRESENTED BY SULLIVAN'S APPEAL

1. A juror shall be excused when his or her actual bias has been proven. When Juror 9 saw the victim (Christopher Bohannon) testify, he realized that he might have a superficial acquaintance with Bohannon. He assured the court that the possibility would not affect his impartiality. Did the trial court properly exercise its discretion when it refused to excuse the juror?

2. A court should provide a first-aggressor instruction when there is evidence that the defendant provoked the need to act in self-defense. Where there was evidence that Sullivan began the physical violence that ended with her stabbing Bohannon, did the court properly provide that instruction?

3. For purposes of the first-aggressor rule, the provoking act that would prevent a defendant's reliance on self-defense must be an "intentional act." The trial court's instruction further limited the provoking act to "an intentional violent act." Was that instruction sufficiently narrow and specific?

4. A court is not required to accept a proposed jury instruction that is defective, or an instruction on a subject adequately covered by other instructions. Sullivan offered an instruction regarding the use of force against multiple assailants. That instruction included an improper comment on the evidence. The self-defense instructions given allowed the jury to take into account the danger posed by multiple assailants. Did the trial court properly refuse that proposed instruction?

5. A prosecutor is permitted to make arguments based on inferences from the evidence. The prosecutor argued that in her testimony, Sullivan chose particular words to suggest a threat of sexual assault and elicit an emotional response. There was no objection to the argument. Has Sullivan failed to establish that the argument was improper and caused enduring, incurable prejudice, as required to obtain reversal?

D. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Dawn Sullivan, was convicted by jury verdict of second degree assault of Christopher Bohannon. CP 9-10, 23; RCW 9A.36.021. The jury also returned a verdict that Sullivan was

armed with a deadly weapon for purposes of a deadly weapon sentence enhancement. CP 22; RCW 9.94A.825.

At sentencing, the trial court, the Honorable Carol Schapira, granted Sullivan an exceptional sentence of zero jail time on the assault, and as to the enhancement, twelve months in the King County Community Center for Alternative Programs, Enhanced. CP 95-99.

Both parties appealed the judgment and sentence. CP 103; Supp. CP __ (Sub no. 117, Notice of Appeal, 2/6/2015). This Court consolidated the appeals, designating Sullivan the Appellant/Cross-Respondent and the State the Respondent/Cross-Appellant.

2. SUBSTANTIVE FACTS

In summary, on October 29, 2012, Dawn Sullivan was at Christopher Bohannon's apartment when they got into an argument and he told her to leave. RP 133-35, 348, 411-13.[1] Sullivan punched Bohannon, who then pulled Sullivan to her hands and knees. RP 136. Sullivan got away, ran to the kitchen, grabbed a knife, and stabbed Bohannon in the arm. RP 142-43, 348.

[1] The entire report of proceedings is consecutively paginated and will be referred to in this brief simply by page number.

Sullivan and Bohannon had been just acquaintances until about a month earlier, when Sullivan began staying at Bohannon's apartment for days at a time. RP 119-21, 397-98. Bohannon allowed Sullivan to stay in his home, and to use his computer, phone, and fax machine, as she looked for a new place to live. RP 122-23, 400-01, 438.

The night prior to the assault (which occurred in the early morning), Sullivan visited Bohannon. RP 128-29, 402-03. They were drinking together that evening. RP 129, 404. After midnight, Sullivan left and walked to the area of nearby downtown Seattle bars. RP 129-30, 405, 439. There, at a bus stop, she met Robert Cessill, who was passing the time between connecting flights of a trip from Alaska to California. RP 347, 406-07. Sullivan invited Cessill back to Bohannon's apartment. RP 347, 407-08.

At the apartment, the three of them talked and before long, Cessill fell asleep on a couch in the living room. RP 131-32, 347-48, 409-10. After Cessill fell asleep, Sullivan asked Bohannon if she could use some of the medical marijuana that he had stored in his freezer. RP 133, 411. Bohannon refused. RP 133, 411. Sullivan lost her temper and said she was leaving. RP 133-34. (Sullivan's testimony was that Bohannon ordered her out at this

point, after she insulted him. RP 412-13, 444.) Sullivan wanted to take Cessill with her, so she went over to the couch to wake Cessill up. RP 134, 413.

At this point, a physical confrontation began, and the testimony of the three participants diverged.

Bohannon's testimony about the altercation. Bohannon testified that Sullivan told Cessill to wake up and when Cessill waved her away, she pulled him off the couch, to the floor. RP 134, 208. Cessill crawled back onto the couch. RP 134. Sullivan raised her fists and threatened to punch Cessill if he did not get up and leave with her. RP 134, 208. Bohannon got between Sullivan and Cessill and told Sullivan to leave. RP 135. Bohannon began to escort Sullivan out, but Sullivan turned and ran back to the kitchen. RP 135-36.

Bohannon followed Sullivan into the kitchen, and Sullivan punched him in the nose, knocking his glasses to the floor. RP 136, 147, 183; Ex. 1, slide 11. Bohannon grabbed Sullivan's wrists and pulled her to her hands and knees, and Bohannon stood with his hand resting on her back. RP 136-37. He tried to get Sullivan to calm down and they stayed in that position for a long time – 30 seconds to two minutes. RP 137-42.

Then Sullivan twisted away, stood, and grabbed a large chef's knife from a magnetic strip on the wall. RP 142, 186. Bohannon asked Sullivan to hand over the knife but instead, Sullivan brought the knife down and cut Bohannon's arm. RP 142-43. The knife was a chef's knife with a blade about 10 inches long. RP 99-102, 156; Ex. 1.

