

NO. 34731-8

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RAMEL EDWARD HAWKINS, APPELLANT

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
FILED  
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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 04-1-04146-7

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant afforded the effective assistance of counsel when defense counsel:
  - a. reasonably proposed the “act on appearance” instruction containing the term “great bodily harm,” which in no way affected the outcome; and
  - b. refrained from objecting to the aggressor instruction when it was supported by credible evidence?

B. STATEMENT OF THE CASE.

On June 22, 2004, Jabbarr Thomas was on his way to drop off a payment at the public utilities building when defendant, RAMEL HAWKINS, chased Thomas down and shot him in the leg. RP 55, 58, 67-68. Thomas had first met defendant a few weeks earlier in the parking lot of an apartment building where both their children lived. RP 51-54. Thomas had a gun on his person, but he did not show defendant at that time. RP 52. At this earlier incident, defendant and Thomas exchanged words, with defendant threatening to shoot Thomas. RP 51-52.

On the day of the shooting, Thomas saw defendant again as he was leaving the apartment. RP 55. Thomas was not wearing a shirt because he had worked out and thought he looked nice. RP 56. Defendant and the

mother of defendant's son were in the parking lot. RP 55. They both stopped and looked at Thomas as he came down the apartment stairs. RP 55. Thomas and defendant did not exchange words. RP 55. Thomas started driving to the public utilities building, which was about a half mile away from the apartment. RP 56. While he was stopped at a light Thomas noticed that defendant was racing up behind him. RP 56-57. Thomas continued driving to the public utilities building and parked his car near the pay station island. RP 61.

Defendant then pulled right up on Thomas as if he was chasing Thomas down. RP 58. Defendant stuck his head all of the way out of his window. RP 65. Thomas thought defendant pulling up on him was a challenge to fight. RP 66. Thomas thought that defendant might be intimidating him because defendant had seen Thomas with his shirt off earlier. RP 66. Thomas asked defendant why he was following him, if he had a problem and if he was trying to fight. RP 58, 65. Thomas then told defendant, "Hey, get out of your car, dude, I'm tired of seeing your face, let's deal with this." RP 66. That is when defendant pulled out his .38 revolver and started shooting at Thomas. RP 66 As soon as Thomas saw the gun he turned to run, but it was too late. RP 68. Defendant shot Thomas in the back of the knee causing an entrance and an exit wound. RP 67-68. Thomas ran around to some bushes, but defendant kept "shooting and shooting and shooting." RP 68.

Mary Gipson was stopped at a traffic light in front of the public utilities building while defendant was shooting. RP 125. She saw something flash, heard at least three gun shots, and saw someone running behind her car. RP 126. Gipson was frightened and took a right turn trying to get away from the shooting. RP 127. One of the bullets struck her car. RP 126-128. This caused a large bullet hole above the rear wheel on the passenger side of her car. RP 128. The bullet was later found lodged in the car's antenna box. RP 130.

After the shooting, defendant pulled out of the parking lot and fled the scene. RP 68. Thomas called his child's mother and told her defendant had shot him. RP 70. Thomas then sought medical care by hopping over to a veterinarian hospital. RP 72. Paramedics arrived and took over the treatment and Thomas was then transferred to a hospital. RP 75. After his treatment at the hospital, Thomas was transferred to jail because a paramedic had found some cocaine in Thomas' sock. RP 75. Thomas later pleaded guilty to a misdemeanor drug charge. RP 75. The paramedic did not find a gun on Thomas. RP 220-221. The investigating police officers did not find a gun on the scene. RP 220-221.

The State charged defendant with first degree assault with a firearm (Count I), drive-by shooting (Count II), and second degree unlawful possession of a firearm (Count III). CP 6-7. Defendant argued self-defense at trial. Defendant claimed he had pulled up behind Thomas at a stop light where Thomas then told him to pull over. RP 341.

Defendant claimed that when he pulled into the parking lot, Thomas said, “I told you last time what was up and you must be ready to feel these shells.” RP 344. Defendant claimed that Thomas had a gun. RP 346. Defendant testified that he thought Thomas “was going to try to kill me.” RP 347. Defendant claimed that if Thomas’ gun had not snagged, then Thomas would have fired it at him. RP 348. Defendant claimed that he was in immediate fear of his life. RP 348.

Defendant’s trial counsel proposed a self-defense “act on appearance” instruction which the court issued. CP 15-45 (Instruction 18). The court also issued an instruction defining great bodily harm and an aggressor instruction. CP 15-45 (Instruction 7 and Instruction 20). The jury did not accept defendant’s claim of self defense and found him guilty as charged. CP 46, 48, 49. The jury also found that defendant was armed with a firearm. CP 47. Defendant has filed a timely appeal. CP 65.

