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SUPREME COURT  
STATE OF WASHINGTON  
9/2/2020 4:05 PM  
BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 98923-1  
(Court of Appeals No. 79586-4-I)

THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

FAWN LITTLE-SKY, Appellant.

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CONTINGENT CROSS-PETITION FOR REVIEW

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**A. IDENTITY OF CROSS-PETITIONER**

Cross-Petitioner, State of Washington, by Kimberly Thulin, appellate deputy prosecutor for Whatcom County, seeks the relief designated in Part B.

**B. COURT OF APPEALS DECISION**

Petitioner Little-Sky has asked this Court to review a number of issues decided by the Court of Appeals, Division I, in State v. Little-Sky, Slip Opinion, No. 79586-4-I (July 20, 2020). The Court of Appeals decision is attached to Little-Sky's petition. As Contingent Cross-Petitioner, the State requests that, if this Court accepts review of the issue of whether the Court of Appeals erred concluding RAP 2.5(a)(3) precludes review of a first aggressor jury instruction pursuant to State v. Grott, 195 Wn.2d 256, 458 P.3d 750 (2020), where giving the instruction did not result in a manifest error affecting a constitutional right, or accepts review of whether the Court of Appeals erred in concluding Little Sky was not prejudiced by her attorney's decision to agree to a first aggressor instruction pursuant to an ineffective assistance of counsel claim, this Court should also accept review of the underlying issue of whether the Court of Appeals erred in holding for the first time on appeal, that the trial court erred giving the first aggressor instruction notwithstanding that the

parties agreed it was appropriate to give<sup>1</sup>. The Court of Appeals decision addresses this issue at pages 6-7 of its Opinion.

**C. ISSUES PRESENTED FOR REVIEW**

1. Whether this Court should review the Court of Appeals decision regarding whether there was a sufficient basis to give a first aggressor instruction if this Court grants review of Petitioner's issue that the Court of Appeals erred concluding any error in giving the first aggressor instruction was not a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3) and State v. Grott, 195 Wn.2d 256, 458 P.3d 750 (2020) or, grants review of Little Sky's assertion that her trial attorney was constitutionally ineffective because he agreed in the trial court that there was a sufficient basis to give a first aggressor instruction.

**D. STATEMENT OF FACTS RELEVANT TO CROSS-PETITION**

*Substantive Facts*

On November 6<sup>th</sup> 2018, Fawn Little Sky assaulted her cousin Jerry Clown at her mother, Carol Rave's, home in Whatcom County. Jerry lived at his Aunt Carol's home along with Carol's son, Luta and her grandson Little Sky's son, Elijah. RP 215, 334-35. Little Sky also lived at her mother's home, even though both she and her mom were aware she was legally prohibited by a valid no contact order from staying at Carol's home. RP 394.

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<sup>1</sup> The State is not filing an answer to Little Sky's petition for review unless this Court otherwise indicates it desires one.

On the morning of November 6<sup>th</sup> 2018 Carol Rave was out of town on a business trip. RP 369. Jerry woke early and went into Bellingham for a 6 a.m. kidney dialysis appointment. RP 216. Jerry suffered from multiple medical issues, including kidney failure and had a permanent shunt in one of his forearms that was used for his bi-weekly kidney dialysis appointments. RP 380. When Jerry came home from his dialysis appointment on November 6th, he was feeling tired and weak, so he got some coffee and settled into a recliner chair in the living room that faced a television. RP 218. A man he did not know subsequently came down the stairs, located behind Jerry from the upstairs bedroom area. Jerry figured the man was probably a friend of Little Sky's, was mad that this guy had stayed in his Aunt Carol's room, so he told him he should stay out. RP 219. The man put on shoes and left. Id. Little Sky subsequently came downstairs and asked Jerry 'where did he go?' RP 220. She also asked Jerry where the car keys were. Jerry did not respond to either question. Id.

Little Sky went back upstairs and asked Luta where the car keys were. RP 221. Little Sky then came back down and asked Jerry 'where are those f 'in car keys. I know one of you has them.' RP 221. Jerry eventually told Little Sky he had the keys but that she could not have them or drive the car. RP 222. Jerry was concerned that Little Sky was under the

influence of methamphetamines as reflected by her angry and short tempered demeanor at that time. He did not want her driving. RP 222-23.

After Jerry responded to Little Sky, he resumed watching television and ignored her. RP 218, 223. Jerry recalled suddenly being hit on the back of his head. RP 225, 238, 248. When he turned to his left to see what was happening, he saw Little Sky had hit him with his walking cane. Little Sky then began repeatedly, wildly, swinging the cane at him. RP 224-5. Jerry reacted by turning toward Little Sky in a manner to defend and shield himself from Little Sky. RP 223, 249. When Jerry turned to defend himself, the cane Little Sky was trying to hit him with broke into pieces. RP 226. RP 249. Jerry testified he yelled knock it off to Little Sky and began screaming for Luta to come help him. RP 225-6. After the cane broke, Little Sky took the broken piece of cane still in her hand and began trying to repeatedly stab Jerry with it, yelling “die mother fucker, handicapped, fucking die. I hate you. I hate you.” RP 227. Little Sky threw the broken piece of walking cane at Jerry as Luta came running down the stairs towards them. RP 228.