Bohannon again grabbed Sullivan's wrists and pulled her to the ground on all fours, under a chair, but Sullivan still had the knife. RP 145. Cessill was awake now and Bohannon asked Cessill to help. RP 146. Cessill grabbed Sullivan from behind and pulled her off the floor and onto the couch. RP 147-48. At the same time Bohannon took the knife away. RP 147-48.

Bohannon then grabbed the other knives that were on the magnetic strip in his kitchen and took all of the knives to his bedroom, where he threw them onto the floor on the far side of the bed, too prevent Sullivan from getting them if she ran back to get another knife. RP 149. When he got back to the living room, Sullivan was passed out, he thought because of the hold that Cessill used on Sullivan. RP 149.

Bohannon ran outside and called 911. RP 149-50. When police arrived, they photographed trails of his blood throughout his

apartment, and the pile of knives on the floor behind the bed. RP 96, 99, 156-58; Ex. 1. Bohannon was transported by ambulance to the hospital; the stab wound to his forearm required seven stitches. RP 152, 329.

Cessill's testimony about the altercation. Cessill woke up to Sullivan standing over him, telling him, "I'm going to punch you in the face." RP 348, 355. When he opened his eyes, Sullivan said he needed to get out immediately. RP 348, 356. When Bohannon said that Sullivan should leave, Sullivan became upset. RP 348.

Bohannon and Sullivan argued, then Sullivan went into the kitchen. RP 357. Bohannon started walking toward the kitchen and Sullivan came out with a knife. RP 357-59. Sullivan backed Bohannon against a wall and repeatedly slashed down at him with the knife, cutting him. RP 358-60.

Cessill remained laying on the couch until Sullivan stabbed Bohannon. RP 357, 368-69. As he lay on the couch, his back was to the kitchen. RP 358. After Sullivan stabbed Bohannon, Cessill got up and put Sullivan in a chokehold until she passed out and dropped the knife. RP 369-70. Bohannon took all the knives away to hide them. RP 370-71, 388.

After a short time, Sullivan came to and left. RP 371. Cessill gathered his things and left, encountering police who had arrived outside the building. RP 371-72.

Sullivan's testimony about the altercation. Sullivan testified that she told Bohannon that she wanted to get Cessill to leave with her, but Bohannon told her to leave Cessill alone, to let him sleep. RP 413. There had been no physical contact with Bohannon at this point. RP 464.

When Sullivan shook Cessill's foot, Bohannon pounced on her and they immediately were rolling on the floor. RP 413-14. The next thing she knew both of the men were on top of her. RP 414. Sullivan said the men were "putting their hands on my body and holding me against my will." RP 415.

Sullivan testified that she "wiggled out," jumped over the couch, and grabbed the knife from the magnetic strip. RP 416, 426. Bohannon grabbed her and the men got the knife away within seconds. RP 416. She was surprised they still came at her after she had gotten the knife. RP 428. Later, Sullivan testified that as soon as she grabbed the knife the men already were on top of her and pinned her to the ground. RP 459-60. Chris then threw her physically out of the apartment. RP 429, 461.

E. ARGUMENT

1. THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE WHEN IT IMPOSED A COMMUNITY ALTERNATIVE IN LIEU OF CONFINEMENT FOR THE DEADLY WEAPON ENHANCEMENT.

The trial court erred in ordering that the sentence of twelve months for the deadly weapon enhancement be served in a community program that was not confinement, and in concluding that it had the authority to do so. The sentence for a deadly weapon enhancement must be served in total confinement.

A trial court's sentencing authority is defined by statute. State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005). A defendant's sentence must be consistent with the law in effect at the time of the offense. RCW 9.94A.345.

The sentence for a deadly weapon enhancement is established by RCW 9.94A.533(4). Because second degree assault is a Class B felony, twelve months must be added to the standard range for that enhancement. RCW 9.94A.533(4)(b); 9A.36.021(2)(a). All deadly weapon enhancement terms are mandatory, "notwithstanding any other provision of law," and "shall

be served in total confinement."[2] RCW 9.94A.533(4)(e); State v. Fuller, 89 Wn. App. 136, 142, 947 P.3d 1281 (1997) (total confinement must be imposed for enhancement). A sentencing court has no authority to impose an exceptional sentence on a deadly weapon enhancement. Fuller, 89 Wn. App. at 142; see State v. Graham, 181 Wn.2d 878, 884, 337 P.3d 319 (2014) (noting in dicta that an exceptional sentence may not be imposed for an enhancement).

The trial court recognized that it was not authorized to impose an exceptional term of confinement for the deadly weapon enhancement. RP 620. It imposed the mandatory twelve-month term of confinement. CP 98. However, the court ordered that the term of confinement "be served on Enhanced CCAP." CP 98.

"Total confinement" is defined as "confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060." RCW 9.94A.030(52). RCW 72.64.050 and .060 provide for work camps for prisoners in State correctional facilities.

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[2] There are two exceptions that are inapplicable here: extraordinary medical placement authorized under RCW 9.94A.728(3); or early release of a person who committed the offense as a juvenile, pursuant to RCW 9.94A.730. RCW 9.94A.533(e).

At the time of sentencing in this case, Sullivan had served 18 days in total confinement, time she spent in the King County Jail after warrants were issued as the case was pending. RP 619. For some periods of time while the trial was pending, Sullivan was ordered to participate in the King County Community Center for Alternative Programs (CCAP). RP 619-626. Enhanced CCAP consists of structured programs on weekdays at the Yesler Building in downtown Seattle. State v. Medina, 180 Wn.2d 282, 285, 324 P.3d 682 (2014); Supp. CP ___ (Sub No. 18, Order of Detention/ Less Restrictive Alternative/ CCAP, 12/26/13). At sentencing, defense counsel asserted that Sullivan must have completed twelve months in CCAP by that time. RP 606, 625-26. The trial court ultimately determined that Sullivan had attended Enhanced CCAP for 93 days. Supp. CP __ (Sub No. 129, Minutes of Motion Hearing, 3/20/15).