C. ARGUMENT.

1. DEFENDANT WAS AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant alleges that his trial counsel was ineffective (1) for requesting an allegedly defective act on appearances instruction and (2) for failing to object to an allegedly improper aggressor instruction. While the invited error doctrine would prevent a challenge to jury instructions when the instructions were proposed by the defendant, this does not

prevent a claim for ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 550-51, 973 P.2d 1049 (1999).

A criminal defendant has the right to effective assistance of counsel under the sixth amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show that counsel provided ineffective assistance, a defendant must show: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reversal of a lower court decision is required where the defendant demonstrates both deficient performance and resulting prejudice. Strickland, 466 U.S. at 687.

In evaluating a claim for ineffective assistance of counsel, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. In engaging this inquiry, a court is highly deferential to the performance of counsel. Id. at 689. A defendant can overcome the presumption of effective representation by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." McFarland, 127 Wn.2d at 336. Jury instructions on self-defense must more than adequately convey

the law and, when read in their entirety, they must make the relevant legal standard manifestly apparent to the average juror. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

In both State v. Studd and State v. Summers the defendant claimed that their counsel was ineffective for proposing jury instructions that were directly taken from the WPIC. Studd, 137 Wn.2d at 533; State v. Summers, 107 Wn. App. 373, 28 P.3d 780 (2001).<sup>1</sup> Because counsel had not fallen below an objective standard of deficient representation for proposing the valid WPIC instructions, the Studd and Summers courts determined that it need not consider the second prong. Studd, 137 Wn.2d at 551; Summers, 107 Wn. App. at 383.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” Id. at 693. In doing so, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have

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<sup>1</sup> In Studd, the Supreme Court rejected this claim because “counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC.” Studd, 137 Wn.2d at 551. Similarly, in Summers, this court rejected the defendant’s challenge because “trial counsel can hardly be found to fall below acceptable standards by requesting an instruction based upon a WPIC instruction appellate courts had repeatedly and unanimously approved.” Summers, 107 Wn. App. at 383.

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

a. Act on Appearance Instruction.

i. **Under the circumstances, it was reasonable for defense counsel to propose the “act on appearance” instruction.**

Under the circumstances in this case it was reasonable for defense counsel to propose an “act on appearance” jury instruction. The instruction was identical to Washington Pattern Jury Instruction (WPIC) 17.04.<sup>2</sup> The note on using WPIC 17.04 indicates that the instruction was intended to be combined with WPIC 17.02, the regular self-defense instruction, “when appropriate.” WPIC 17.04 at 203. WPIC 17.04 expands the reach of self-defense by allowing a person to act on appearances in defending himself even if afterwards he was mistaken as to the extent of the danger. Defendant’s theory of the case warranted this instruction as he claimed that the victim had a gun (RP 346), despite that a gun was never found on the victim or at the scene. RP 206-208, 220-221.

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<sup>2</sup> WPIC 17.04 states: 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 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. 11 Washington Practice: Washington Pattern Jury Instructions 203, WPIC 17.04 (2d ed. 1994) (Cited as “WPIC 17.04”).

Defense counsel may not have been aware that the language “great bodily harm” in the act on appearances instruction has been questioned because the case this language was drawn from has not been overturned. The comment to WPIC 17.04 states that the act on appearances defense is based on State v. Miller, 141 Wash. 104, 250 P. 645 (1926), which states that defendants can act on appearances “if they believed in good faith and on reasonable grounds that they were in actual danger of *great bodily harm*.” Miller, 141 Wash. at 105-106 (emphasis added). Prior to 1994, WPIC 17.04 referred merely to injury, not great bodily harm. WPIC 17.04 at 204. In 1994, the Washington Supreme Court Committee on Jury Instructions changed WPIC 17.04 to more accurately state the law on apprehension of danger as set forth in State v. Miller and its progeny. Id. In doing so, the Committee quoted language from the Miller opinion that referred to danger of great bodily harm (rather than danger of injury) and inserted it into WPIC 17.04. Id. (quoting Miller, 141 Wash. at 105-6).

In sum, it was reasonable for defense counsel to propose an “act on appearance” jury instruction considering that the jury instruction would have (1) arguably expanded defendant’s self defense claim, (2) was taken from a WPIC, and (3) was based off language from a Washington Supreme Court case that has not been overturned.

Defendant relies on three cases to allege defendant’s trial counsel was deficient in proposing WPIC 17.04: State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. Rodriguez, 121 Wn. App. 180, 87

P.3d 1201 (2004); and State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984, (2001). However, none of these cases mention or explicitly overrule Miller. Moreover, even after these cases were published the Washington Supreme Court Committee on Jury Instructions did not change the language in the act on appearances instruction. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 157, WPIC 17.04 (Supp. 2005).

