

NO. 34483-1-II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,
v.
JONATHAN J. MCKINLAY,
Appellant.

FILED
COURT OF APPEALS
06 DEC 11 AM 9:59
STATE OF WASHINGTON
BY [Signature] DEPUTY CLERK

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 05-1-01367-6

HONORABLE PAULA CASEY, Judge

RESPONDENT'S BRIEF

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Deputy Prosecuting Attorney
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	1
ARGUMENT	10
1. <u>The Court's Jury Instruction No. 17, addressing the defendant's right to reasonably rely upon appearances in using force in self-defense, properly stated the law applicable to this case by including the phrase "great bodily harm", and therefore defense counsel did not render ineffective assistance by proposing this instruction.</u>	10
2. <u>There was credible evidence in this case that the defendant's purposeful actions provoked the use of force that gave rise to his claim of self-defense, and therefore the Court acted properly in providing a "first aggressor" instruction to the jury, and so the defendant's trial counsel did not render ineffective assistance by not objecting to that instruction.</u>	22
3. <u>Taking into account the defendant's version of the circumstances under which he stabbed Spahr, as told to detectives, the Court properly found that such evidence did not justify giving a "no duty to retreat" instruction to the jury so that the defendant could argue his theory of the case.</u>	25
CONCLUSION	30

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 984 (2001)	20,21
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990)	12
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	12,13
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003)	27
<u>State v. Riley</u> , 137 Wn.2d 904, 976 P.2d 624 (1999)	23,24,26
<u>State v. Rodriguez</u> , 121 Wn. App. 180, 87 P.3d 1201 (2004)	18,20,21
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997)	13,14,15,16,17,18,20,21
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005)	24,25
<u>State v. Wingate</u> , 155 Wn.2d 817, 122 P.3d 908 (2005)	24

A. STATEMENT OF THE ISSUE

1. Whether the defendant's trial counsel rendered ineffective assistance when he proposed a jury instruction addressing the defendant's right to reasonably rely upon appearances in using force in self-defense, and used the phrase "great bodily harm" in that instruction.

2. Whether there was credible evidence that the defendant's purposeful actions provoked the use of force that gave rise to his claim of self-defense, thereby justifying a "first aggressor" instruction to the jury, and therefore the defendant's trial counsel did not render ineffective assistance by not objecting to that instruction.

3. Given the defendant's version of the circumstances under which he stabbed Darryl Spahr, whether the court properly found that such evidence did not justify giving a "no duty to retreat" instruction to the jury.

B. STATEMENT OF THE CASE

As of July, 2005, defendant Jonathan McKinlay resided in Reno, Nevada. However, in late July, 2005, he traveled to Olympia, Washington, to attend the funeral of his grandmother. 1-31-06 Trial RP 107. The funeral took place on July 20, 2005. 1-31-05 Trial RP 107. After the funeral, the defendant went with a group of individuals to have drinks. The group included the defendant's

mother, Sonia White, and her friend, Aaron Thomas, the defendant's girl friend, Crystal Peters, and an individual whose first name was "Tom". 2-1-06 Trial RP 23.

The group first went to the Point Tavern in Tumwater. Then, between 11:30 and 12 that evening, they went to downtown Olympia and ended up at the Bar Code tavern. 1-31-06 Trial RP 107-109; 2-1-06 Trial RP 23-24. They stayed at the Bar Code until shortly after 1:00 in the morning of July 21st. 1-31-06 Trial RP 108-109.

Darryl Spahr and Armand Ruffin were bouncers at the Bar Code. They were both at the tavern on the night of July 20, 2005 and early morning of July 21, 2005. 1-30-06 Trial RP 22-24. Tyler Andrews was also there that evening and early morning. At one point after midnight, Andrews noticed some people leaving the Bar Code carrying two of the bar stools from that business. 11-30-06 Trial RP 24-25. Andrews immediately informed Spahr, who went out to retrieve the bar stools, followed by Andrews. 1-30-06 Trial RP 24; 1-31-06

Trial RP 7.