The trial court concluded that because it was imposing a jail sentence, the court had discretion to give credit for CCAP attendance as confinement time served. RP 620. The court noted that there was "a significant legal challenge" to the sentence, and concluded that it was for the court of appeals to determine whether CCAP was sufficient. RP 619-20.

The Supreme Court has held that King County Enhanced CCAP, which requires only attendance at programs during the day, does not constitute total confinement.[3] Medina, 180 Wn.2d at 289. There was no argument in the trial court that it was total confinement, and the court did not find that it was. RP 613-15, 620. The provision that the sentence be served by attendance at CCAP was illegal; it should be vacated and the court should order it be stricken on remand.

2. THE TRIAL COURT DID NOT HAVE AUTHORITY TO GRANT CREDIT FOR TIME SERVED IN AN ALTERNATIVE COMMUNITY PROGRAM.

In imposing sentence on the deadly weapon enhancement, the trial court erred in granting the defendant credit for time served in Enhanced CCAP, a community program that was not total confinement. The Sentencing Reform Act does not entitle Sullivan to credit for time served in that community program.

A sentencing court must give an offender credit for all confinement time served before sentencing for that offense. RCW

[3] The order directing Sullivan to participate in Enhanced CCAP illustrates that the program is the same as when the Court in Medina held it did not constitute confinement. Supp. CP ___ (Sub No. 18, Order of Detention/ Less Restrictive Alternative/ CCAP, 12/26/13).

9.94A.505(6). King County Enhanced CCAP does not meet the statutory definition of confinement. Medina, 180 Wn.2d at 289.

RCW 9.94A.680 provides for "alternatives to partial confinement." In 2009, that statute was amended to permit credit for time served in a county's community programs, providing: "For offenders convicted of nonviolent and nonsex offenses, the court may credit time served by the offender before the sentencing in an available county supervised community option and may authorize county jails to convert jail confinement to an available county supervised community option...." RCW 9.94A.680(3); 2009 Wash. Laws Ch. 227, § 1. The court in Medina held that when a court is sentencing for a violent offense, the 2009 amendment prohibits a court from granting credit for presentence time in King County CCAP. 180 Wn.2d at 290. Second degree assault is a violent offense. RCW 9.94A.030(55)(a)(viii).

Because Sullivan was sentenced for second degree assault, a violent offense, the court had no authority to grant her credit for days that she attended CCAP against any sentence of confinement. That provision of the judgment should be vacated and the court should order that it be stricken on remand.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO EXCUSE AN UNBIASED JUROR.

Sullivan claims that the trial court erred by declining to excuse Juror 9 for actual bias, when midtrial the juror disclosed that he thought he might have been introduced to Christopher Bohannon at some point and they might have mutual friends. This claim is without merit. A trial court has discretion to determine whether actual bias of a juror has been established, and the trial court here did not abuse its discretion in concluding that actual bias was not established in this instance.

a. Relevant Facts.

During the testimony of Bohannon, Juror 9 realized that he might have some acquaintance with the witness, and informed the court. RP 166. Juror 9 then was questioned by the court and both parties. RP 166-73.

Juror 9 said that when Bohannon began testifying, Juror 9 was "reasonably confident" he had met Bohannon before, that "he just seems familiar." RP 166-67. Juror 9 was not sure he had actually met Bohannon at all, or if Bohannon just looked familiar. RP 167, 170-71. However, he said, "I feel like I was introduced to

him," and they could be friends on Facebook (the internet social media site). RP 169. If they had met, it would have been at least a few years earlier. RP 168. Juror 9 said that he and Bohannon could have mutual friends, although Juror 9 did not know who those mutual friends might be. RP 166, 169. Juror 9 did not recall having heard anything about Bohannon from possible mutual friends. RP 170. Juror 9 could not recall having any conversation with Bohannon, either in person or on Facebook. RP 166.

Juror 9 did not believe his possible acquaintance with Bohannon would affect his assessment of Bohannon's testimony. RP 168. He did not believe that he would have any additional insight as to Bohannon's testimony. RP 170. He noted that because he was not sure Bohannon was actually an acquaintance or just seemed familiar, his assessment of Bohannon's credibility would not be affected. RP 170-71.

Sullivan asked the trial court to excuse Juror 9 "in an abundance of caution...since he believes he may know Mr. Bohannon, they may have mutual friends." RP 173. The court denied that request, stating: "I'm not excusing anybody on the off chance that they now [sic] maybe met somebody in an inconsequential meeting because he doesn't remember if, if he

actually met him, and he doesn't even know if it's the same person." RP 173. The court noted, "I don't consider Facebook friends much of a kinship." RP 171.

b. Sullivan Has Not Established Actual Bias.

The right to an impartial jury is guaranteed by the Sixth Amendment and by Article I, section 22 of the Washington Constitution. U.S. Const. amend. VI; Wash. Const. Art. I, § 22. Sullivan asserts that Juror 9 should have been excused based on actual bias. "Actual bias" is statutorily defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the [juror] cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). RCW 4.44.190 provides that when there is a challenge for actual bias, "although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."

The trial court's denial of a challenge based on actual bias is within its discretion, and it is not reversible error unless there was a manifest abuse of discretion. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991); Hough v. Stockbridge, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009). The trial court is in the best position to determine a juror's ability to be impartial, as it can observe the juror's demeanor and evaluate the juror's responses. Noltie, 116 Wn.2d at 839.

