

66331-3

66331-3

NO. 66331-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDWARD COBB,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES

1. Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.

Appellant sought out an armed confrontation with a rival gang member, then claimed he shot the victim in self defense. Did the trial court properly give a first aggressor instruction?

2. Where the trial court properly gave a first aggressor instruction, was Appellant's counsel ineffective by failing to object to a properly given jury instruction?

3. Does delayed entry of Findings of Fact and Conclusions of Law require reversal or remand when there has been no prejudice to the Appellant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The Appellant, Edward Cobb, was charged with murder in the first degree with a firearm enhancement. CP 1. The State alleged that Cobb shot and killed Chezaray Bacchus at an Arby's restaurant during the Kent Cornucopia Festival on July 12, 2008. CP 2-4. The Information was amended to add one count of

unlawful possession of a firearm in the first degree. CP 9-10. Cobb pleaded guilty to the unlawful possession of a firearm charge and proceeded to trial on the murder charge. CP 74-86. The jury found Cobb guilty of premeditated murder with the firearm enhancement. CP 72-73. The court imposed a standard range sentence of 416 months confinement for murder in the first degree, and 48 months for unlawful possession of a firearm. CP 105. The court sentenced Cobb on November 30, 2010. CP 6.

Prior to trial the court held a CrR 3.5 hearing to determine the admissibility of Cobb's statements to the police. The defense offered no argument to suppress Cobb's statements and merely deferred to the court. 3 RP 43¹. The trial court found the statements were admissible; however, the court did not enter findings of fact and conclusions of law until June 21, 2011. CP 114.

¹ The verbatim report of proceedings consists of fifteen volumes, which will be referred to in this brief as follows: 1 RP (10/11/10), 2 RP (12/12/10), 3 RP (12/13/10), 4 RP (12/18/10), 5 RP (12/19/10), 6 RP (12/20/10), 7 RP (12/21/10), 8 RP (12/25/10), 9 RP (12/26/10), 10 RP (12/27/10), 11 RP (11/1/10), 12 RP (11/2/10), 13 RP (11/3/10), 14 RP (1/4/10), 15 RP (11/30/10).

2. SUBSTANTIVE FACTS

Chezaray Bacchus was seventeen years old when Edward Cobb shot and killed him on July 12, 2008. 4 RP 104; 12 RP 36. Bacchus was part of a gang known as the "Little Thuggin Savages" (also known as "LTS"). 5 RP 7. Bacchus and several LTS members planned to go to a festival in Kent called the Kent Cornucopia Days.² 5 RP 11. They arrived by bus at the Kent Station. 5 RP 13.

Edward Cobb was eighteen years old and a member of the "Low Profiles" gang (also known as "LP"). 10 RP 4; 12 RP 4. Cobb and his friends also planned to go to the Kent Cornucopia Festival.³ 10 RP 7-8. Cobb also took the bus to the Kent Station. 12 RP 10.

a. The Confrontation At The Kent Station

When Bacchus and his friends were at the bus station they encountered Edward Cobb and his friends. There was a

² Several of Bacchus' friends who went to Kent with him testified at trial including Patrice Brown (4 RP 107), Mahogany Lee (5 RP 3), Champayne Hendricks (7 RP 21), and Dijon Patterson (6 RP 7).

³ Several Of Cobb's friends who went to Kent with Cobb testified at the trial including Lugene Slade (10 RP 3), Satori Butler (10 RP 26), Tiffany Anderson (10 RP 50), Leonard Warran (10 RP 71), Deshea Lee (10 RP 116), and Martin Harris (11 RP 8).

confrontation between the LP and LTS groups. 4 RP 113; 7 RP 38. Members of the LP group taunted members of the LTS. 5 RP 13-15. A circle formed around some of the LP members and LTS members including Bacchus. 4 RP 114. Bacchus argued with Leonard Warran, a close friend of Cobb's. 10 RP 71. There was no physical fight at the Kent Station.