**ii. Defendant was not prejudiced because there is no likelihood that the term “great bodily harm” in the act on appearances instruction affected the outcome.**

Defendant relies on the cases of Walden and Rodriguez<sup>3</sup> for the proposition that he was prejudiced by the language “great bodily harm” being included in the act on appearances instruction. Defendant alleges he was harmed by the court defining great bodily harm as “injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that creates significant serious permanent loss or impairment of the function of any bodily part.” Defendant argues that

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<sup>3</sup> Although defendant does not refer to it Division Two adopted Rodriguez in State v. Marquez, 131 Wn. App. 566, 577, 127 P.3d 786 (2006). Marquez is distinguishable because defendant did not argue that the victim was threatening to shoot defendant at close range. Marquez, 131 Wn. App. at 569 (defendant claimed his girlfriend had been punched). Further, the court did not analyze the instruction under an ineffective assistance of counsel claim, which shifts the burden of proof to defendant who has to show the result of the proceeding would have been different.

when the definition of great bodily harm is read with the self-defense instructions it raised the bar for lawful self defense. That is that the jurors would have to find that in order to act in self-defense, defendant had to believe that he was in actual danger of great bodily harm (i.e. probability of death, serious permanent disfigurement, etc...).

Walden and Rodriguez are distinguishable because in those cases the defendants did not argue that the victims were threatening to shoot them at close range. Walden, 131 Wn.2d at 471-472 (defendant had been pushed off a bicycle and claimed three unarmed teenagers were going to beat him up); Rodriguez, 121 Wn. App at 180 (defendant claimed he was scared of younger victim who wore a big ring and had threatened to knock defendant's teeth out).

Unlike the defendants in Walden and Rodriguez who allegedly feared being beaten with fists, defendant's theory was that he feared being killed by a gun shot. Defendant's theory makes moot his claim that inclusion of the term "great bodily harm" raised the bar of lawful self-defense. The threat of a gunshot at close range, "easily and obviously satisfies" the definition of great bodily harm. See Freeburg, 105 Wn. App. at 505 (defendant not prejudiced by definition of great bodily harm in self defense instructions when defendant's theory was that he faced a gunshot at close range).

In this case, defendant testified that he thought the victim "was going to try to kill me." RP 347. Defendant affirmed that the victim was

walking along side his vehicle. RP 344. Defendant claimed that if the victim's gun had not snagged the victim would have fired it at the defendant. RP 348. Defendant claimed that he was in immediate fear of his life. RP 348. Had the jury believed defendant, it would doubtless have believed he faced a threat of great bodily harm. Accordingly, defendant was not prejudiced by the language "great bodily harm," because there is no likelihood that jury instruction affected the outcome.

b. Aggressor Instruction.

i. **It was reasonable for defense counsel not to object to the aggressor instruction when it was supported by credible evidence.**

To prevail on ineffectiveness claim involving counsel's failure to raise legal issue, defendant must show that the issue has merit. See Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)). Credible evidence of a defendant's provoking act is appropriate grounds for a first-aggressor instruction. Riley, 137 Wn.2d at 909-10. A first-aggressor instruction may also be proper when the record shows the defendant was intentionally involved in wrongful conduct before the charged assault

occurred, which a “jury could reasonably assume would provoke a belligerent response by the victim.” State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985). A court may properly give a first-aggressor instruction even when there is conflicting evidence as to whether the defendant’s conduct precipitated a fight. State v. Davis, 119 Wn.2d 657, 665-66, 835 P.2d 1039 (1992); see also State v. Heath, 35 Wn. App. 269, 666 P.2d 922, review denied, 100 Wn.2d 1031 (1983) (first-aggressor instruction was deemed proper when there was conflicting evidence about whether defendant’s prior threatening act or victim’s blows provoked the fight in question).

Some courts have stated that first aggressor instructions are not favored because they may eliminate the claim of self-defense. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990) (citing State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039 (1989)). Two scenarios where courts have found first aggressor instructions inappropriate, are when (1) the defendant’s provoking “act” is merely belligerent language, Riley, 137 Wn.2d at 911; and (2) the defendant’s only threatening act towards the victim is the assault itself; State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

In this case, it was appropriate for defense counsel not to object to the aggressor instruction. The State presented evidence found that defendant provoked the need to act in self-defense based on the following evidence: (1) defendant raced up behind Thomas at a stop light (RP 56-

57); (2) defendant pulled right up on Thomas as if he was chasing Thomas down (RP 58); (3) defendant stuck his head all of the way out of his window (RP 65); and (4) Thomas thought defendant pulling up on him was a challenge to fight (RP 66). Despite defendant's assertions, this evidence shows defendant's threatening conduct precipitated any alleged assault by Thomas. Further, this conduct was not merely belligerent language. The first aggressor instruction was supported by the evidence. In sum, it counsel was not deficient for failing to challenge the instruction. Further, no prejudice resulted to defendant because the instruction was not given in error.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this court to affirm defendant's convictions.

DATED: JANUARY 18, 2007

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Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*Victor Johnson*  
Date Signature

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