A defendant must prove actual bias to successfully challenge the trial court's decision. Id. at 838; State v. Grenning, 142 Wn. App. 518, 540, 174 P.3d 706 (2008), aff'd, 169 Wn.2d 47 (2010). The defendant must establish more than a possibility that the juror was prejudiced. Noltie, 116 Wn.2d at 839-40. Equivocal answers do not require a juror be removed – the question is whether a juror with preconceived ideas can set them aside. Id.

The possibility that Juror 9 had been introduced to Bohannon some years earlier, and that they might have the status of friends on Facebook, does not establish actual bias. Juror 9 stated that his ability to assess the testimony would not be affected by this possibility and there is no contradictory evidence. RP 168, 170-71. In the trial court, Sullivan observed the juror's demeanor

and did not identify any reason to disbelieve the juror's statements that he would not be affected. RP 173.

Sullivan's argument on appeal is that actual bias was established by the juror's recognition of the witness as someone he may have met and with whom he might have mutual friends. That proof of possible acquaintance does not establish bias; even if some bias based on possible acquaintance is assumed, Sullivan has not established that the trial court manifestly abused its discretion in concluding that the juror could be impartial.

In a case with quite similar facts, this Court held that a juror's recognition of the victim (of a burglary and attempted rape) when the victim took the stand did not establish actual bias. State v. Rempel, 53 Wn. App. 799, 803-04, 770 P.2d 1058 (1989), rev'd in part on other grounds, 114 Wn.2d 77 (1990). In Rempel, the juror realized that she had previously worked with the victim, a much more substantial relationship than the possible superficial acquaintance Juror 9 described. Even in a case where the juror realized midtrial that a witness was a waitress at a restaurant he frequented, and then learned that he (the juror) was distantly related to two of the three victims, the appellate court deferred to the trial court's determination that the juror's assurance

of continued objectivity was credible. State v. Colbert, 17 Wn. App. 658, 664-65, 564 P.2d 1182 (1977).

The trial court did not abuse its discretion in refusing to excuse Juror 9 when the court concluded that there was no evidence of bias.

4. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT SELF DEFENSE CANNOT BE CLAIMED BY A FIRST AGGRESSOR.

Sullivan claims that a first-aggressor instruction was not warranted by the evidence in this case and that the court's first-aggressor instruction was too vague because it did not specify the provoking act. Both claims are meritless. The instruction was appropriate because there was evidence at trial that Sullivan began the physical violence that ended with her stabbing Bohannon. The court's instruction was not overly broad – its statement that a provoking act that would prevent the defendant's reliance on self-defense must be "an intentional violent act" was sufficiently narrow, and was more favorable to Sullivan than the law requires.

a. The Evidence Warranted A First-Aggressor Instruction.

There was evidence presented at trial that as Bohannon tried to get Sullivan to leave his apartment, Sullivan pulled Cessill off of the couch and, fists raised, threatened to punch Cessill; then Sullivan punched Bohannon in the face, so Bohannon pulled her to the floor and restrained her; in reaction to that restraint, Sullivan twisted away, armed herself with a chef's knife, and returned to attack Bohannon with the knife. RP 134-37, 142-43, 186, 208. These facts warrant an aggressor instruction, and the trial court did not err in giving that instruction. CP 40 (Instruction 14).[4]

Jury instructions are sufficient if they permit each party to argue its theory of the case and the instructions properly explain the applicable law. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). To establish self-defense, a jury must find that the defendant reasonably believed that he or she was in danger of imminent harm, assessed from the standpoint of a reasonably prudent person standing in the defendant's shoes, knowing what the defendant knows, and seeing what the defendant sees. Id. In general, a defendant cannot successfully invoke the right of self-

[4] The self-defense instructions given in this case, CP 40-44, are attached as Appendix A.

defense if he or she provokes an altercation by an intentional act that is reasonably likely to provoke a belligerent response. Id.; State v. Wingate, 155 Wn.2d 817, 821-22, 122 P.3d 908 (2005). That limitation on the right to act in self-defense is explained to the jury in what is commonly known as a first-aggressor instruction. Wingate, 155 Wn.2d at 821.

A first-aggressor instruction is appropriate where (1) the jury can reasonably determine that the defendant provoked the need to act in self-defense; (2) there is conflicting evidence as to whether the defendant's conduct provoked the fight; or (3) there is evidence that the defendant made the first move by drawing a weapon. Riley, 137 Wn.2d at 909-10; State v. Anderson, 144 Wn. App. 85, 90, 180 P.3d 885 (2008).

Whether there is sufficient evidence to support a first-aggressor instruction is a question of law, reviewed de novo on appeal. Anderson, 144 Wn. App. at 89. When determining if the evidence was sufficient to support the instruction, the appellate court must view the supporting evidence in the light most favorable to the party requesting the instruction. Wingate, 155 Wn.2d at 823 n.1; State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). The Supreme Court has repeatedly emphasized that a first-

aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant precipitated the fight. Id. at 822; Riley, 137 Wn.2d at 910; State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992). This Court has observed that the first-aggressor instruction is necessary to allow the State to argue their theory of the case and *particularly* appropriate where there is conflicting testimony as to whether the defendant or victim provoked the altercation. State v. Cyrus, 66 Wn. App. 502, 508-09, 832 P.2d 142 (1992); accord, State v. Ward, 125 Wn. App. 138, 149, 104 P.3d 61 (2005).

A first-aggressor instruction should be given where called for by the evidence. Riley, 137 Wn.2d at 910 n.2. However, trial courts are cautioned to use care in giving the instruction because of the State's burden of disproving self-defense. Id.

