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SUPREME COURT NO. 96023-2

NO. 76128-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD WHITAKER,

Appellant.

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

The Honorable Hollis Hill, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Richard Whitaker, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Whitaker asks this Court to review the decision of the Court of Appeals in State v. Whitaker, No. 76128-5-I, filed June 11, 2018.¹

C. ISSUES PRESENTED FOR REVIEW

1. Is a defendant's right to due process violated when the trial court gives the jury an instruction on justifiable homicide that is ambiguous as to the State's burden of proof?

2. Is a defendant denied effective assistance of counsel where counsel assents to an instruction that is misleading as to the State's burden of proof?

D. GROUND FOR REVIEW

Review should be granted under RAP 13.4(b)(3) because this case raises significant questions of law under the United States and Washington constitutions as they pertain to ineffective assistance of counsel and due process.

¹ A copy of the decision is attached as an appendix.

E. RELEVANT FACTS

In the very early hours of December 13, 2015, Whitaker and his girlfriend Wendy White were in the Belltown area of Seattle. RP 609.² Whitaker was selling drugs to support his family. RP 654, 656, 905-06. White drove Whitaker to the area that night. RP 609.

Whitaker didn't want White involved in selling drugs at night, but she sometimes insisted on coming. RP 613, 919. Whitaker understood the dangers of the streets at that time of night, having been jumped and stabbed less than a month before and knowing that people will do strange things to get drugs. RP 908-13. He knew the streets were particularly dangerous for women. RP 919.

That night, while Whitaker was engaged in a drug transaction, White walked away. RP 619, 924. Brent McDonald – a stranger – approached her to buy crack cocaine. RP 618, 622. McDonald was very intoxicated and White got a “weird vibe” from him. RP 679. Feeling very uncomfortable, White refused to sell anything to McDonald and rejoined Whitaker who promptly told McDonald that White was his girlfriend and to back off. RP 624, 679, 925. Whitaker and White attempted to move away but

² Transcripts are referred to as follows: RP refers to the multi-volume transcript transcribed by Cynthia A. Kennedy; 2RP refers to the multi-volume transcript transcribed by Michelle Vitrano; and 3RP refers to the corrected transcript for October 13, 2016.

McDonald followed, lagging about 30 feet behind. RP 680-81.

Whitaker went into a shop to buy some cigarettes while White waited outside. RP 926-26. McDonald approached White again. RP 926. McDonald tried multiple times to get White to sell him drugs. RP 624. Whitaker came out and again told McDonald to leave White alone. RP 927. White noticed Whitaker was getting nervous about McDonald's behavior. RP 625, 683.

Whitaker and White eventually lost sight of McDonald as they walked to a different location. RP 683. Believing McDonald had left, White stood on the sidewalk under cover from the rain and began smoking a cigarette while Whitaker remained close by. RP 973. At one point, they saw McDonald crossing a street and moving away from them. RP 684, 929. However, McDonald suddenly turned, made eye contact with White, and quickly changed directions toward them. RP 628, 684-86, 929. He walked diagonally through the intersection, making a beeline for White. RP 628, 684-86, 929. White did not know what McDonald's intentions were and this made her uncomfortable and fearful.³ RP 686-88.

³ In its argument, the State claims White was not afraid and did not even feel the need to pay attention to McDonald. BOR at 21. However, White testified that she felt threatened (RP 641), uncomfortable (RP 698), and afraid (RP 687, 698). The State also claims "White could see that McDonald did not have a weapon" but it fails to offer a citation to White's testimony in the record.

Given the time of night and circumstances on the street, McDonald's behavior appeared to White and Whitaker to be very odd and aggressive. RP 697, 931. Whitaker became very concerned for their safety. RP 945-46. He positioned himself between McDonald and White. RP 690, 933. Whitaker asked McDonald why he was following them and told him to stop. RP 629, 688, 930. McDonald responded aggressively, saying that he was free to walk where he wanted. RP 629, 697, 930. McDonald continued to move forward in a cocky and hostile manner. RP 631-32.

Whitaker was not in any condition to get into a physical fight with McDonald due to his recent stabbing, and he did not know what kind of weapons McDonald might have or what he was going to do. RP 935-37, 946. Whitaker feared for their lives. RP 946. As McDonald persisted and got within three feet of White, Whitaker pulled a gun he had been carrying and shot McDonald. RP 690, 937.