Spahr observed two individuals down the street, throwing the bar stools at the window of another tavern, which was closed at the time. 1-31-06 Trial RP 7-8, 108. Spahr ran toward these individuals. When he got about halfway to them, he was confronted by the defendant, who was dressed entirely in red clothing. 1-31-06 Trial RP 8-9, 11, 17. Spahr demanded the return of the bar stools. The defendant yelled at Spahr and struck Spahr in the face. Spahr stepped back, at which point the defendant took another swing at Spahr, but missed. 1-31-06 Trial RP 9, 26.

Spahr yelled for the other bouncer, Armand Ruffin, to come to his assistance. 1-31-06 Trial RP 10. Ruffin ran up and used his forearm to knock the defendant to the ground. 1-31-06 Trial RP 40. When the defendant started to get up, Ruffin again knocked him to the ground and held him down, stating that the police were on the way. 1-31-06 Trial RP 40.

Crystal Peters struck Ruffin with her purse,

which caused Ruffin to lose his grip on the defendant. 1-31-06 Trial RP 40; 2-1-06 Trial RP 30. At that point, the defendant lashed out with a knife, lacerating Ruffin's right thigh. 1-31-06 Trial 40, 42, 60, 125. The defendant then got up and again swung the knife at Ruffin, slicing into Ruffin's left shoulder. 1-31-06 Trial RP 40, 43, 125-127.

While this was taking place, the defendant's mother, Sonia White, struck Spahr with one of the bar stools. 1-31-06 Trial RP 19; 2-1-06 Trial RP 29. After the defendant had gotten back to his feet and had struck Ruffin in the arm with the knife, Spahr confronted the defendant. At that point, the defendant lunged at Spahr, stabbing Spahr in the stomach, perforating the abdominal cavity. 1-31-06 Trial RP 13, 40, 127-129.

After stabbing Spahr, the defendant started to leave, but then moved back toward Spahr with the knife in his hand. At that point, Ruffin grabbed the bar stool and confronted the defendant, who then left the area. 1-31-06 Trial

RP 40, 47.

Both Ruffin and Spahr collapsed to the ground as a result of their injuries. Police were contacted. Olympia Police Officer Michelle Nutter was first to arrive in response, and she observed both Spahr and Ruffin lying on the ground, with other persons trying to stop the bleeding from each individual's injuries. 1-30-06 Trial RP 5-6. Medics responded thereafter, and both Spahr and Ruffin were transported to St. Peter Hospital for medical treatment. 1-30-06 Trial RP 9, 16. Police were unable to locate the defendant in a subsequent search in the area of the Bar Code. 1-30-06 trial RP 11-12.

The defendant and the others in his group met up by the truck they had previously traveled in, and left together in the vehicle. The entire group then left the next day for Reno, Nevada. 1-31-06 Trial RP 114; 2-1-06 Trial RP 31.

The defendant's sister, Chelsie McKinlay spoke to the defendant by phone a few days after he returned to Reno. The defendant threatened any

member of his family who gave information to the police concerning what had happened. 1-31-06 Trial RP 98-100. Chelsie revealed to her neighbor, Raymond Rowland, what she had learned concerning events at the Bar Code on July 21st. Rowland called Crime Stoppers and reported what Chelsie had told him. 1-30-06 Trial RP 82-83. In this way, Olympia police focused on defendant Jonathan McKinlay as a suspect. 1-31-06 Trial RP 70-71.

Olympia police contacted law enforcement in Reno, and as a result, the defendant was placed in custody on July 28, 2005. 2-1-06 Trial RP 8. On July 29th, Olympia Police detectives interviewed the defendant in Reno. He denied that anyone in his group had stolen a bar stool. The defendant claimed that after he and the others in his group had left the Bar Code, a white male ran at him. The defendant chose to strike this man in the face with his fist. 2-1-06 Trial RP 110-111. The defendant further stated that a black male ran up to him at that point and took him to the ground,

and that the white male and black male kept hitting him and kicking him while he was on the ground. The defendant asserted he recognized the black male as the individual who had checked their identification when they first entered the Bar Code. 1-31-06 Trial RP 111-112.