The testimony in the case at bar supported a first-aggressor instruction. Bohannon testified that after he refused to let Sullivan smoke his medical marijuana, Sullivan lost her temper. RP 133-34. At that point, Sullivan said she was leaving or, according to Sullivan's testimony, Bohannon told her to leave his apartment. RP 133-34, 412-13, 444. Bohannon testified that instead of leaving, Sullivan went to the couch where Cessill was sleeping, tried to

wake him up (so he could leave with her), and when he resisted, dragged him off the couch. RP 134, 208. Both Bohannon and Cessill testified that as Cessill lay on the couch, Sullivan stood over Cessill and threatened to punch him in the face. RP 134, 208, 348, 355. Bohannon believed Sullivan had to be taken seriously because she had her hands raised in fists as she made the threat. RP 134, 208. When Bohannon intervened and demanded that Sullivan leave, Sullivan punched him in the face twice, knocking his glasses to the floor. RP 136, 147, 183. These violent acts by Sullivan were reasonably likely to provoke a belligerent response, so they support the conclusion that she was the aggressor in the physical altercation that ensued, when she grabbed a kitchen knife and stabbed Bohannon. RP 136-37, 142-43.

Sullivan does not dispute that there was evidence that she began the physical confrontation when she punched Bohannon in the face; she asserts the acts were a "single course of conduct culminating in the knife cut" and so cannot support a first-aggressor instruction. App. Br. at 17. Neither of the cases on which Sullivan relies support her assertion that the provocation must not be part of

a single "course of conduct." In State v. Brower,[5] the court found a first-aggressor instruction unjustified when the only wrongful conduct of the defendant was pointing a gun into a man's stomach as he told the man to return to his apartment; that single act was the assault charged. The second case, State v. Wasson,[6] contradicts Sullivan's proposition, as the case notes that it has "long been established that the provoking act must also be related to the eventual assault as to which self-defense is claimed." 54 Wn. App. at 159. The court in Wasson disapproved use of a first-aggressor instruction because there was no evidence the defendant initiated any act toward the man he shot until that final assault.[7] 54 Wn. App. at 159-60.

Sullivan cites no case holding that a first-aggressor instruction is not warranted if the provocation is part of a single course of conduct that culminates in the charged assault. This Court can conclude that after diligent search, she has found none. Roberts v. Atlantic Richfield, 88 Wn.2d 887, 895, 568 P.2d 764 (1977). Sullivan cites two cases for their analysis of whether a

[5] 43 Wn. App. 893, 721 P.2d 12 (1986).
[6] 54 Wn. App. 156, 772 P.2d 1039 (1989).
[7] Wasson was in a fight with his cousin in an alley when a man (Reed) visiting in a nearby apartment came down to complain about the noise. 54 Wn. App. 157-58. Reed attacked the cousin, then came at Wasson, who shot Reed in the chest. Id.

series of acts constitutes a single course of conduct, but those cases did not involve self-defense instructions: one was a double jeopardy analysis,[8] the other was an analysis of whether a unanimity instruction was required.[9]

It would be illogical to require that the provoking act must be separate from the course of conduct that resulted in the charged assault. The point of the first-aggressor doctrine is that the defendant cannot provoke a violent action by another and then excuse his own violent response as self-defense. The provocation, the response, and the charged assault must be connected. Bea, 162 Wn. App. at 577.

Other cases upholding the giving of a first-aggressor instruction illustrate that the provocation must be part of the same continuing series of events as the charged assault. For example, in Riley, supra, the evidence of provocation that warranted the first-aggressor instruction was that the defendant drew a gun and aimed it at Jamarillo, then when he believed Jamarillo was reaching for his own gun, the defendant shot Jamarillo. 137 Wn.2d at 906-10. In Ward, supra, the evidence of provocation that warranted the instruction was the defendant's initiation of (or introduction of a

[8] State v. Villanueva Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014).
[9] State v. Rodriquez, 187 Wn. App. 922, 936-37, 352 P.3d 200 (2015).

weapon to) the fight that ended with the defendant stabbing the victim in the back, killing him. 125 Wn. App. at 142, 147-49. The facts in Bea are very similar to the facts at bar: after an initial fight in the home of the victim (Cruz), the defendant began to leave, then veered into the kitchen, grabbed a knife, grappled with and stabbed Cruz. Bea, 162 Wn. App. 573-74. The court held that an aggressor instruction was properly given because the defendant was not entitled to invoke self-defense if he provoked Cruz by instigating the original fistfight. Id. at 577-78. See also Davis, 119 Wn.2d at 666 (first-aggressor instruction warranted based on evidence that defendant punched Gunderson and when Locke intervened, defendant stabbed Locke).

Sullivan's argument that words alone are not sufficient to support a first-aggressor instruction is irrelevant in this case. The jury was instructed that the provocation must be an "intentional violent act" to preclude reliance on self-defense. CP 40. Words that are accompanied by threatening behavior do warrant an aggressor instruction. Anderson, 144 Wn. App. at 90 (the defendant yelled as he leaned over a person with his hands on the arms of the chair that she was sitting in – this was more than words and supported the first-aggressor instruction). The evidence that Sullivan pulled

Cessill off the couch, and stood over him with fists raised, threatening to punch him, constitutes threatening behavior, not just words.

b. The First-Aggressor Instruction Given Was A Proper Statement of the Law.

Sullivan's claim that the first-aggressor instruction given was too vague and too broad is entirely without merit. Sullivan challenges the instruction's statement that a qualifying provocative act must be an "intentional violent act reasonably likely to provoke a belligerent act." CP 40. That language is not only sufficient, it is more narrow than required. It does not constitute error.

