NO. 97183-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

Robert Grott,
Respondent.

ANSWER TO PETITION FOR REVIEW

LISE ELLNER
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RULES, STATUTES, AND OTHERS

A. IDENTITY OF RESPONDING PARTY

Respondent Robert Grott through his attorney, Lise Ellner, asks this court to deny review of the Court of Appeals decision designated in Part B of this answer.

B. COURT OF APPEALS DECISION

Robert Grott requests this Court deny review of the Court of Appeals opinion in *State v. Grott*, COA No. 50415-4-II.

C. ANSWER TO STATE'S ISSUES PRESENTED FOR REVIEW

1. The state incorrectly claims this Court should accept review because the Court of Appeals "presumed" prejudice when the trial court gave a first aggressor instruction, and should not have reviewed the issue under RAP 2.5, but in fact, the Court of Appeal engaged in a harmless error analysis to determine actual prejudice. (Opinion at pages 5-6)

2. The state incorrectly claims this Court should accept review because the Court of Appeals erred in finding the evidence presented at trial did not support giving a first aggressor instruction, and the court disregarded settled precedent, but the Court of Appeals correctly applied well settled precedent under *State v. Riley*, 137

Wn.2d 904, 909-10, 976 P.2d 624 (1999), that the provoking act cannot be the same as the charged crime.

3. Mr. Grott was denied his constitutional right to the effective assistance of counsel by counsel's failure to object to the first aggressor instruction.

D. STATEMENT OF THE CASE

In the interests of judicial economy, respondent adopts the statement of the case set forth in the Court of Appeals opinion.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

In addition to the following argument, Robert Grott adopts the arguments set forth in his opening brief.

1. This Court Should Deny Review

This Court should deny the state's petition for review because it fails to satisfy any of the criteria set forth in RAP 13.4(b). The state argued that its petition satisfies RAP 13.4(b)(1) (2), (3). But this is incorrect. RAP 13.4(b) provides in relevant part as follows:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict

with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

The state fails to meet these criteria because the decision in this case is not in conflict with any precedent and does not raise a significant question of law under the state or federal constitution.

a. THE COURT OF APPEALS WAS CORRECT TO HOLD THAT MR. GROTT COULD RAISE FOR THE FIRST TIME ON APPEAL, THE ISSUE OF THE COURT IMPPROPERLY GIVING THE FIRST AGGRESSOR INSTRUCTION BECAUSE THIS WAS MANIFEST ERROR AFFECTING MR. GROTT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHICH RELIEVED THE STATE OF ITS BURDEN OF PROOF

The trial court gave a first aggressor instruction without support from the record. Defense counsel did not object but argued in closing to the jury that Mr. Thomas was the first aggressor, not Mr. Grott. RP 2290. The Court of Appeals correctly determined that Mr. Grott was not the first aggressor in the altercation, and it was reversible error to give the first aggressor instruction.

i. Court Of Appeals Correctly Determined Review Appropriate Under RAP 2.5

Without any evidence to support a first aggressor instruction, the jury was able to consider that the state need not disprove self-defense beyond a reasonable doubt. *State v. Kyllo,* 166 Wn.2d 856, 864, 215 P.3d 177 (2009)*; State v. Walden,* 131 Wn.2d 469, 932 P.2d 1237 (1997); *State v. Acosta,* 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

Generally, an appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception exists for a claim of manifest error affecting a constitutional right. *Id.* In order to benefit from this exception, "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" *State v. O'Hara,* 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (alternation in original) (*quoting State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

Next, "to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." *State v.*

Kalebaugh, 183 Wn.2d 574, 584-85, 355 P.3d 253 (2015); RAP 2.5(a)(3).

This issue is subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (establishing state's burden to show harmless error beyond a reasonable doubt).

Kalebaugh addressed a similar issue. In *Kalebaugh*, the trial court provided an "off hand explanation for reasonable doubt after voir dire. *Kalebaugh,* 183 Wn.2d at 586. The court however provided legally correct written jury instructions explaining reasonable doubt. *Kalebaugh,* 183 Wn.2d at 584-85.

This Court held that "the mistake is manifest from the record" because it clearly implicates a constitutional interest: the presumption of innocence which "is the bedrock upon which the criminal justice system stands." *Kalebaugh,* 183 Wn.2d at 584. Because the trial court should have known this was a misstatement of the law, the Court of Appeals was correct to review the issue for the first time on appeal under RAP 2.5(3). *Kalebaugh,* 183 Wn.2d at 584-85.

Like *Kalebaugh*, in Mr. Grott's case, the Court of Appeals

analyzed the error under RAP 2.5 by first acknowledging that to permit review for the first time on appeal, Mr. Grott was required to, and did establish, that the error was both constitutional and manifest. (Opinion at pages 5-6). To determine the error was manifest, the Court of Appeals placed itself in the trial court's shoes and determined that giving the first aggressor instruction had the actual and practical effect of relieving the state of its burden of proof which prejudiced Mr. Grott and created a manifest, not harmless, error. (Opinion at pages 5-8).