Panicked, White and Whitaker got into her car and drove away, but they were eventually arrested a few weeks later. RP 643, RP 808. Meanwhile, McDonald died almost immediately from the gunshot wound. 2RP 55. Police later discovered McDonald

was carrying a crack pipe with residue. RP 471-72, 890. An autopsy revealed McDonald's blood alcohol content was .21 – well over twice the legal limit. He also had elevated levels of marijuana in his system. RP 88.

The King County prosecutor charged Whitaker with one count of second degree murder while armed with a firearm and one count of unlawful possession of a firearm. CP 1-10. At trial, Whitaker raised a justifiable homicide defense. CP 24; RP 997-1119. He testified that he felt his and White's lives were in danger. RP 945. He testified that they had asked McDonald to go away numerous times, they had walked away, he had put himself between McDonald and White – but to no avail. RP 946.

McDonald kept progressing toward White in spite of all these efforts, so Whitaker believed he had to react. RP 946.

To support this defense, defense counsel submitted, and the trial court gave, the standard WPIC instruction for justifiable homicide, which states:

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction. Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:

- 1) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;
- 2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
- 3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. 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.

CP 48.

During jury deliberations, the jury made the following inquiry regarding the justifiable homicide instruction:

“Do all three elements have to be met in order for a homicide to be justifiable, i.e. if 2 of three are met is it justifiable? (Instruction #15)

CP 63 (emphasis in original). Receiving this, the parties met with the court to discuss an answer. 3RP 3. The trial court noted that it thought Instruction 15 was “very confusing because it requires the jury to sort of look at the old negatives.” 3RP 4. It suggested that

the following instruction be given:

The State has the burden of proving beyond a reasonable doubt that homicide was not justifiable. The State can carry this burden by proving beyond a reasonable doubt that one or more of the three elements in Instruction 15 has not been established.

3RP 4.

Defense counsel objected because she recognized the last sentence suggested that the defense had an obligation of establishing those elements to the jury rather than the State proving their absence. 3RP 5-6. She asked that the trial court make the last line read as follows: "The State can carry this burden by proving beyond a reasonable doubt that one or more of the three elements in Instruction 15 is not true." 3RP 6.

The State countered that, instead of making that change, the last sentence should read: "Justifiable homicide occurs when all three of these elements are met." 3RP 7. Defense counsel agreed to this despite having previously noted a burden-shifting flaw in essentially the same instruction. 3RP 8. Ultimately, the following answer was the sent to the jury:

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. A homicide is justifiable when all three elements in Instruction 15 are met.

CP 64. The jury returned a guilty verdict shortly afterward. CP 65.

On appeal, Whitaker asserted the trial court's answer to the jury's question impermissibly shifted the State's burden of proof. He also asserted, his attorney was ineffective for failing to object to the trial court's response. Amended Brief of Appellant (ABOA) at 9-16; Reply Brief of Appellant (RB) at 1-8. The Court of Appeals disagreed, concluding the trial court's answer did not shift the burden. Appendix at 7-9.

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS WRONGLY HELD WHITAKER WAS NOT DENIED DUE PROCESS WHEN THE JURY WAS GIVEN AN INSTRUCTION THAT WAS AMBIGUOUS AS TO THE STATE'S BURDEN OF PROOF.

Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt." State

v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007).

Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind. State v. Sublett, 156 Wn. App. 160, 183, 231 P.3d 231, 243 (2010) (citing State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968)). Additional instructions on the law may be given during deliberation in response to a jury inquiry at the discretion of the court, but they too cannot be misleading or ambiguous. State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). If the jury instructions – when read as a whole – are ambiguous, the reviewing court cannot conclude that the jury followed the constitutional rather than the unconstitutional interpretation. Sandstrom v. Montana, 442 U.S. 510, 526, 99 S.Ct. 2450, 2460, 61 L.Ed.2d 39 (1979); State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997).

Jury instructions on self-defense must more than adequately convey the law. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), abrogated by on other grounds, State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. McCreven, 170 Wn. App. 444, 462, 284 P.3d 793, 802 (2012). The instructions “must make the relevant legal standard manifestly apparent to the average juror.” State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

Instructing the jury in a manner that relieves the State of its burden of disproving self-defense is an error of constitutional magnitude. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1998); State v. Kindell, 181 Wn. App. 844, 854, 326 P.3d 876, 882 (2014).

A defendant asserting a claim of self-defense bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense. State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). Once this threshold is met and a jury is then instructed on self-defense, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The absence of self-defense becomes another element of the offense that the State must prove. State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007).