The pattern instruction on the first-aggressor doctrine uses this language: "No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense...." Washington Pattern Jury Instructions, Criminal; 11 Wash. Prac. 16.04 (emphasis added). The language of that instruction has been approved by the Supreme Court. Wingate, 155 Wn.2d at 821; Riley, 137 Wn.2d at 908-14.

The trial court in this case narrowed the language of the instruction even further, providing in Instruction 14: "No person may, by any intentional violent act reasonably likely to provoke a

belligerent response, create a necessity for acting in self-defense...." CP 40 (emphasis added). The instruction was more narrow than necessary – it did not suffer from vagueness.

Sullivan relies on a case that found an older version of the pattern instruction unconstitutionally vague, State v. Arthur, 42 Wn. App. 120, 708 P.2d 1230 (1985). The instruction disapproved in Arthur referred to "an unlawful act" that created a necessity to respond. Id. at 121. The court concluded that this term was too broad because it could encompass accidents, and held that the provocation must be an intentional act. Id. at 124. This defect was cured with the current pattern language, "by any intentional act." WPIC 16.04. The trial court's requirement of "any intentional violent act" cured the vagueness problem identified in Arthur.

Sullivan contends that Instruction 14 was too vague and broad because the court did not specify which intentional acts would constitute provocation. Instructions are simply required to correctly state the law, however, not apply it to the facts of the case. Riley, 137 Wn.2d at 909. As previously argued, Sullivan's aggression toward Cessill or her punching Bohannon in the face could be a basis for a jury to conclude that Sullivan was the first aggressor. The jury could not have relied on the stabbing itself as

provocation that negated self-defense, because under Instruction 14, the provocation must create a necessity for the defendant's use of force. CP 40. Thus, the same act could not be both the provocation and the assault. Instruction 14 was a proper statement of the law.

5. THE DEFENSE INSTRUCTION REGARDING MULTIPLE ASSAILANTS WAS DEFECTIVE AND SUPERFLUOUS, AND PROPERLY REJECTED.

Sullivan claims that the trial court erred in refusing her proposed instruction regarding the use of force against multiple assailants. That instruction was a comment on the evidence, however, and was properly refused on that basis. Further, the instruction was superfluous, so it was within the court's discretion to refuse it even if it was not defective.

Sullivan's proposed instruction follows:

> As it is within the realm of common experience that two or more people are more likely to inflict injury than only one person, the amount of force that is necessary to prevent the infliction of injury, and thus is not unlawful, may vary with the number of persons the defendant reasonably believes are about to commit or assist in an offense against a person.

CP 75. In the trial court, Sullivan argued that it "add[ed] information to the jury as far as the fact that what's necessary is going to vary

depending on how many aggressors there are," noting that the language was taken from State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000). RP 486. The court declined the instruction without explanation, and Sullivan offered no further argument. RP 486. This Court can affirm that decision on any ground within the record. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

The proposed instruction was properly rejected because it was an impermissible comment on the evidence. A trial court may properly refuse to give an instruction if it is flawed in any way. Crossen v. Skagit Cty., 100 Wn.2d 355, 361, 669 P.2d 1244 (1983). A judge is constitutionally prohibited from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." Wash. Const. art. IV, § 16; State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). The proposed instruction included this premise: "it is within the realm of common experience that two or more people are more likely to inflict injury than only one person." CP 75. That was a prohibited comment on the facts in the case, suggested the court's attitude toward the amount of force that could reasonably be used in the case, and

inaccurately conveyed that the proposition is a matter of law, so the court properly refused the instruction on the basis that it was flawed.

The instruction also was properly refused because it was cumulative, and the relevant law was covered by other instructions given by the court. Evaluation of the propriety of the trial court's refusal of an instruction must be in the context of the instructions as a whole. State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993). A trial court is not required to give an instruction that is cumulative, collateral to, or repetitious of instructions given. Id. at 655. The legal subject matter of the proposed instruction was already contained in the trial court's instruction on lawful force, Instruction 15. CP 41.

Instruction 15 provided, in relevant part:

> The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using or offering to use 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 the incident.

CP 41. This language is from the current pattern instruction on the use of lawful force in self-defense. 11 Wash. Prac. 17.02. The trial court used the language in the instruction proposed by Sullivan.[10] CP 68; RP 492-93.

The language of the instruction disapproved in Irons required the defendant reasonably believe *the victim* intended to inflict harm and the defendant reasonably believe there was imminent danger of *that harm* being accomplished. 101 Wn. App. at 550, 552. The court in Irons held the words "the victim" and "that harm" could be read to require the jury to consider only the actions of the victim in assessing the defendant's reasonable belief as to the danger posed. Id. at 552. Because the case involved multiple assailants, the court concluded that it could be misleading. Id. at 553.

In the case at bar, the use of force instruction, Instruction 15, does not refer to force used by the victim, and could not mislead the jury in evaluating the use of force against multiple assailants. Instruction 15 provides that the use of force is lawful when used by a person who "reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary." CP 41.

[10] Sullivan agreed that the paragraph relating to malicious trespass or interference with property should be removed. RP 493.

That language does not limit the source of the danger to acts of the victim – it does not limit the source of the danger in any way. The instruction then provides that the person using the force may use such force as a reasonably prudent person would "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 the incident." CP 41. There is no suggestion that the jurors are limited to consideration of the acts of the eventual victim in determining whether the force used by the defendant was lawful.