The defendant further related that he had pulled out a pocket knife and had slashed at the two individuals who were kicking him. This had caused the two individuals to back off, at which point he had gotten to his feet and had run away. The defendant acknowledged he never saw a weapon in the possession of either individual. 1-31-06 Trial RP 112-113.

Crystal Peters was also interviewed in Reno by Olympia detectives. She provided information concerning the location of the knife used by the defendant to stab Spahr and Ruffin. These detectives then conveyed that information back to the Olympia Police Department. 1-31-06 Trial RP 116-117. In response, Olympia Police Detective Sam Costello went to a flower box on the side of

Charlie's Bar, near the Bar Code, and located a knife. That knife had a blade which was three inches in length. 1-31-06 Trial RP 85-87.

On July 26, 2005, an Information was filed in Thurston County Superior Court Cause No. 05-1-01367-6 with one count of second-degree assault while armed with a deadly weapon, alleging Armand Ruffin as the victim, one count of second-degree assault while armed with a deadly weapon, alleging Darryl Spahr as the victim, and one count of felony harassment alleging Chelsie McKinlay to be the victim. CP 3-4. On November 22, 2005, the State filed a First Amended Information charging two counts of third-degree assault with a deadly weapon in anticipation that the defendant would plead guilty to those counts pursuant to a plea agreement. CP 18. However, the defendant changed his mind at the last minute and refused to enter guilty pleas to the amended charges. 11-22-05 Hearing RP 9-10. On January 5, 2006, a Second Amended Information was filed which restored the charges to what they had originally been. CP 20-

21.

A jury trial was held on those charges during the period of January 30 - February 2, 2006. Count Three, felony harassment, was dismissed at the end of the State's case since Chelsie McKinlay had testified that she did not feel any fear as a result of the threat made to her by the defendant. 2-1-06 Trial RP 19. The defendant proposed a jury instruction, based on WPIC 17.05, stating that the law does not impose a 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.

WPIC 17.05; Defendant's Proposed Jury Instruction No. 21 in CP 24-56. The court refused to give this instruction, stating that the instruction was not appropriate based on what was at issue in this case, and asserted that the Court's Jury Instructions Nos. 15 and 17 provided the defendant with sufficient ability to argue his theory of self defense. The defendant took exception to

this failure to give Defendant's Proposed Jury Instruction No. 21. 2-1-06 Trial RP 50-51. The defendant did not take exception to the court giving or failing to give any other instruction. 2-1-06 Trial RP 51.

After deliberations, the jury found the defendant guilty of second-degree assault against Darryl Spahr, as alleged in Count II. The jury also found the State had proved the special allegation that the defendant was armed with a deadly weapon at the time of that offense. However, the jury could not reach a unanimous verdict on Count I, involving Ruffin as the alleged victim. Therefore, a mistrial was declared for that charge. 2-2-06 Trial RP 4-6.

On February 14, 2006, a sentencing hearing was held with regard to Count II. The court imposed a standard range sentence of 14 months plus 12 months for the deadly weapon enhancement, for a total of 26 months in prison. CP 96-104.

C. ARGUMENT

1. The Court's Jury Instruction No. 17, addressing the defendant's right to reasonably

rely upon appearances in using force in self-defense, properly stated the law applicable to this case by including the phrase "great bodily harm", and therefore defense counsel did not render ineffective assistance by proposing this instruction.

The trial court instructed the jury in the following manner with regard to the right of a person to reasonably act on appearances in defending himself.

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.

Court's Instruction to the Jury No. 17, CP 68-91. This instruction is identical to Washington Pattern Jury Instruction (WPIC) 17.04. The instruction was proposed by the defendant. Defendant's Proposed Jury Instruction No. 20, CP 24-56.