This was an error the trial court could have corrected because it is well-established that it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) (*citing Albin v. National Bank of Commerce*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962); *State v. Heath*, 35 Wn. App. 269, 271-72, 666 P.2d 922 (1983)).

The Court's langue in its opinion might have been a bit in-artful by using the word "presume" but the Court did not presume the error was manifest but rather held, after analysis, that Mr. Grott established the error was manifest.

> To raise this issue for the first time on appeal, Grott must show that giving the instruction constitutes a manifest error affecting a constitutional right. RAP 2.5(a)(3). Grott has made this showing.

Opinion at page 5.

The Court explained that giving the first aggressor instruction was prejudicial constitutional error that relieved the state of its burden to disprove self-defense. (Opinion at pages 5-6).

> Because there is no evidence that Grott made an intentional act *before* the shooting that a jury could reasonably assume would provoke a belligerent response, we hold that the first aggressor instruction was improper. And because the instruction relieved the State of its burden to prove that Grott did not act in self-defense beyond a reasonable doubt, we presume that the error was prejudicial"

Opinion at page 8.

After determining the error could be raised for the first time on appeal, the Court of Appeals analyzed under a de novo review, and held that the error was not harmless beyond a reasonable doubt because the record did not support the first aggressor instruction. Opinion at pages 6-7.

This Court should deny review because the state's claim that the Court of Appeals presumed the error to be manifest is not accurate and not supported by the record, and the error was not

harmless beyond a reasonable doubt.

ii. Court of Appeals to Hold First Aggressor Instruction Improper

The right to have the jury properly instructed in a manner that does not relieve the state of its burden of proof is a "fundamental constitutional due process requirement". *Kalebaugh,* 183 Wn.2d at 584; *accord O'Hara,* 167 Wn.2d at 105. In other words, the state must prove the defendant committed the crime beyond a reasonable doubt because "[t]he presumption of innocence 'is the bedrock upon which the criminal justice system stands.' "*Kalebaugh,* 183 Wn.2d at 584 (*quoting State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)). This means that once a claim of self-defense is asserted, the absence of self-defense becomes an element of the crime that the state has the burden to disprove beyond a reasonable doubt. *State v. McCullum,* 98 Wn.2d 484, 493–494, 656 P.2d 1064 (1983).

Whether sufficient evidence justified a first aggressor instruction is a question of law reviewed de novo. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). This Court reviews the evidence in the light most favorable to the party requesting the first

aggressor instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2002); *Riley,* 137 Wn.2d at 909.

Generally, 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). "It is prejudicial error to submit an issue to the jury that is not warranted by the evidence." *Clausing*, 147 Wn.2d at 627.

Specifically, to support a first aggressor instruction the state must offer credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense. *Riley*, 137 Wn.2d at 909-10. This means there must be a separate and distinct act apart from the crime. *State v. Sullivan,* 196 Wn. App. 277, 289, 383 P.3d 574 (2016) (*citing Riley*, 137 Wn.2d at 909-10); *State v. Brower*, 43 Wn. App. 893, 902-03, 721 P.2d 12 (1986) (*citing State v. Upton*, 16 Wn.App. 195, 204, 556 P.2d 239 (1976)).

The trial court errs if it gives a first aggressor instruction when there is no evidence to support that the defendant's conduct

precipitated the need to use self-defense. *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039 (1989). Our courts have repeatedly explained that a first aggressor "instruction should 'be given only sparingly and carefully, in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction.'" *Riley,* 137 Wn.2d at 909 n. 2, 910 n.2; *Bea,* 162 Wn. App. at 576; *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). Moreover, the first aggressor instruction is "not favored". *Sullivan*, 196 Wn. App.at 289. "Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction." *Arthur,* 42 Wn. App. 125 n.1.

The state relied improperly on *Sullivan*, which cited to *Wasson*, to suggest the Court "overlooked" that the provoking act can be part of a "single course of conduct" that leads to the assault. Petition at page 18, *citing Sullivan***,** 196 Wn. App. at 290." This is incorrect.

Sullivan is factually inapposite but otherwise legally in accord with the Court of Appeals decision in Mr. Grott's case. In *Sullivan*,

unlike in Mr. Grott's case, the single course of conduct consisted of a scenario where two men were fighting among themselves, when Sullivan, a woman, as the first aggressor, attempted to pull one of the men off the couch and threatened to punch him. *Sullivan,* 196 Wn.App. at 291. The other man testified that Sullivan punched him in the face before he and the other man used force against her. Id. In this scenario, the ongoing fight between the other men was a single course of conduct to which Sullivan joined, but she was the first aggressor against the men. Id. The Court of Appeals in Mr. Grott's case did not "overlook" this inapplicable language, it simple is irrelevant in Mr. Grott's case. *Hughes*, 106 Wn.2d at 192.