If the language of the lawful force instruction is misleading or inaccurate, as Sullivan argues on appeal, the error is invited error, as the trial court used the instruction that Sullivan proposed. Compare CP 41, 75; RP 492-93. A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

6. THE PROSECUTOR COMMITTED NO ERROR IN CLOSING ARGUMENT.

Sullivan claims that the prosecutor committed misconduct in closing by making an argument that was an unwarranted inference

from the evidence and an improper appeal to jurors' emotions. This claim should be rejected. The challenged argument was that in her testimony, Sullivan used language suggesting that the men could have intended a sexual assault, and that she testified in that manner to achieve an emotional reaction. 10RP 83. The remark, which drew no objection, was a fair argument based on Sullivan's testimony. Defense counsel at trial was not surprised by the inference, did not object to it, and appeared to reinforce it in her own argument. If the remark was improper, any prejudice could have been cured by a simple instruction, and any error was not a basis for reversal.

A defendant who claims that prosecutorial error or misconduct deprived the defendant of a fair trial generally bears the burden of establishing that the conduct was both improper and prejudicial.[11] State v. Emery, 174 Wn.2d 741, 759-60, 764 n.14, 278 P.3d 653 (2012). To establish prejudice, the defendant must show a substantial likelihood that the improper conduct affected the jury's verdict. Id. In analyzing potential prejudice, improper

[11] The exception to this rule is that if the defendant has established that the prosecutor flagrantly or apparently intentionally appealed to racial bias in a way that undermined the defendant's credibility or the presumption of innocence, the State must establish beyond a reasonable doubt that the misconduct did not affect the jury's verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). In this case, there is no claim that there was any appeal to racial bias at any point during the trial.

comments are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. Id. at 764 n.14; State v. Rafay, 168 Wn. App. 734, 824, 829-30, 285 P.3d 83 (2012).

If defense counsel failed to object, a conviction will not be reversed for prosecutorial error or misconduct unless the improper conduct was so flagrant and ill-intentioned that it resulted in enduring prejudice "so inflammatory that it could not have been defused by an instruction." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The absence of an objection by defense counsel "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.2d 221 (2006) (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). Counsel for the defendant may not remain silent, hoping for a favorable verdict, and then claim misconduct for the first time on appeal. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994).

In closing argument, the State is accorded wide latitude to argue the evidence and reasonable inferences from that evidence. Dhaliwal, 150 Wn.2d at 577. The distinction between a permissible

inference and an impermissible reference to a matter outside the record was explained in McKenzie, supra. The court noted that in a previous case where there was no evidence that the defendant threatened his first wife with a gun, it was reversible error for the prosecutor to assert in closing argument that he had done so. McKenzie, 157 Wn.2d at 58. However, inferences regarding motivations of the defendant that have a basis in the record are permissible. Id. at 58-59.

The statement that Sullivan contends was misconduct is highlighted in this excerpt of the prosecutor's closing argument:

> According to defendant's version of events, [Cessill]'s kind of rousted up on the couch, and then he notices that Ms. Sullivan and Chris [Bohannon] have fallen to the ground. So, according to Ms. Sullivan, he apparently just kind of jumps in and starts grabbing her body? And why does she grabbing her body? Because she wants to have the strongest emotional reaction to you because we all realize that any kind of sexual assault is heinous and we – she wants us to have that reaction.
>
> But the idea that he just is woken up and is, like, Hey, let me – let me jump in here is kind of absurd. And then for him to – you heard him talk about – at the very beginning of the testimony he was asked, Do you remember this?
>
> And he was, like, Do I remember this? I told this story, like, a hundred times. It was crazy. I was in Seattle for a couple hours and I see this lady go crazy and whack this guy. If he was being a threat, if he was doing something wrong, if he was assaulting her as she wants you to believe, why would he ever tell anyone this story?

RP 543-44.

Sullivan did not object to that argument, either when it occurred or at any time afterward. Sullivan cannot show that a simple objection and curative instruction would not have obviated any potential prejudice.

Sullivan claims that the prosecutor's argument was completely unwarranted, that the record does not support the inference that Sullivan had implied this could have been an attempted sexual assault . However, Sullivan had testified that about two weeks prior to this incident, she woke up after a night of drinking with Bohannon and Bohannon told her that they had had sex. RP 398-99. Sullivan said she could not remember that and would not have consented to sex with Bohannon if she had been sober, but was drunk and made a bad decision she regretted. RP 435. This testimony certainly suggested that Bohannon had taken advantage of Sullivan when she was unable to resist.[12] Sullivan said that she was not happy when she was told they had had sex but she just let it go. RP 399.

The charged assault occurred in the middle of the night in Bohannon's apartment. In her testimony about that night, Sullivan

[12] When the prosecutor complained that this was evidence of prior bad acts that had not been disclosed before it was presented to the jury, contrary to pretrial rulings, the trial court said that it was "not sure" it would be considered a rape. RP 419.

said that she met Cessill, who was a stranger, at a bus stop where he was talking to another woman. RP 406-08. She said she "rescued him from something bad he was about to do." RP 408. Sullivan claimed that when she tried to wake up Cessill to leave with her, Bohannon "pounced" her and they rolled on the floor, then she "had two boys on top of me." RP 413-14. Defense counsel asked, "What were you terrified they might do?" RP 415. Sullivan did not answer directly, instead saying, "I just knew I was getting hurt," and "I was scared and people were putting their hands on my body and holding me against my will for no reason." RP 415. Later on direct, Sullivan again described the men as both "on top of me." RP 426.

On cross examination, Sullivan repeated that she had "two boys on top of me and one of them I don't know." RP 445. She said Bohannon never punched her as they were on the ground, that it was "sloppy rolling around," "me trying to get away, him trying to pull me back." RP 448. She said she grabbed the knife, because she was scared, saying "If I'm already getting beat up by two boys what's going to come next, you know?" RP 460.