On appeal, the defendant contends that the use of the phrase "great bodily harm" in this instruction misstated the law. Under the doctrine of invited error, a defendant in a criminal trial

cannot request that a certain instruction be given to the jury and then, after the requested instruction has been given, complain on appeal that the giving of the instruction was error. State v. Henderson, 114 Wn.2d 867, 870-871, 792 P.2d 514 (1990). While acknowledging this restriction, the defendant argues that his trial attorney rendered ineffective assistance of counsel by failing to use the term "injury" in place of "great bodily harm" in this instruction.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, in that it fell below an objective standard of reasonableness based on a consideration of all the circumstances; and (2) that defense counsel's performance prejudiced the defendant because there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). When considering a claim of ineffective assistance, the

court must engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

In arguing that the Court's Instruction No. 17 was in error in this case, and that defense counsel was ineffective in proposing it, the defendant relies upon State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997). However, Walden not only provides no support for the defendant's argument, it clearly establishes that Jury Instruction No. 17 was an accurate statement of the relevant law, given the facts of this case.

In Walden, it was alleged that Walden had fallen off a bicycle, then became angry when several nearby teenagers started laughing, and came at them with a knife, attempting to use the weapon to injure them, but failing in that effort. The defendant asserted self-defense, claiming that the teenagers had pushed him off the bicycle and were attempting to beat him up, and he displayed the knife to scare them off. Walden, 131 Wn.2d at 471-472.

At the end of the case in Walden, the court instructed the jury as follows:

One has the right to use force only to the extent of what appears to be the apparent imminent danger at the time. However, when there is no reasonable ground for the person attacked or apparently under attack to believe that his person is in imminent danger of death or great bodily harm, and it appears to him that only an ordinary battery is all that is intended, he has no right to repel a threatened assault by the use of a deadly weapon in a deadly manner.

Great bodily injury as used in this instruction means injury of a graver and more serious nature than an ordinary battery with a fist or pounding with the hand; it is an injury of such nature as to produce severe pain, suffering and injury.

Walden, 131 Wn.2d at 472. The Washington Supreme Court ruled that the first paragraph of this instruction adequately conveyed "the relevant law on the amount of force allowed in self-defense". Walden, 131 Wn.2d at 475. Thus, where a defendant had wielded a deadly weapon against unarmed persons, and was claiming self-defense, it was legally correct to instruct the jury that the defendant's right to rely upon reasonable appearances was limited to what appeared to be a danger of death or great bodily harm, as opposed

to an ordinary battery.

This ruling directly refutes the contention of the defendant in this case. Having stabbed Spahr in the abdomen with a knife at a time when Spahr was unarmed, even under the defense version of the event, the defendant contends it was error to instruct the jury that he could rely on appearances in defending himself only if he believed in good faith and on reasonable grounds that he was in danger of great bodily harm. However, as State v. Walden makes clear, that instruction was not error, but rather an accurate statement of the applicable law in this case.

The problem in Walden was the second paragraph of the instruction quoted above. The definition of great bodily harm stated therein injected objective criteria of what great bodily harm could consist of, contrary to the part subjective, part objective approach that was intended for an evaluation of a claim of self-defense. Under certain facts, an attack by fists from a person otherwise unarmed could subjectively

be viewed as threatening great bodily harm, and that view could be objectively reasonable. Under such circumstances, the use of a knife in self-defense could be legally justifiable. However, the definition of great bodily harm in the second paragraph of the instruction in Walden could be interpreted by a juror as foreclosing such a basis for self-defense. Thus, it was the second paragraph only which created error. Walden 131 Wn.2d at 475-478.

In the present case, the jury was not given a definition for great bodily harm. Therefore, the error committed in Walden is not present here. In this case, the defendant was free to argue that the attack of Ruffin and Spahr, under his version of events, could reasonably have been viewed by the defendant as threatening great bodily harm. In fact, defense counsel essentially did make such an argument. 2-1-06 Trial RP 97-98. However, it was also legally appropriate, given the facts of this case, to preclude the defendant from arguing that his use of the knife upon Spahr was

reasonable even if he did not fear great bodily harm.