There were conflicting accounts of the end of the confrontation at Kent Station. Witnesses associated with Cobb testified that Bacchus flashed a gun or lifted his shirt as though flashing a gun at Warran. 10 RP 11, 31, 56, 80, 124; 11 RP 13. Witnesses associated with Bacchus testified there was a verbal argument only and they did not see Bacchus with a gun at any time on July 12, 2008. 4 RP 120; 5 RP 17, 26; 6 RP 17; 7 RP 39. Bacchus was pulled away from the argument by his friend "Salt" and they all left the Kent Station. 4 RP 115, 128; 12 RP 16. Cobb pulled Warran away from the confrontation. 12 RP 16.

Police were at the Kent Station and noticed there were rival gang members loitering and tensions were rising. 5 RP 64-65. Officer Mike O'Reilly saw young people in gang colors and flashing gang signs in the crowd. 5 RP 77, 84-85. Police were concerned a fight might break out and cleared the Kent Station. 5 RP 79.

b. The Murder At Arby's Restaurant

Bacchus and his friends went to the Arby's a few blocks away. 4 RP 115; 5 RP 18. As they walked to the restaurant Mahogany Lee saw Cobb and Devonte "Dirty D" Rosemon behind them. 5 RP 19. Bacchus and his friends stood outside the Arby's talking. 5 RP 20. Bacchus was talking on a cell phone. 4 RP 118. Cobb appeared and fired a gun at Bacchus. 5 RP 21. Bacchus stumbled inside the Arby's and Cobb pursued and fired a second shot. 5 RP 23. Mahogany Lee heard Cobb yell "LP" as he fired the second shot. 5 RP 26.

Molly Mather was working at the Kent Cornucopia Festival and was going to the Arby's. 4 RP 61. She noticed a conspicuous teenager dressed in a red tank top⁴ walking to the Arby's with a large group of teens. 4 RP 63. Cobb stood out because all the teens were having fun and talking except Cobb. 4 RP 64-66. While Mather ordered her food inside the restaurant she heard the first gunshot. 4 RP 67. She saw the man in red come into the Arby's with a gun in his hand and she fled. 4 RP 68-69.

⁴ Cobb later admitted that he was the man in red, and that he was the shooter. 12 RP 64.

Patrons at the Arby's heard the initial gunshot outside and mistook it for a firecracker or car backfiring. See testimony of Chelsea Embry (4 RP 81), Kristen Brady (4 RP 94), Dana Bahe (5 RP 98), Dawn Chatfield (5 RP 114), and Joel Koalonji (6 RP 171). The shooter in red entered the restaurant with a gun. 4 RP 82, 84-85, 94; 5 RP 98-99. The patrons heard a second shot inside the Arby's. 4 RP 86, 95; 5 RP 102, 116; 6 RP 173. None of the patrons reported seeing another armed person other than the shooter wearing red. 4 RP 88-89, 99; 5 RP 108.

The cashier at Arby's, Juan Gudino-Ibarra, heard the first shot outside and thought it was a firecracker. 4 RP 42-43. Gudino-Ibarra saw a young man come into the restaurant and fall on the ground. 4 RP 42-43. He then saw the shooter enter with a gun. 4 RP 46. Gudino-Ibarra described the shooter's actions: "He comes in not caring, not looking around, just focused on one goal . . . the person on the ground." 4 RP 46. Gudino-Ibarra never saw a gun in the victim's possession. 4 RP 53. The only weapon he saw was the gun the shooter fired. 4 RP 53.

Dana Bahe tried to provide aid to Bacchus after the shooting. 5 RP 105. Bahe attempted to apply pressure to the wound to Bacchus' head and noted that initially Bacchus had a

weak pulse. 5 RP 106-07. While trying to save Bacchus in the moments after the shooting he did not see any firearm in his possession or in the vicinity. 5 RP 108.