Little Sky denied striking Jerry in the back of the head. She claimed that when she came downstairs Jerry jumped up fast from his chair and lunged at her, “started blowing up,” struck her in the side of the

arm which led to her grabbing and swinging Jerry's cane wildly at him in self-defense. RP 411-412. She testified she continued hitting Jerry until she heard the cane break loudly over him and heard footsteps coming down the stairs towards her. RP 411-2, 413, 431. Little Sky also claimed she stayed calm and steady during assault but that it was Jerry who got heated. RP 443. Little Sky left before Luta came downstairs and did not call the police. RP 459.

By the time Luta was downstairs, Jerry was crying in pain and a forearm bone was visibly sticking out from his arm. RP 228. Jerry denied that he got out of his chair, instead claiming he tried to defend himself while he remained seated. RP 249-50.

Little Sky's son, Elijah, and Luta testified Little Sky was upset, cussing and screaming because she wanted the keys to the family car. RP 296-7, 265. Little Sky corroborated Jerry's testimony that Little Sky was acting impatient, aggressive and seemed to be under the influence of something when she assaulted Jerry. RP 268, 294.

Little Sky denied at trial that she was under the influence of anything on November 6<sup>th</sup> 2019. RP 400. She also asserted that Jerry attacked her and that she acted lawfully in self-defense. Specifically, she claimed Jerry was mad and acting irritated with her. RP 405. She noted

that Jerry was often irritable after he got dialysis. RP 406. She explained she wanted the family car keys so she could take her friend back to town. Initially, according to her, Jerry denied or did not respond to her request for the keys. Eventually, Jerry told her he had the car keys but that she wasn't getting them. RP 408-410. Little Sky explained at trial that she often felt bullied in the house by Jerry and her brother Luta.

Immediately after the assault, Luta observed that Jerry was visibly upset and could see Jerry's forearm and wrist appeared to be broken. RP 384, 388. Luta told Little Sky to leave, pushed her out of the house whilst telling her the cops were coming. RP 229, 304. After Jerry called 911, Luta drove Jerry to the emergency room for evaluation. RP 240. At the hospital, Jerry appeared to be visibly upset and in pain; he asserted he had been struck in the head, arms and hands. RP 341, 381. Jerry explained he suffered injuries to both his hands because he tried to use them to protect his head and shield himself from Little Sky's blows and later attempts to stab him. RP 342-3. The attending ER physician noted Jerry had visible obvious injuries to both forearms; photos depicted bruising and bone protrusion of the wrist. RP 344, 382. X-rays revealed fractures to his left forearm and at the base of his thumb. Id. No visible injuries to the back of Jerry's head were observed. RP 365.



*Procedural Facts*

At trial, Little Sky claimed she acted in self-defense when Jerry leapt up from his chair to confront her when she came downstairs. She claimed Jerry previously bullied her so she simply reacted physically in self-defense. Jerry in turn, testified Little Sky hit him in the back of the head and he turned and reached out defensively with his arms when Little Sky then began to repeatedly assault him with his cane. Little Sky denied hitting Jerry in the back of the head. Little Sky agreed under these facts, a first aggressor instruction was appropriate to give; she argued at trial notwithstanding the instruction, that there was no physical evidence to corroborate Jerry's claim that she hit him first and provoked the need to act in self-defense and therefore the State could not prove beyond a reasonable doubt Little Sky was the aggressor. RP 540, 542, 544, 547. In that context, Little Sky argued that yes, she assaulted Jerry but in self-defense and that her believable, credible account of using lawful force when Jerry jumped up at her has not "been disproven beyond a reasonable doubt by the State." RP 543.

A jury convicted Little Sky of violating the no contact order, assault in the second degree and acquitted her of a burglary in the first degree charge. CP 44, 45. Little Sky asserted for the first time on appeal,

that the trial court erred giving the first aggressor instruction, the same jury instruction she agreed below was appropriate to give. Little Sky also asserted in part, her trial counsel was constitutionally ineffective for failing to object to this jury instruction. CP 52, 65-66. The Court of Appeals affirmed Little Sky's conviction notwithstanding that it concluded the evidence did not sufficiently warrant a first aggressor instruction. COA Slip. Op. at 6-7. Pursuant to RAP 2.5(a)(3) and State v. Grott, 195 Wn.2d 256, the Court of Appeals held giving the aggressor instruction in this case did not relieve the State of its burden of proof and therefore the error was not a manifest error affecting a constitutional right warranting further review.

Little Sky now seeks review of this Court of Appeals decision, arguing this Court should clarify that Grott does not preclude review under RAP 2.5(a) (3), where there is insufficient evidence to support giving a first aggressor instruction or alternatively, that where there is no factual basis to support a first aggressor instruction, it is ineffective assistance of counsel for a trial attorney to fail to object to giving this the instruction. Pet. for Rev. at 9. The State respectfully asks that if either of these issues are accepted for review, this Court also accept review of the Court of Appeals decision that Petitioner's issues are predicated on: whether the

evidence in this case, when taken in the light most favorable to the State, sufficiently supports giving a first aggressor jury instruction.

**E. REASONS WHY CONTINGENT REVIEW SHOULD BE ACCEPTED**

The State is contingently cross-petitioning for review of the Court of Appeals decision pursuant to RAP 13.4(d), regarding the sufficiency of the evidence supporting the first aggressor instruction if, and only if, this Court accepts review of Little Sky's Petition challenging whether the Court of Appeals should have found the first aggressor instruction given constituted a manifest constitutional error pursuant to RAP 2.5(a)(3) and/or, that the Court of Appeals erred concluding Little Sky was not prejudiced by her attorney's agreement to give the first aggressor instruction pursuant to an ineffective assistance of counsel claim. Two of three of the issues Little Sky seeks further review on are predicated on the Court of Appeals erroneous decision that summarily concludes the evidence below did not support a first aggressor instruction, notwithstanding Little Sky's determination at trial that giving this instruction was appropriate. See, Slip. Op. at 6-7. Therefore, if Little Sky's Petition is granted, the State requests this Court also review the sufficiency of the evidence supporting the instruction at issue in this case.

In State v. Grott, 195 Wn.2d 256, this Court held reviewing courts must evaluate unpreserved objections to first aggressor instructions “on a case by case basis” to determine whether they may be raised for the first time on appeal. Grott, 195 Wn.2d at 267. Where the issue is whether the evidence is sufficient to warrant giving an instruction, “appellate courts must carefully consider the specific evidence presented below in the light most favorable to the requesting party.” *Id.* Review of the sufficiency of the evidence on appeal is highly deferential to the trier of fact’s decision. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). Moreover, an aggressor instruction is appropriate even where there is conflicting evidence as to whether the defendant’s conduct precipitated the assault. State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992).

When all of the evidence is viewed in the light most favorable to the State, sufficient evidence supports giving the first aggressor instruction in this case. The State theorized it was Little Sky’s *conduct* that initiated the assault and Little Sky’s apparent need subsequently, after she initially struck Jerry on the back of the head, to act in self –defense when Jerry turned to defend himself. Little Sky was upset, yelling and reactionary when Jerry refused to respond to her or give her the car keys she wanted. Consequently, the State asserted Little Sky came back down the stairs behind Jerry and smacked him in the back of the head. Jerry reacted.

Depending on who and what the jury found credible, the jury could have concluded based on this evidence that Jerry turned and tried to defend himself from his chair as he testified to or, they could have believed that Little Sky hit Jerry and that Jerry then leapt out of his chair and lunged at Little Sky; and that either way, Jerry's reaction provoked Little Sky's need to react in self-defense. Finally, the jury could have rejected Jerry's claim that Little Sky hit him at all; in which case the jury would not have found Little Sky was the aggressor beyond a reasonable doubt. Under these circumstances this first aggressor instruction would not relieve the State of its burden of disproving Little Sky assaulted Jerry in self-defense beyond a reasonable doubt. All of the evidence in the record inclusive of the conflicting evidence, when viewed in the light most favorable to the State, supports the first aggressor instruction given in this case.

The Court of Appeals erred by failing to examine the conflicting evidence below in the light most favorable to the State to determine whether sufficient evidence supported giving a first aggressor instruction in this case. This erroneous decision provided the basis for Little Sky's current Petition claiming that the erroneously given first aggressor instruction resulted in 'practical and identifiable' constitutional prejudice that warrants further review pursuant to RAP 2.5(a)(3) and pursuant to an ineffective assistance of counsel claim. If this Court considers granting

Little Sky's Petition, review should also be granted on whether or not there was sufficient evidence to support sustaining the first aggressor instruction.

**F. CONCLUSION**

For the reasons set forth above, Contingent Cross-Petitioner, State of Washington, respectfully requests that, should this Court grant review of Little Sky's RAP 2.5(a)(3) manifest constitutional error or ineffective assistance of counsel claim, this Court also grant review of the Court of Appeals determination regarding the sufficiency of the evidence supporting the first aggressor jury instruction.

Respectfully submitted this 2 day of September, 2020.

*Kimberly Thulin*

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**September 02, 2020 - 4:05 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 98923-1  
**Appellate Court Case Title:** State of Washington v. Fawn Lefay Little Sky  
**Superior Court Case Number:** 18-1-01549-1

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