The defendant refers to a footnote in Walden as a basis for arguing that the use of the phrase "great bodily harm" in an "act on appearances" self-defense instruction is a misstatement of law. Walden, 131 Wn.2d at 475 n. 3. However, this argument takes that footnote out of context, ignoring the actual concern expressed in that footnote.

The footnote, in its entirety, states as follows:

We also note the inconsistent use of the terms "great bodily harm" and "great bodily injury" within instruction 18. The Washington Pattern Jury Instructions advocate the use of a third variation on this term: great personal injury. WPIC 2.04.01. Despite the potential confusion inherent in the inconsistent use of these three terms, the issue in this case concerns the definition of the term in the context of self-defense. As recommended by the Supreme Court Committee on Jury Instructions, we advocate using the term "great personal injury", and will do so throughout this opinion. See cmt., WPIC 2.04.01 (because "great bodily harm" is an element of first-degree assault and is distinctly defined in that context, it should not be used in instructions on self-defense). See RCW 9A.36.011; RCW 9A.04.110(4)(c). When "great

personal injury" is used in place of the other terms as used in their respective sources, the opinion will so indicate by using brackets, e.g., [great personal injury].

Walden, 131 Wn.2d at 475, n. 3. The potential problem noted in this footnote arises when the phrase "great bodily harm" is used in differing contexts within the same case. It then creates potential confusion in the jury's use of the term in evaluating a claim of self-defense. In the present case, the term "great bodily harm" was not used inconsistently in differing contexts, and so did not present the potential for confusion discussed in the footnote in Walden.

An example of a case in which the differing uses of the term "great bodily harm" did create such potential for confusion, and therefore prejudice, is State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004). In that case, Rodriguez was convicted of first-degree assault while armed with a deadly weapon. The jury was instructed on self-defense, including an instruction on the right to act on appearances identical to the

instruction used in the present case. In response, the appellate court noted as follows:

Now, standing alone or with other instructions to this jury on the question of self-defense, this statement would at least be innocuous and perhaps even an accurate statement of the law. The problem here is that the court also instructed the jury on the requirements of assault in the first degree. And as part of that charge to the jury, the court defined "great bodily harm" as follows:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

(Citation omitted.) This is the only definition of "great bodily harm" in the instructions to the jury. And when this definition is read into the self-defense instruction, the problem becomes apparent. Based on this definition of "great bodily harm", the jury could easily (indeed may have been required to) find that in order to act in self-defense, Mr. Rodriguez had to believe he was in actual danger of probable death, or serious permanent disfigurement, or a loss of a body part or function. And this is precisely the problem the Supreme Court warned against in *State v. Walden*. Like the instructions the court found objectionable in *Walden*, the instructions here "[b]y defining [great bodily injury] to exclude ordinary batteries, a reasonable juror could read [the instruction] to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e., whether the

defendant reasonably believed the battery at issue would result in great personal injury." Walden, 131 Wn.2d 469, 477 (1997).

Rodriguez, 121 Wn. App. at 185-186.

Thus, the appellate court found in Rodriguez that the use of the phrase "great bodily harm" in the "act on appearances" instruction relating to self-defense was not, in itself, a problem. Error only arose, as in Walden, when a further instruction was given defining "great bodily harm", which then restricted the jury's evaluation of a defendant's subjective perception of his potential harm, including whether the defendant reasonably perceived he was in danger of great bodily harm even if that was not truly the case.

The same problem existed in State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001), which is cited in Appellant's Brief in support of his claim of error regarding the use of the phrase "great bodily harm" in Instruction No. 17. In Freeburg, the jury was instructed on what the term "great bodily harm" meant identical to the definition of that phrase given in Rodriguez,

supra. Then a self-defense instruction was given stating that a defendant could act on appearances in using force to defend himself if he had reasonable grounds to believe he was in danger of great bodily harm. The use of that instruction together with the definition of "great bodily harm" was held to be error, although harmless error in that case. Freeburg, 105 Wn. App. at 503-505.