Applying these concepts here, once Whitaker met his burden of production, he was entitled to a jury instruction that placed the entire burden of proof upon the State to establish the absence of justifiable homicide. By the time the case was sent to the jury for deliberations, the defendant did not have to “meet” any elements as to justifiable homicide, nor did the State. Instead, in order to

convict, the jury had to conclude the State had established the absence of these elements. In other words, it must start with the presumption the homicide was justified. Unfortunately, the trial court's answer to the jury question stated the law in such a way that suggested that the jury must look at whether those elements are met, when it instructed: "A homicide is justifiable when all three elements in Instruction 15 are met." Contrary to the Court of Appeals opinion (Appendix at 7), this is misleading as to the burden of proof.

Implicit in the jury's question to the trial court and in the trial court's answer was the idea that before the jury could conclude that the homicide was justifiable, it had to be satisfied that the three elements were met. This undercuts the presumption of innocence via justifiable homicide. Certainly, no one can conceive of the burden of meeting the three elements as falling upon the State. Instead, this statement would lead the ordinary juror to infer that his or her duty was to start with a determination as to whether the defense had established the three elements.

The jury instructions should not have misled the jury to focus on whether all three elements were "met." The focus should have been on whether any one of the three elements was shown to be

absent. The trial court's answer should have unambiguously informed the jury that unless the State established beyond a reasonable doubt that any one of the three elements did not exist, the homicide was justifiable. It did not do so. As such, the instructions – read as a whole – were ambiguous and misleading as to the State's burden of proof.

In sum, the record shows the trial court's answer to the jury impermissibly shifted the burden of proof away from the State, and it was thus, a violation of appellant's due process right. Review should be granted because the Court of Appeals decision to the contrary creates a significant constitutional question as to the trial court's inadvertent shifting of the burden of proof when answering a jury inquiry.

II. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS WRONGLY CONCLUDED WHITAKER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. A defendant is denied this right and is entitled to reversal of his convictions when his attorney's conduct: (1) falls below a minimum objective standard of

reasonable attorney conduct, and (2) the defense was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); State v. Estes, 188 Wn. 2d 450, 458, 395 P.3d 1045, 1049 (2017). As shown below, both prongs are met here.

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. Id. Prejudice exists if there is a reasonable probability that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Strickland, 466 U.S. at 694. A “reasonable probability” is even lower than a preponderance standard. Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Estes, 188 Wn. 2d at 458. It is established by showing a mere probability sufficient to undermine confidence in the outcome. Id.

Counsel's performance was objectively unreasonable when he assented to the State's proposed answer to the jury, instructing them in a way that made ambiguous the State's burden of proving the absence of justifiable homicide. See, the argument made in Section I. Inexplicably, after objecting to the trial court's proposed instruction because it improperly suggested the defendant had to

affirmatively prove the homicide was justified – defense counsel assented to the State’s proffered instruction that essentially said the same thing. There is no legitimate tactical explanation for this.

Defense counsel correctly recognized that telling the jury that a homicide was justified if all three elements were “established” improperly suggested that the defense had a burden to affirmatively prove the elements before the jury could consider if the State had offered evidence to rebut this. 3RP 5-6. Yet, he agreed to instructing the jury that “A homicide is justifiable when all three elements in Instruction 15 are met.” CP 64; 3RP 8. This makes no sense. There is essentially no difference between **establishing** the three elements and **meeting** the requirements of those three elements. Both instructions suffer the same problem -- they reasonably implied that before the jury could conclude that the homicide was justifiable, the jury had to be satisfied that the three elements had been proved. However, the law requires that the jury be satisfied that the State had disproved an element beyond a reasonable doubt regardless of what the defense offered.

Counsel’s deficient performance in assenting to the court’s clarifying instruction was prejudicial. The core issue here was whether the homicide was justified. By assenting to the instruction,

defense counsel allowed the jury – whose question showed confusion as to the burden of proof – to be further misled as to which party had to establish which elements as the jury endeavored to decide whether the homicide was justifiable. There is a reasonable probability that the trial court's clarifying question misled the jury to shift the burden away from the State and onto the defense and thereby convict without finding the State had proved beyond a reasonable doubt the absence of justifiable homicide.

In sum, the Court of Appeals was incorrect when it concluded Whitaker was provided effective assistance of counsel. Its holding creates a significant constitutional question regarding what constitutes effective assistance of counsel when faced with a jury inquiry. Hence, review should be granted.

G. CONCLUSION

For the reasons stated above, petitioner respectfully asks this Court to grant review. RAP 13.4(b)(3).

Dated this 28th day of June, 2018.

Respectfully submitted

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 RICHARD WHITAKER, AKA RICHARD)
 CHARLES ROUNDTREE,)
)
 Appellant.)