On redirect examination, Sullivan was asked what was going through her mind when the men "had you on the ground." RP 464-

65. Sullivan responded that she was scared, thought "how much more are they going to hurt me?", "Will they bash me in the head?", and "If they're doing this there's worse to come." RP 465. Counsel again asked about when the men were "holding her down," and Sullivan said she had to struggle to get away from people "holding me and digging nails in my neck" because she did not know what their intentions were. RP 466.

Defense counsel at trial apparently agreed that the testimony supported an inference that Sullivan was implying that this was an attempted sexual assault, as earlier in his closing the prosecutor referred to the same theory and defense counsel did not object. RP 539. The prosecutor had referred to Sullivan's implication that the assault included a sexual motivation, as follows:

> And, importantly, even after she cut him they didn't continue to assault her. You know, if there are these two guys that are enraged, and then she cuts them? I mean, if that's really what happens, her version of events, why do they not just turn on her and, frankly, beat the crap out of her? If she was fearful of some sort of sexual assault, I mean, at this point, why not just frankly go to town? If they're these guys that are as terrifying as she wants to portray them as.
>
> But that's not what happened.

RP 539. There was no objection to this argument. RP 539.

The clearest indication that defense counsel agreed with the prosecutor's inference is that defense counsel did not deny it in her closing argument – quite the opposite. RP 553-78. Counsel did not argue that there was no suggestion that this was a sexual assault. The phrasing of the defense closing reinforced the inference that Sullivan was afraid of sexual assault, with the following statements:

> You have two intoxicated men on top of a smaller person, unexpectedly in a context that makes no sense at the time.

RP 569-70.

> They stayed on her, and they stayed on her until she got away. Why on earth would she expect them to just stay in the kitchen or stay in the living room and not chase her down the hall? Because they just did something crazy and unexpected and threatening to her. Of course she would have reason to believe that they weren't just going to let her walk away.

RP 570.

> [I]t wasn't as though [Cessill] and [Bohannon] were on top of her telling her Leave, leave, leave now. At that point the conversation wasn't even about leaving. It was – there wasn't a conversation. She was on the ground and she was being restrained.

RP 571.

The defense attorney's repeated references to the unspecified threat that would be perceived when two men are on

top of a woman, restraining her, also suggest a threat of sexual assault, particularly because defense counsel did not deny the prosecutor's assertion that Sullivan's testimony suggested that this was, or could have been, an attempted sexual assault.

The prosecutor's identification of and challenge to Sullivan's effort to inflame the passions of the jury was proper argument. The court instructed the jury that they were the sole judges of the credibility of the witnesses. CP 26. The prosecutor repeated that point. RP 543, 552. The court instructed the jury that it must not let emotions overcome the rational thought process or be swayed by sympathy or prejudice. CP 27. It instructed that remarks and arguments of the lawyers were not evidence and it must disregard any statement or argument not supported by the evidence. CP 27. Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

Sullivan's argument on appeal is that a false allegation of sexual assault is so inflammatory that it is impermissible to refer a defendant's implied allegation of sexual assault. The argument echoes the prosecutor's point – that the suggestion of sexual assault was intended to generate an emotional response. The prosecutor is not prohibited from making an argument because the

subject matter is emotionally laden. Although Sullivan repeatedly suggests that the prosecutor was referring to facts outside the record, that would be inconsistent with the point of the argument, which was that this implication of sexual assault during the testimony at trial was an effort on Sullivan's part to produce an emotional response.

Sullivan argues that remarks about sexual assault and false claims of sexual assault are especially prejudicial, but that does not put such arguments off limits. When the evidence supports an inference, the prosecutor is permitted to articulate that inference, even if it is inflammatory. For example, the Supreme Court has held that a prosecutor may refer to the defendant as a "rapist" if the evidence supports that inference. McKenzie, 157 Wn.2d at 57-58.

Evaluating the prosecutor's entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions, this Court should conclude that the prosecutor's closing argument was not improper. It addressed issues before the jury: Sullivan's version of events and her credibility. It discussed her testimony and drew reasonable inferences from it. Sullivan's failure to object, or to rebut the prosecutor's argument in her closing, indicates at least that it was not unduly prejudicial. More

likely it indicates that defense counsel agreed with the prosecutor's characterization of the testimony and intended that the jury believe that the assault described by Sullivan could have been an attempted sexual assault. If the single challenged remark was improper, it could have been cured if there had been an objection.

F. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Sullivan's conviction. The provision of her sentence that permitted her to serve time imposed on the deadly weapon enhancement in CCAP Enhanced should be vacated and stricken on remand. The provision of her sentence that credited time attending CCAP Enhanced against the sentence imposed also should be vacated and stricken on remand.

DATED this 16TH day of February, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent/Cross-Appellant
Office WSBA #91002

Appendix A

Jury Instructions 14-17A

CP 40-44

NO. 14

No person may, by any intentional violent act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

NO. 15

It is a defense to a charge of assault second degree and assault fourth degree that the force used, attempted, or offered to be used was lawful as defined in this instruction.

The use of, attempt to use, or offered to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using or offering to use 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 the incident.

The State has the burden of proving beyond a reasonable doubt that the force used, attempted to use, or offered to be 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

No. 16

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

No. 17

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."

No. 17A

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.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant/ cross-respondent, Kevin A. March, containing a copy of the Brief Of Respondent/ Cross-Appellant, in State v. Dawn Sullivan, Cause No. 73217-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

02-16-16
Date

Done in Seattle, Washington