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COURT OF APPEALS

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NO. 34483-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

vs.

JONATHAN J. MCKINLAY,

Appellant,

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Paula Casey, Judge  
Cause No. 05-1-01367-6

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in permitting McKinlay to be represented by counsel who provided ineffective assistance by proposing and failing to object to an incorrect “act on appearances” jury instruction that used “great bodily harm.”
02. McKinlay was prejudiced by his counsel’s failure to object to the trial court’s instruction 18 on the first aggressor.
03. The trial court erred in failing to give McKinlay’s proposed instruction 21 on no duty to retreat.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether McKinlay’s counsel was ineffective in proposing and failing to object to an erroneous instruction on self-defense that can be read so as to require that McKinlay reasonably feared great bodily harm? [Assignment of Error No. 1].
02. Whether McKinlay was prejudiced by his counsel’s failure to object to the trial court’s instruction 18 on the first aggressor? [Assignment of Error No. 3].
03. Whether the trial court erred in failing to give McKinlay’s proposed instruction 21 on no duty to retreat? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jonathan J. McKinlay (McKinlay) was charged by

second amended information filed in Thurston County Superior Court on January 5, 2006, with two counts of assault in the second degree while armed with a deadly weapon, counts I and II, and felony harassment, count III, contrary to RCW's 9A.36.021(a) or (c), 9A.46.020(1)(a)(i), (2)(b), 9.94A.533(4) and 9.94A.602. [CP 20-21].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 10-11]. Trial to a jury commenced on January 30, the Honorable Paula Casey presiding. Count III, felony harassment, was dismissed for insufficient evidence. [RP 02/01/06 19-20].

The jury returned a verdict of guilty of count II (assault of Darryl Spahr), with a special finding that McKinlay was armed with a deadly weapon during the commission of the offense. [CP 92-93].

Based upon an agreed offender score, McKinlay was sentenced within his standard range, including deadly weapon enhancement, and timely notice of this appeal followed. [CP 96-104, 110; RP 02/14/06 3-7].

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02. Substantive Facts<sup>1</sup>

On July 21, 2005, at 1:24 a.m., Officer Michelle Nutter arrived at the scene of a reported stabbing at a local tavern. [RP 01/30/06 4-5]. Darryl Spahr “was very excited, very upset. He was bleeding profusely.” [RP 01/30/06 7]. He had a stab wound in his chest. [RP 01/30/06 10].

Earlier that morning, Spahr, who was a bouncer at the tavern, followed some people down the street to retrieve a bar stool taken from the tavern. [RP 01/30/06 21, 23,-24, 27-28, 55, 59]. When he approached the people, McKinlay, who was “pretty drunk,” swung at Spahr and hit him in the face and began screaming at him. [RP 01/30/06 30; RP 01/31/06 9-10, 17]. Armand Ruffin saw McKinlay punching Spahr and ran toward McKinlay and “gave him a forearm and knocked him down.” [RP 01/31/06 39-40, 54-55]. After McKinlay “wiggled free” from Ruffin and stabbed him with a knife [RP 01/31/06 40-41], Spahr “went after (him), and the guy like lunged at (Spahr), and that’s when (Spahr) got stabbed.” [RP 01/31/06 13, 17]. McKinlay then left the scene with a group of people. [RP 01/30/06 37-38, 49-50]. When asked how McKinlay used the knife on Spahr, Ruffin replied, “Right in the chest.” [RP 01/31/06 44]. After McKinlay ran off, Spahr realized that his “hand

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<sup>1</sup> The facts are limited to charge for which McKinlay was convicted.

was covered in blood, and there was blood just like gushing out of me.” [RP 01/31/06 14]. Spahr never swung at or punched McKinlay. [RP 01/31/06 15, 64]. As a result of the incident, Spahr suffered a stab wound to the chest, which penetrated into his abdominal cavity. [RP 01/31/06 128-29].

According to Detective Aaron Jelcick, McKinlay told him that he hit Spahr in the face when he saw him running toward him and that he was then taken to the ground by Ruffin, where both Ruffin and Spahr hit and kicked him. [RP 01/31/06 110-111, 133]. At this point, McKinlay “pulled a pocket knife out, which he had, and slashed back and forth at the two individuals.” [RP 01/31/06 112].

McKinlay’s mother, Sonia White saw two people on top of her son and hit one of them with a bar stool. [RP 02/01/06 26-29, 37].

D. ARGUMENT

01. MCKINLAY’S COUNSEL WAS INEFFECTIVE IN PROPOSING AND IN FAILING TO OBJECT TO AN ERRONEOUS INSTRUCTION ON SELF-DEFENSE THAT CAN BE READ SO AS TO REQUIRE THAT MCKINLAY REASONABLY FEARED GREAT BODILY HARM.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of

reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance. i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995).

At the close of trial, the court instructed the jury that the State had the burden of proving that McKinlay was not acting in self defense when

he struggled with and stabbed Spahr. In instructing on self defense, the court gave instruction 15, which read, in part:

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

[Court's Instruction 15; CP 84].

In addition, defense counsel proposed and the trial court gave instruction 17,<sup>2</sup> which instructed the jury that McKinlay was entitled to “act on appearances” in using force to defend himself even though in reality he faced no actual threat of harm:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful. (emphasis added).

[Court's Instruction No. 17; CP 86].

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<sup>2</sup> McKinlay's proposed instruction 20 is identical to the court's instruction 17. [CP 44].

Instruction 17 misstates the elements of self-defense because it requires that McKinlay reasonably perceived a threat of “great bodily harm” when the law of self defense requires only that the defendant perceive a threat of “injury.” Instruction 17 is thus in conflict with instruction 15, which accurately states the level of threat that the defendant perceives by referring only to “injury.”

In State v. Walden, 131 Wn.2d 469, 475 n.3, 932 P.2d 1237 (1997), the Washington Supreme Court voiced disapproval of an “act of appearance” instruction that contains reference to “great bodily harm.” The court noted that the use of the term “great bodily harm” is inconsistent with the use of the term “great personal injury” in the justifiable homicide instruction. The court further explained that the term “great personal injury” ought to be used consistently in instructions relating to self defense due to the possible confusion arising from the fact that “great bodily harm” is a defined element of first degree assault. Id.; see also State v. Freeburg, 105 Wn. App. 492, 504-05, 20 P.3d 984 (2001) (in justifiable homicide case, reference to “great bodily harm,” as opposed to “great personal injury,” undercuts the subjective standard that the slayer may act on appearances).

“A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” State v. Walden, 131 Wn.2d at 473, quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

The use of the “great bodily harm” language in this case undercut the subjective standard by which McKinlay could act on appearances and in the process affected the outcome. McKinlay’s theory was that he swung at Spahr only after Spahr had run toward him, and that he used the knife only after he was taken to the ground by Ruffin, where Ruffin and Spahr began to hit and kick him, which gave rise to his reasonable belief that he was about to be injured, not necessary that he feared, as instructed, “great bodily harm.” The prosecutor relied on the great bodily harm language in his closing argument by arguing, based on the court’s instruction 17, that McKinlay could “act on appearance” only if he believed in good faith and on reasonable grounds that he was “in actual danger of great bodily harm.” [RP 02/01/06 76].

First, the record does not reveal any tactical or strategic reason why trial counsel would have proposed the instruction or failed to properly object to the instruction. Since instruction 17 is in conflict with instruction 15, which accurately states the level of threat that the defendant perceives by referring only to “injury,” had counsel not proposed the

instruction or properly objected to the instruction, it would not have been given.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's failure in proposing the instruction and in failing to object to the instruction here at issue, the self-defense instructions would not have required that McKinlay reasonably feared great bodily harm and the State would not have been able to argue this to the jury. Under the facts of this case, the jury could have convicted McKinlay if it found that he did not believe that he was in actual danger of great bodily harm even if it found that he reasonably believed that he was about to be injured.

Counsel's performance was deficient because he proposed and failed to properly object to the court's instruction 17 on the grounds previously argued herein, which was highly prejudicial to McKinlay, with the result that McKinlay was deprived of his constitutional right to

effective assistance of counsel, and is entitled to reversal of his conviction for assault in the second degree.

02. MCKINLAY WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S INSTRUCTION 18 ON THE FIRST AGGRESSOR.<sup>3</sup>

Without objection, the trial court instructed 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 use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

[Court's Instruction No. 18; CP 87].

It is reversible error to give the aggressor instruction where the evidence is lacking that the defendant acted intentionally to provoke an assault against the victim. State v. Wasson, 54 Wn. App. 156, 159-160, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989), citing State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) (aggressor instruction improper where evidence lacking to show defendant was involved in wrongful or improper conduct which precipitated the charged offense).

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<sup>3</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper. (citation omitted). The inclusion of the instruction effectively deprived him of his theory of self-defense; the jury was left to speculate as to the lawfulness of the conduct prior to the assault. (citation omitted).

Id.

In State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), the court, citing Wasson, 54 Wn. App. at 159, citing State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985), held that “(t)he provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim.” Clearly, aggressor instructions are not favored. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990).

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.

State v. Arthur, 42 Wn. App. at 125 n.1.

As recently noted by the Washington Supreme Court:

While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant’s claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt.

Accordingly, courts should use care in giving an aggressor instruction.

State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

The evidence does not support the giving of the aggressor instruction in this case. While there was evidence that McKinlay was initially screaming at Spahr, an aggressor instruction may not be given where words alone are the asserted provocation. State v. Riley, 137 Wn.2d at 911. Moreover, there was evidence presented at trial that McKinlay only swung at Spahr when he saw him running toward him and that he used the knife only being taken to the ground where he was hit and kicked by both Spahr and Ruffin.

The aggressor instruction effectively deprived McKinlay of his ability to claim self-defense. See Wasson, 54 Wn. App. at 160. And an error affecting a defendant's self-defense claim is constitutional in nature and cannot be found harmless unless it is harmless beyond a reasonable doubt. State v. Kidd, 57 Wn. App. at 101 n.5, citing State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983). In view of the importance the State assigned to this issue during closing argument, wrongly asserting that McKinlay could not even claim the defense unless he believed that he was in actual danger of great bodily harm, it cannot be claimed that the error was harmless beyond a reasonable doubt.

Assuming arguendo, this court finds that trial counsel waived the issue relating to the trial court's first-aggressor instruction by failing to object to it, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object. For the reasons set forth above, had counsel objected, the trial court would not have given the instruction.

The prejudice here is self evident: but for counsel's failure to object, the trial court would not have given the instruction, which effectively deprived McKinlay of his ability to claim self-defense.

McKinlay's conviction for assault in the second degree must be reversed and remanded for retrial without the aggressor instruction.

03. THE TRIAL COURT ERRED IN FAILING TO GIVE MCKINLAY'S PROPOSED INSTRUCTION 21 ON NO DUTY TO RETREAT.

McKinlay took exception to the court's failure to give his proposed instruction 21 on no duty to retreat:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

[Defendant's Proposed Instruction No. 21; CP 45; RP 02/01/06 49-51].

A person has no duty to retreat when he or she is assaulted in a place where he or she has a right to be. State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). And an instruction should be given to this effect when sufficient evidence is presented to support it. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). What's more, a party is entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading and allow the party the opportunity to argue his or her theory of the case. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003) (citing State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980)).

In this case, again, the facts indicate that McKinlay initially swung at Spahr only after Spahr had run toward him on the street, and that he used the knife only after he had been taken to the ground by Ruffin, where Ruffin and Spahr began to hit and kick him. As Spahr came down the street to confront McKinlay, McKinlay was arguably left with an easy opportunity to retreat. Although presumably aware of this, the trial court, in refusing to give the instruction at issue, ignored this, noting merely that other instructions allowed McKinlay to argue that he "was simply

defending himself in this instance as he was being attacked by others.”  
[RP 02/01/06 51].

Be that as it may, the no duty to retreat instruction is required where, as in this case, a jury may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense.

The trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by the evidence in the case. Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999). Failure to provide such instructions constitutes prejudicial error. Id.

State v. Redmond, 150 Wn.2d at 495.

Here, the refusal to grant the no duty to retreat instruction was reversible error, as the jury may have speculated as to whether retreat was a reasonable option for McKinlay.

E. CONCLUSION

Based on the above, McKinlay respectfully requests this court to reverse and dismiss his conviction.

DATED this 11<sup>th</sup> day of September 2006.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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