No. 76128-5-1
DIVISION ONE
UNPUBLISHED OPINION

FILED: June 11, 2018

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APPELWICK, C.J. — Whitaker appeals his jury conviction for second degree murder. He contends that he was denied his right to a fair trial because the trial court’s response to a jury question impermissibly shifted the State’s burden of proof. In the alternative, he contends, his attorney was ineffective for failing to object to the trial court’s response. We affirm.

FACTS

In the early morning hours of December 13, 2015, Richard Whitaker was selling crack cocaine in the Belltown neighborhood of Seattle. Whitaker was accompanied by his girlfriend, Wendy White. Whitaker had a .45 semi-automatic pistol in his backpack.

According to White, at some point in the evening, Brent McDonald approached her and asked if she would sell him drugs. White did not know McDonald. She refused, concerned that McDonald might be an undercover officer, because he was clean cut and “just didn’t look like your typical user.” McDonald

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left and White lost sight of him. White testified that McDonald approached them several times that night asking to buy drugs. Each time, Whitaker told McDonald to go away and each time he complied.

At around 3:00 a.m., McDonald approached Whitaker and White again. White described McDonald's attitude as "cocky" and that she was "uneasy." However, White testified that she was not scared by McDonald and did not feel that she was in danger. White admitted that McDonald did not hurt her, display a weapon or even raise his voice at her.

I mean I didn't think he was coming to hit me or something, but I didn't know what he was going to do, and it's that unknown that creates the fear. It's not like that he had a hatchet and he was like chasing after me. It wasn't nothing like that. But it's like when you're coming towards a person that has asked you to leave them alone, I can't imagine there's positive intent. It's just -- it just felt very uncomfortable.

Whitaker asked McDonald, in an aggressive tone, "[W]hy are you following us?" McDonald responded, "I'll walk these free streets of America wherever I want to walk." McDonald continued to approach until he was approximately four to five feet away from White. Whitaker pulled the gun out of his backpack and shot McDonald. The bullet entered McDonald's right side and exited his left side. McDonald died almost instantly.

Whitaker and White fled in White's car. The following day, Whitaker threw the gun into Lake Washington.

Police arrested Whitaker based on a tip from a confidential informant that Whitaker had admitted to killing McDonald. The State charged Whitaker with second degree murder while armed with a firearm.¹

At trial, Whitaker admitted that he shot McDonald but asserted he had done so in self-defense. Whitaker testified that he supported himself selling crack cocaine. He stated that it was a dangerous business and that he had previously been stabbed and robbed at gunpoint by customers. Whitaker testified that he shot McDonald because McDonald had repeatedly approached White that evening and he believed McDonald intended to hurt her.

The State presented the testimony of several employees at the bar where McDonald had been that evening. All of them testified that McDonald, who was a regular customer, was soft-spoken and friendly and never aggressive. The State also presented the testimony of several witnesses who lived or worked in the area of the shooting, none of whom heard raised voices or threats. In addition, the State introduced surveillance video that recorded the incident. The video shows McDonald approaching and appearing to talk to White, while White calmly smoked a cigarette. McDonald appears to walk away just as Whitaker fires the gun.

At Whitaker's request, the trial court instructed the jury on the defense of justifiable homicide. A jury convicted Whitaker as charged. Whitaker appeals.

¹ Whitaker was also charged with and convicted of first degree unlawful possession of a firearm. Whitaker does not challenge this conviction.

DISCUSSION

Whitaker contends that he was denied due process because the trial court's response to a jury's question about the justifiable homicide instruction confused the jury as to the State's burden of proof.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Self-defense instructions, read as a whole, must make the relevant legal standard manifestly apparent to the average juror. State v. Sullivan, 196 Wn. App. 277, 291-92, 383 P.3d 574 (2016).

A homicide is justifiable if the slayer acts in lawful defense of the slayer or another person, being in reasonable fear of imminent great personal injury or death. RCW 9A.16.050. If there is some evidence tending to prove the defendant acted in self-defense, the State has the burden of proving the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983).

The trial court gave the standard instruction for justifiable homicide. Jury Instruction 15 provided,

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:

1) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;

2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. 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.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.02 (4th ed. 2016) (WPIC).

In closing argument, defense counsel misstated the State's burden of proof regarding the defense of justifiable homicide:

And there are two important things to remember here. The first is that this is the State's burden to disprove. This isn't the defendant's burden to prove what was going on. It is the State's burden to prove beyond a reasonable doubt that these factors don't apply, that they weren't met, that that isn't what happened here.

....

The State has to prove beyond a reasonable doubt that Mr. Whitaker didn't reasonably believe that he was in imminent danger, and the State has to prove to you that Mr. Whitaker's use of force was unreasonable given the facts and circumstances as they appeared to Mr. Whitaker at the time.

(Emphasis added.) In rebuttal, the prosecutor corrected defense counsel's misstatement of law, explaining that because all three elements of the definition

must exist in order for a homicide to be justified, the State was only required to disprove one in order to negate the defense:

You heard the defense counsel talk a little bit about instruction 15, and I need you to really pay attention to it, because what defense told you is that the State has to prove not only that he didn't believe -- that he believed that he was in fear of great bodily injury, but that also that he was in imminent danger of being harmed and that the force used was reasonable.

What the instruction actually says is that justifiable homicide occurs when all three of those things are met, which means if the State can show you that the defendant's behavior was not reasonable, that his conduct was not reasonable, that it does not matter what was in his mind at the time. If he didn't use reasonable force, then the homicide is not justifiable.

So take a look at your instruction. See that all three things have to be met before a homicide is justified, and you will be confident that it was not.

During deliberations, the jury submitted the following written question:

Do all three elements have to be met in order for a homicide to be justifiable? i.e. [sic] if 2 of 3 elements are met, is it justifiable?

When the parties met to discuss the question, the trial court stated,

Okay. I think this instruction is very confusing because it requires the jury to sort of look at a double negative. If the parties want to agree, that's fine. I would be prepared to instruct the jury as follows: "The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. The State can carry this burden by proving beyond a reasonable doubt that one or more of the three elements in Instruction 15 has not been established."

Defense counsel stated,

I might suggest that instead of it has not been established, "is not true" -- my concern about has not been established is it kind of sounds like it's something that the defense has an obligation to establish that there's -- that that's my requirement.

....

. . . I think my -- my concern -- [is that] maybe "that does not exist" is - is easier - my concern is that we're talking about it hasn't been proven or it hasn't been established. I think that suggests that the defense has an obligation to prove it initially and then the State is disproving and I don't think that's an accurate reflection of the instruction -- I think we could say -- I think we could just end it with "is not true" maybe or "one of those elements is not true."

The parties ultimately agreed on the following response to the jury:

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. A homicide is justifiable when all three elements in Instruction 15 are met.

(Emphasis added.)

Whitaker contends that the phrase "when all three elements in Instruction 15 are met" would cause a reasonable juror to infer "that his or her duty was to start with a determination as to whether the defense had established the three elements."

We disagree. Here, the trial court's response to the jury question was an accurate statement of the law. The trial court correctly informed the jury that the State had the burden of proving beyond a reasonable doubt that the homicide was not justifiable. The trial court then reiterated instruction 15, which states that a homicide is justifiable when three elements are present: that Whitaker reasonably believed McDonald intended to inflict death or great bodily harm; that Whitaker reasonably believed there was imminent danger of such harm; and that Whitaker's use of force was reasonable under the circumstances. In other words, the trial

court properly instructed the jury that the State had the burden to show that all three elements were not met.

Contrary to Whitaker's assertion, the jury question does not indicate that the jury misunderstood the burden of proof. It appears that the question arose following defense counsel's misstatement of law in closing argument. The jury was understandably confused as to whether the State had to prove all of the elements in instruction 15 or just one of them. However, at no point did the jury evince any confusion as to which party held the burden of proof.²

In the alternative, Whitaker contends, he was denied effective assistance of counsel because defense counsel assented to the erroneous response. To prevail on this claim, Whitaker must demonstrate both that defense counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). We strongly presume that counsel's representation was effective. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because, as discussed above, the trial court did not misstate the law or shift the burden of proof, defense counsel's performance was not deficient. Nor is there any reasonable probability that defense counsel's assent to the trial court's wording of the response changed the outcome of the trial.

In a pro se statement of additional grounds, Whitaker reiterates the claims made by appellate counsel regarding the jury question. In addition, Whitaker

² Because we conclude that the trial court's response to the jury question was proper, we need not address the State's assertion that Whitaker has waived any challenge by inviting the error.

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claims that (1) defense counsel was ineffective for failing to propose a self-defense instruction; and (2) the trial court erred in failing to give a lesser included offense instruction. Whitaker's claims are too conclusory to merit review. RAP 10.10; State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued); State v. Marintorres, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider pro se arguments that are conclusory or unsupported).

Affirmed.

Appelwick, C.J.

WE CONCUR:

[Signature]

Scheinle, J.

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

June 28, 2018 - 11:10 AM

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