The state also cites to *Hughes*, 106 Wn.2d 176, to assert the decision in Mr. Grott's case conflicts with *Hughes*, because the Court in Grott affirmed well-settled precedent that "the provoking act cannot be part of the charged assault". Petition at page 18. *Hughes* does not support the state's claim.

In *Hughes,* the police in the course of investigating Hughes for a murder legitimately had their guns drawn, but Hughes fired the first shot after the police identified themselves as police but before the police fired. *Hughes*, 106 Wn.2d at 192. The Court determined

there was credible evidence in the record to support the first aggressor instruction based on Hughes' firing the first shot which ignited the gun battle. Id.

The state in its petition omitted critical facts when citing to *Hughes,* to argue the Court of Appeals decision conflicts with *Hughes*, when in fact the legal holding in *Hughes* supports Mr. Grott. Contrary to the state's assertion, the Court in *Hughes*, did not decide that the person who fires the first shot is the first aggressor. *Hughes*, 106 Wn.2d at 192. Rather Hughes determined the question was whether the first shot was justified. that was based on just who fired the first shot, but based on whether that shot was justified. Id. In *Hughes*, the defendant was not justified in firing at the police after they identified themselves with guns drawn. Id.

Here, by contrast, the Court of Appeals correctly held that Grott reasonably feared Mr. Thomas was reaching for a gun when he responded in self-defense. Because the state's claims in its petition are meritless, this Court should deny review.

b. ROBERT GROTT WAS PREJUDICED BY COUNSEL'S CONSTITUTIONALLY DEFICIENT PERFORMANCE

Mr. Grott raised the issue of ineffective assistance of counsel for failing to object to the first aggressor instruction issue in his opening appellate brief, but the court to appeals did not address this issue. Pursuant to RAP 13.4(d1), Mr. Grott raises this issue in this Answer.

A claim of ineffective assistance of counsel based on jury instructions that relieve the state of its burden to disprove self-defense is an issue of constitutional magnitude that may be considered for the first time on appeal. *Kyll*o, 166 Wn.2d at 862-63; *State v. Nichols,* 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross,* 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied,* 549 U.S.

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1 "If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer."

1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington,* 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. Amend. VI; Wash. Const. art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that: (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins,* 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied,* 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33 (citing *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004);

State v. Aho, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *Nichols,* 161 Wn.2d at 8. “The remedy for lawyer's ineffective assistance is to put defendant in position in which he would have been had counsel been effective.” *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). In this case, counsel’s conduct constituted ineffective assistance of counsel.

“Jury instructions on self-defense must more than adequately convey the law.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Jury instructions, read as a whole, “must make the relevant legal standard manifestly apparent to the

average juror." Id; *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). In *Walden,* the jury was properly instructed in part, but in addition, the jury was given an incorrect "act on appearances" instruction defining the kind of injury that must be apprehended. *Walden*, 131 Wn.2d at 475. *Id.* The Court held that reversal was required.

In *Kyllo*, counsel provided the correct law on self-defense but relied on the wrong definitions of the degree of injury required to act on self-defense, requiring "substantial bodily harm", an apprehension of greater harm than was required before Kyllo could act on a mistaken belief he was about to be injured. *Kyllo*, 166 Wn.2d at 863-69.

The Court held offering the wrong instruction could not have been tactical and ultimately reversible error because counsel should have known the proffered instructions were incorrect and the result of using the wrong instructions denied Kyllo the right to use self-defense –the basis of his entire case. *Kyllo*, 166 Wn.2d at 870.

Here, in Mr. Grott's case, counsel did not offer the wrong instructions, but similar to Kyllo did not object to the erroneous

instruction which deprived Mr. Grott of his right to self-defense because it permitted consideration of the first aggressor instruction that was not warranted because there was no evidence to support the instruction.

In Mr. Grott's case, the Court of Appeals correctly determined it was reversible error to provide the first aggressor instruction because it relieved the state of its burden to disprove self-defense. Under this opinion, as well as *Kyllo, Walden*, and *LeFaber,* counsel's performance was deficient and prejudicial. This Court can uphold the Court of Appeals on the impropriety of offering the first aggressor instruction and also hold that reversal was required due to prejudicial ineffective assistance of counsel.

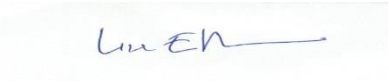
F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should deny review because the state fails to raise any issue of merit and none of the claimed issues meets the criteria for review under RAP 13.4(b). Moreover, Mr. Grott was prejudiced by counsel's failure to object to the first aggressor instruction, that amounted to prejudicial ineffective assistance of counsel.

DATED THIS 22nd day of May 2019.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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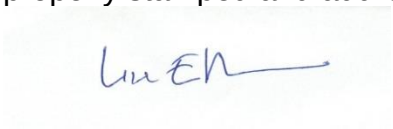

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