In the present case, the error identified in Walden, Rodriguez, and Freeburg is simply not present. No definition of the phrase "great bodily harm" was given here, and so there was no restriction placed on the jury's consideration of that phrase in evaluating the subjective belief of the defendant at the time he used force against Spahr. None of these cases support McKinlay's claim here that the use of the phrase "great bodily harm" in an "act on appearances" instruction on self-defense itself constitutes error. McKinlay's claim is not accurate. The use of that phrase in the Court's Instruction to the

Jury No. 17 in this case was proper. Therefore, no showing has been made that defendant's trial counsel rendered ineffective assistance by proposing an "act on appearances" self-defense instruction using that phrase.

2. There was credible evidence in this case that the defendant's purposeful actions provoked the use of force that gave rise to his claim of self-defense, and therefore the court acted properly in providing a "first aggressor" instruction to the jury, and so the defendant's trial counsel did not render ineffective assistance by not objecting to that instruction.

In the present case, the trial court gave an additional instruction on self-defense, which stated the following:

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 defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Court's Instruction to the Jury No. 18, CP 68-91. Defense counsel did not take exception to the giving of this instruction. On appeal, the defendant claims that the failure to take such

exception constituted ineffective assistance of counsel.

The defendant's burden of proof in making such a claim has been discussed above. There is no contention that the instruction was improperly worded, nor is there any dispute that such an instruction is proper if there is evidence to support it. Rather, the defendant contends on appeal that there was not evidence in this case which supported the giving of that instruction.

The right of self-defense cannot be legitimately invoked by an aggressor or one who provokes an altercation, and therefore a "first aggressor" instruction is appropriate when there is credible evidence from which a jury could reasonably determine that the defendant provoked the use of force that gave rise to his claim of self-defense. State v. Riley, 137 Wn.2d 904, 909-910, 976 P.2d624 (1999). Even if there is conflicting evidence on this point, the instruction is appropriate if there is evidence from which a reasonable juror could conclude that

the defendant provoked the altercation. State v. Wingate, 155 Wn.2d 817, 822-823, 122 P.3d 908 (2005); Riley, 137 Wn.2d at 910. Credibility determinations with regard to such conflicting evidence are the sole province of the jury. State v. Ward, 125 Wn. App. 138, 148, 104 P.3d 61 (2005).

In the present case, Darryl Spahr testified that when he went to retrieve the bar stools, the defendant approached him and punched him in the face. Then when Spahr backed away, the defendant swung at him again, but missed. Spahr did not swing back at him. 1-31-06 Trial RP 8-9.

Tyler Andrews testified he accompanied Spahr to retrieve the bar stools, and that the defendant swung at Spahr and hit him in the head, at which point Spahr backed away. 1-30-06 Trial RP 28-31.

Armand Ruffin testified he watched while Spahr went to retrieve the bar stools. Ruffin observed the defendant punch Spahr, which is what prompted Ruffin to run over and intervene. 1-31-

06 Trial RP 39-40.

Even the defendant, in his interview with Olympia Police Detectives, stated that he observed a man simply running toward him and chose to strike the man in the face with his fist. The defendant made no claim that the man made any threatening statement or gesture, nor did he claim the man was holding any sort of weapon. 1-31-06 Trial RP 110-111.

This evidence was sufficient to justify providing the jury with the first aggressor instruction. Since the instruction was not given in error, defendant's counsel did not render ineffective assistance in failing to object to the instruction. Ward, 125 Wn. App. at 149-150.

3. Even assuming the defendant's version of the circumstances under which he stabbed Spahr, as told to detectives, the court properly found that such evidence did not justify giving a "no duty to retreat" instruction to the jury so that the defendant could argue his theory of the case.

As set forth in the Statement of the Case above, the defendant proposed a self-defense instruction at trial to explain that there is no

duty to retreat. That instruction read as follows:

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.