Officer Ian Warmington was the first on the scene. He found Bacchus lying on the floor of the Arby's bleeding from the head. 4 RP 24. He attempted CPR but could not revive Bacchus. He did not see any gun in Bacchus' possession or on anyone else at the Arby's. 4 RP 26-27.

Bacchus died from two gunshot wounds. The first wound entered his right shoulder and crossed his chest, severing an artery. 9 RP 63, 76. The second wound entered the right side of the face. 9 RP 63. There was stippling around the wound to the face indicating the shot was fired at close range. 9 RP 72. Both shots contributed to the death of Bacchus. 9 RP 77.

There was no evidence of any other firearm at the scene other than the gun Cobb used to kill Bacchus. Shelly Warran from the Kent Police department processed the scene looking for evidence. 6 RP 74. She specifically looked for evidence of another firearm such as shell casings, bullets, or bullet strikes. 6 RP 74. Warran did not find any bullets, casings, strikes or firearms at the scene. 6 RP 78-81.

Cobb was later identified by three witnesses in photo montages shown to Mahogany Lee, Hendricks, and Patterson. All three identified Cobb from the montages. 5 RP 33; 6 RP 22; 9 RP 153-54.

c. Cobb's Initial Flight From The Scene

Cobb fled with Rosemon north to Jason Street in Kent. The street ended into an overgrown field. 6 RP 109-11. Residents Anna and Ed Maughan saw Cobb and Rosemon acting suspiciously and called the police. 6 RP 11-113, 140. Police arrived and ordered Cobb and Rosemon out of the field. 6 RP 118. Rosemon complied but Cobb hesitated and appeared to remove his denim shorts leaving only basketball shorts underneath. 6 RP 119-20, 131-33, 140-42. Cobb's denim shorts were later recovered from the field.⁵ 7 RP 13-14. Cobb later admitted that he had attempted to change his appearance to avoid being arrested. 12 RP 44-46.

⁵ Neither Cobb nor Rosemon had a gun when they were detained. King County search and rescue searched the field looking for the murder weapon without success. 7 RP 86. Approximately one year later, a rusted .38 revolver was found by the owner of the property and turned it over to police. 7 RP 74-75. Cobb acknowledged at trial that the rusted gun was the gun he used to shoot Bacchus. 12 RP 20.

Officer Tami Honda detained Cobb and advised him of his constitutional rights. 6 RP 182. Cobb indicated that he understood his rights and agreed to speak to the officer. Cobb acknowledged that he was at the Arby's and heard the gunshots. 6 RP 184. Cobb said he ran because he believed someone was after him. 8 RP 181. Cobb denied any involvement in the shooting.

Cobb was transported back to the Arby's but as no witnesses had identified the shooter yet, he and Rosemon were released.

d. The Shooting Of Cobb In Renton

After Cobb was released by Officer Honda at the scene he and his friends took a bus from the Kent Station to Renton. When Cobb arrived in Renton he was shot in the back of the head. 12 RP 51. Renton police responded and investigated. 8 RP 5. Cobb claimed that he did not know who shot him. 9 RP 27. Cobb was taken to Harborview Medical Center for treatment. He was released from the hospital on July 18, 2008. 9 RP 28.

e. Cobb's Statements

i. Cobb's statements to Detective Kelly

Detective Steve Kelly was assigned to investigate the murder of Bacchus. 8 RP 136. Kelly went to the hospital and interviewed Cobb on July 16, 2008. 9 RP 19. Kelly did not arrest or detain Cobb. 9 RP 21. Cobb again acknowledged that he was at the Arby's but denied any involvement in the shooting. 9 RP 23-24.

On July 18, 2008, Cobb was charged with the murder of Bacchus and a warrant for his arrest was issued. 9 RP 29. Detective Kelly attempted to locate Cobb without success. Detective Kelly contacted Cobb's mother Yvonne Smith in order to locate Cobb. Smith arranged a three-way phone call between Kelly, Cobb and herself. 7 RP 24. Cobb acknowledged that he shot Bacchus, but claimed he acted in self-defense. 9 RP 29-32. Cobb claimed that Bacchus was "reaching" for a gun so he shot Bacchus first. 9 RP 31.

Cobb was not arrested until October 25, 2008. 8 RP 27. When police attempted to search the home for Cobb he was caught fleeing out of a window and arrested. 8 RP 38.

ii. Cobb's letters

While Cobb was in the King County jail he began to correspond with a teenage girl at the Washington Youth Academy. The Academy is a school for troubled kids. It prohibits writing to inmates in jail unless they are a family member. 9 RP 13. Staff at the Youth Academy found letters from Cobb to a student at the Academy and turned the letters over to Detective Kelly. 9 RP 16-18.

In one of Cobb's letters he described the shooting of Bacchus:

My brother Leonard and Chez were beefing. Chez flashed the burner [gun]. We were all supposed to fight the police broke us up. Like half an hour later my brother Leonard said Chez had to get it.⁶] And since I was the oldest and I was hella drunk me and Dirty D went looking for Salt and Chez. When we got to Arby's Chez looked at me and Dirty. Me and Dirty saw him reaching for something. It could have been a cell phone but I wasn't going to take that chance. It was a serious mistake but he would have tried to kill my cousin if he would of got the chance to.

9 RP 47-48.

⁶ Hendricks rode the same bus as Cobb and his friends to Kent. 7 RP 23-24. She overheard a conversation about a gun, and someone said that "Be-Fresh" was going to "get it." 7 RP 25-26. Bacchus was also known as Be-Fresh. 7 RP 26. While Hendricks was not clear who made the remark, Cobb's letter clearly established that he talked to Warran at some point about the fact that Bacchus had to "get it."

Cobb's mother, Smith, identified the handwriting on the letters as belonging to Cobb. 7 RP 19-20. Cobb later testified and acknowledged writing the letters. 12 RP 4, 59, 67.

iii. Cobb's testimony

Cobb testified at the trial and again acknowledged that he shot Bacchus but claimed he acted in self defense. Cobb testified that he had taken a bus to Kent with his friends. 12 RP 12. The group was drinking but none of them were drunk. 12 RP 14. When they got to the Kent Station there was a confrontation between his group and Bacchus'. 12 RP 15. Warran and Bacchus were arguing and Warran pushed Bacchus. 12 RP 15-16. Cobb claimed Bacchus flashed a gun. Cobb said he stepped in to grab Warran, and Bacchus' friend "Salt" pulled Bacchus away. 12 RP 15-16. Cobb said that Warran then flashed his gun. 12 RP 16. According to Cobb, Bacchus said that the LP's were "gonna get it," and Warran responded by saying "I got mine." 12 RP 18. Cobb claimed that Warran wanted to fight Bacchus but the police separated everyone. 12 RP 16. Cobb acknowledged that he too was armed with a .38 caliber handgun. 12 RP 20.

Cobb claimed that he went with Rosemon to set up a fight between Warran and Cobb. 12 RP 30. They went to Arby's and Cobb saw Bacchus. 12 RP 35-36. Cobb testified "I seen him make a move, and not necessarily he didn't pull the gun, but I seen him make a move toward what I thought was the gun he had." 12 RP 36. Cobb drew his gun and shot Bacchus even though he never actually saw a gun drawn by Bacchus. 12 RP 36-37. Bacchus stumbled through the door of the Arby's. 12 RP 37. Cobb went into the restaurant and saw Bacchus lying on the ground. 12 RP 41. Cobb's own lawyer questioned why Cobb shot Bacchus a second time while he was down and Cobb testified "Like I said, in my mind I was still thinking that he could still shoot me. He could still reach for a gun." 12 RP 43. Cobb admitted the second shot was to Bacchus' head. 12 RP 69. Cobb fled with Rosemon and changed his clothes because he did not want to get caught. 12 RP 44-46.

After Cobb testified, the State requested the court give the aggressor instruction in WPIC 16.04. Cobb did not object to the instruction. 12 RP 84-85. The trial Court gave the following instruction to the jury:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill 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.

CP 65.

The jury convicted Cobb of premeditated murder with the firearm enhancement.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY GAVE THE WPIC 16.04 AGGRESSOR INSTRUCTION.

Cobb asserts that the trial court erred by giving an "aggressor" instruction to the jury. WPIC 16.04. Cobb is incorrect. Even assuming the truth of Cobb's testimony, he sought out an armed conflict with a rival gang member, thus precipitating any claimed need to shoot in "self defense." The trial court properly instructed the jury⁷.

⁷ Cobb did not object to giving the aggressor instruction. 12 RP 84-85. A failure to object to a trial court error generally waives that party's right to raise the challenge on appeal unless a "manifest error affecting a constitutional right" occurred. RAP 2.5(a)(3). However, erroneously giving an aggressor instruction has been found to be constitutional error. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998); State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433, 437 (2010).

a. The Trial Court Properly Instructed The Jury

To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that he acted in self-defense. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). A defendant must show a reasonable apprehension of great bodily harm and imminent danger. In order to establish self-defense, a finding of actual danger is not necessary. The jury must find only that the defendant reasonably believed that he or she was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. Janes, 121 Wn.2d at 238.

However, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973); State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). "A court

properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon.”

State v. Anderson, 144 Wn. App. 84, 89, 180 P.2d 885 (2008) (citing Riley, 137 Wn.2d at 909-10, 976 P.2d 624). Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. State v. Hughes, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1991). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584 (1987). An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992). The State needs to produce some evidence showing a defendant was the aggressor to meet its burden of production. Riley, 137 Wn.2d at 909-10. This Court reviews de novo whether sufficient evidence justifies an aggressor

instruction. Anderson, 144 Wn. App. at 89. It is not error to give this instruction when there was credible evidence from which the jury could reasonably have concluded that it was the defendant who provoked the need to act in self-defense. Hughes, 106 Wn.2d at 192; State v. Heath, 35 Wn. App. 269, 271-72, 666 P.2d 922 (1983).

Ample evidence supported the instruction in this case. It was the State's theory that Cobb sought out Bacchus because in his own words, "Chez had to get it." 9 RP 47-48. Cobb followed Bacchus to the Arby's. 5 RP 19. Cobb was armed with a .38 revolver and sought out a rival gang member who he believed was also armed with a gun. 12 RP 20, 72. When he found Cobb at the Arby's he drew his weapon and opened fire. There was no credible evidence that Bacchus actually reached for a weapon.⁸ The evidence at trial established that Cobb sought Bacchus and Cobb drew his weapon and fired first. 4 RP 118-19; 5 RP 21-23; 12 RP 36-37. The jury could infer from the evidence that Cobb was acting with premeditated intent to kill. Even if Bacchus saw Cobb coming

⁸ Cobb claimed that Bacchus was reaching for something which he conceded may have been merely a cell phone. 9 RP 36-37, 47-48. Only Deshea Lee claimed to have seen Bacchus draw a gun, but even Cobb disavowed Lee's version of events. 12 RP 23. No gun was ever found around Bacchus.

and attempted to defend himself by reaching for a gun, Cobb precipitated any "need" to shoot. There was credible evidence from which the jury could reasonably have concluded that it was the defendant who provoked the need to shoot and thus the evidence supported the trial court's instruction. Hughes, 106 Wn.2d at 192.

Cobb maintained that he was still acting in self defense when he pursued Bacchus into the restaurant and fired a second shot into Bacchus' head at close range while he lay on the floor. 12 RP 41-43. Cobb claimed he fired the second shot because Bacchus continued to pose a threat to him. Cobb claimed Bacchus was still moving and might have been reaching for a weapon. 12 RP 41-43. Clearly, at this point the first aggressor instruction was warranted. Cobb was the first to draw a gun and fire and Bacchus fled, he did not return fire. It was Cobb who provoked any further need to "defend" himself by pursuing Bacchus into the restaurant. Cobb fired two shots, and for each shot the first aggressor instruction was appropriate for each shot.

Cobb argues that the evidence showed only that he happened upon Bacchus and opened fire; hence, the first aggressor instruction was not warranted. Brief of Appellant at 12. Cobb relies upon State v. Wasson, 54 Wn. App. 156, 772 P.2d

1039 (1989) to argue that the provoking act cannot be the actual assault. Brief of Appellant at 12. Cobb is incorrect. Cobb's analysis fails because he ignores the confrontation at the Kent Station. Even after the Kent Station confrontation subsided, Cobb sought out his rival to continue the fight, all while armed with a handgun. In Cobb's own words, "Chez had to get it." At this point, Cobb became the first aggressor to the confrontation that ended with Bacchus' death at Arby's. Cobb relies on his own testimony that he merely intended to set up a fistfight between Warran and Bacchus. At most, this establishes conflicting evidence on the aggressor instruction issue. Conflicting evidence over who was the aggressor warrants an instruction. Cobb's own account he was setting up a fight between two armed teens that had just flashed guns at each other. Cobb's argument that this was not provocative conduct is without merit. Even assuming his story, he provoked any need to shoot Bacchus at the Arby's.

b. Any Error Was Harmless

Any error in giving the WPIC 16.04 aggressor instruction was harmless. Erroneous use of the aggressor instruction is reviewed under the constitutional harmless error standard. State v.

Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998); State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433, 437 (2010). The error cannot be deemed harmless unless it is harmless beyond a reasonable doubt. Id.

Cobb argues that any error from giving the first aggressor instruction cannot be harmless. Brief of Appellant at 15. Cobb even suggests the Supreme Court's decision in State v. Kidd, 57 Wn. App. 95, 101, 786 P.2d 847, 851 (1990) supports this contention despite the Supreme Court affirming the conviction because the error was harmless. Brief of Appellant at 18. The Supreme Court held:

The error was harmless, however, since we are persuaded beyond a reasonable doubt that no reasonable jury could have found that the bus shootings were acts of lawful self-defense. In such circumstances, error related to self-defense instructions is harmless.

Kidd, 57 Wn.2d at 101.

Similar to Kidd, no reasonable jury could have found the shooting of Bacchus was a lawful act of self defense. Cobb admitted that when he fired the first shot at Bacchus he may have been merely reaching for a cell phone. 12 RP 36-37. There was simply no evidence to support the argument that Cobb's pursuit of

Bacchus into the restaurant and shooting him in the head while he lay defenseless on the floor was self-defense. Even Cobb conceded "maybe the second shot was a little reckless, a little bit excessive force." 12 RP 60. Even Cobb seemed to recognize his claim of self defense was flawed. Under these circumstances WPIC 16.04, even if improper, was harmless.

2. DEFENSE COUNSEL WAS NOT INEFFECTIVE BY FAILING TO OBJECT TO A PROPERLY GIVEN AGGRESSOR INSTRUCTION.

Cobb argues that his attorney was ineffective for failing to object to the first aggressor instruction. This argument fails because, as argued above, the court properly instructed the jury. Furthermore, any error by the trial court was harmless beyond a reasonable doubt. Cobb cannot show deficient performance by his counsel for failing to object to a proper instruction, nor can he demonstrate prejudice.

To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both that defense counsel's representation was deficient and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222,

225-26, 743 P.2d 816 (1987). The test for deficient representation is whether counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. Thomas, 109 Wn.2d at 225. The prejudice prong of the test requires the defendant to show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Competency of counsel is determined based upon a review of the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To overcome this presumption, the defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336; State v. Summers, 107 Wn. App. 373, 382, 28 P.3d 780 (2001).

Counsel's performance did not fall below an objective standard of reasonableness. The aggressor instruction is appropriate where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. State v. Hughes, 106 Wn.2d 176, 191-92,

721 P.2d 902 (1986); Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1991). Cobb's counsel recognized there was ample evidence to support giving the instruction. There is simply no basis to conclude that the performance of Cobb's attorney was deficient by failing to object when the evidence supported giving the aggressor instruction.

Cobb has failed to establish any prejudice from the allegedly deficient performance of his attorney. Even if the trial court erred by giving the aggressor instruction, the jury found that Cobb acted with the premeditated intent to kill Bacchus. The jury clearly rejected Cobb's claim that he intended only to set up a fistfight rather than intending to kill Bacchus. Cobb's own words were that "Like half an hour later my brother Leonard said Chez had to get it. And since I was the oldest and I was hella drunk me and Dirty D went looking for Salt and Chez." 9 RP 47-48. Cobb followed Bacchus to the restaurant. He sought an armed confrontation with Bacchus. He shot Bacchus, conceding Bacchus may have merely been reaching for a cell phone. Cobb then pursued Bacchus into the Arby's and shot him in the head at close range as Bacchus lay on the floor. There was no evidence that Bacchus had a gun at the Arby's. There was no reasonable probability that the jury would

have concluded that Cobb acted in self defense, hence, Cobb cannot establish he was prejudiced by his attorney failing to object to the aggressor instruction.

Cobb's claim of ineffective assistance should be rejected. Cobb's counsel was not ineffective by failing to object to an instruction that was supported by the evidence, and Cobb cannot demonstrate any prejudice.

3. THE LATE ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW HAS NOT PREJUDICED THE APPELLANT, AND THUS REVERSAL OR DISMISSAL IS INAPPROPRIATE.

Cobb argues that his convictions should be remanded because findings of fact and conclusions of law were not timely filed. However, the findings have since been filed, and Cobb can show no prejudice from the delay. Reversal and remand is not required.

If the Court of Appeals does not receive written findings and conclusions from the State before hearing the merits of an appeal, then the failure to enter those findings may merit reversal of the conviction. State v. Smith, 68 Wn. App. 201, 842 P.2d 494 (1992). Where the State merely delays the entry of findings, but files them

before the appeal is considered, the court will not reverse the conviction absent a showing of prejudice. State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998).

The appellant must show prejudice for reversal of a case based upon tardy entry of findings of fact and conclusions of law. State v. Bennett, 62 Wn. App. 702, 710-11, 814 P.2d 1171 (1991). A conviction will normally not be reversed absent a showing of prejudice or some form of tailoring of the findings to address the issues raised in the appellant's brief. State v. Brown, 68 Wn. App. 480, 485-86, 843 P.2d 1098 (1993); State v. Litts, 64 Wn. App. 831, 836-37, 827 P.2d 304 (1992); Bennett, 62 Wn. App. at 711; State v. Taylor, 69 Wn. App. 474, 477, 849 P.2d 692 (1993).

In the present case, the findings have now been filed by the trial court. Cobb did not raise any arguments to suppress his statements at the trial court, nor does he raise any substantive issues on appeal from the CrR 3.5 hearing. 3 RP 43. There is no evidence that the prosecutor tailored the findings of fact and conclusions of law. Cobb has not alleged any prejudice due to the late filing of findings of fact, and absent any prejudice, reversal would be inappropriate.

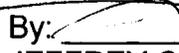
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Cobb's conviction for murder in the first degree with a firearm enhancement.

DATED this 13th day of August, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. EDWARD COBB, Cause No. 66331-3-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.

W Brame
Name
Done in Seattle, Washington

8/15/11
Date 8/15/11

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