WPIC 17.05; Defendant's Proposed Jury Instruction No. 21 in CP 24-56. The trial court found that the evidence in this case did not justify giving that instruction.

I don't believe this is a situation in which the no duty to retreat instruction should be given, but I believe the combinations of Instructions No. 15 and 17 allow the defense to argue that the defendant was simply defending himself in this instance as he was being attacked by others.

2-1-06 Trial RP 50-51.

On appeal, the defendant contends that the denial of this instruction was error. Jury instructions are sufficient if they allow the parties to argue their theory of the case, and when read as a whole properly inform the jury of the applicable law. Riley, 137 Wn.2d at 909. The giving of an instruction concerning the lack

of a duty to retreat would have been appropriate only if there was sufficient evidence to support it. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

Assuming the particulars of the defendant's version of events in support of a claim of self-defense, if retreat would not have been a reasonable alternative response to the claimed act of aggression, then it was appropriate for the court to refuse to give an instruction concerning the lack of a duty to retreat. Redmond, 150 Wn.2d at 493-494. In this case, the charge of second-degree assault naming Spahr as the victim alleged that the defendant had assaulted Spahr with a deadly weapon or, in the alternative, had assaulted Spahr and had recklessly inflicted substantial bodily harm. CP 20-21. Thus, the charge referred to the defendant's use of a knife on Spahr.

The defendant claimed to Olympia Police detectives that a black male forced him to the ground, and then the black male and white male

hit and kicked him while he was on the ground. He stated that it was at this point that he took out the knife and slashed at the two individuals in self-defense. 1-31-06 Trial RP 111-112. If the jury had found this version of events credible, there would have been no danger that, absent an instruction that there is no duty to retreat, the jury would have concluded the defendant should have retreated as an alternative response to this situation, and therefore the instruction was properly denied.

The defendant argues the "no duty to retreat" instruction was needed to govern the jury's analysis of the point in time when the defendant first struck Spahr by punching him in the face. However, there was no charge alleging that punch to have been a criminal assault, requiring a determination by the jury whether there was proof beyond a reasonable doubt that it was not self-defense. The purpose of a "no duty to retreat" instruction could only have been to aid the jury in its evaluation of the defendant's

claim of self defense, which was a defense to the alleged crime of assault. The alleged assault was stabbing Spahr with a knife, not a punch to the face that caused no injury. The issue the instructions pertained to was whether the State had proved that the stabbing was not an act of self-defense under the law. Therefore, the court's determination whether the evidence justified a "no duty to retreat" instruction could properly be based on the evidence regarding the commission of the alleged offense, not evidence pertaining to other events which led up to the alleged offense.

A second problem with the defendant's argument is that a "no duty to retreat" instruction pertains to how a defendant can legally respond to some act of aggression. The instruction refers to standing one's ground and defending against an "attack". However, in admitting the punch to Spahr's face to detectives, the defendant did not describe any attack. He simply described Spahr running

towards him. 1-31-06 Trial RP 110-111.

There was no evidence presented from which a reasonable juror could have determined that the defendant was attacked at that point, or that a reasonable person in the position of the defendant would have perceived that he was being attacked, simply on the basis of someone running up to him without any other indication of hostility. If there was no evidence of a reasonably perceived attack, there could be no reason to question whether the defendant had a duty to retreat from such "attack". Therefore, the court did not abuse its discretion in finding that there was no evidence in this case requiring that a "no duty to retreat" instruction be given so that the defense could argue its theory of the case.

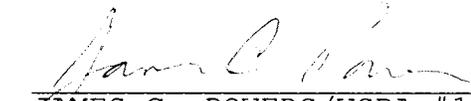
D. CONCLUSION

Based on the above, the State respectfully requests that this court find that there was no ineffective assistance by defense counsel, and that the court properly excluded a "no duty to

retreat" self-defense instruction in this case,
and affirm the defendant's conviction for one
counts of assault in the second degree while armed
with a deadly weapon.

DATED this 8th day of December, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 8th day of December, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney