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NO. 35185-4-II

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

STATE OF WASHINGTON

Respondent,

v.

JUAN REYES-MARQUEZ,

Appellant.

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ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Diane M. Woolard, Judge
OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred in using combined instructions pertaining to “great bodily harm,” contrary to *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004) and *State v. Marquez*, 131 Wn.App. 566, 127 P.3d 786 (2006).

2. The trial court erred by giving Instruction 10, which provides:

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.

3. The trial court erred by giving Instruction 14, which provides:

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.

4. Reyes-Marquez was denied effective assistance of counsel when trial counsel proposed Instruction 14.

5. There was insufficient evidence presented to convict Reyes-Marquez of first degree assault.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has the due process right to jury instructions that accurately state the law and make the relevant standard

manifestly apparent to the jury. The trial court instructed the jury that Reyes-Marquez was entitled to act on appearances in defending himself, but only if he reasonably believed that he was in actual danger of great bodily harm. The trial court instructed the jury that “[g]reat 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.” Did the trial court use a combination of instructions that has been found to constitutionally defective in *State v. Rodriguez* and *State v. Marquez*? Assignments of Error No 1, 2, and 3.

2. A jury instruction misstating the law of self defense is an error of constitutional magnitude, which is presumed to be prejudicial. Were the instructions on self-defense constitutionally defective because they failed to make the relevant legal standard manifestly apparent to jurors? Assignments of Error No. 1, 2, and 3.

3. Where defense counsel proposed the instruction on appearances, was Reyes-Marquez denied effective assistance of counsel? Assignment of Error No. 4.

4. Is there sufficient evidence to convict Reyes-Marquez of first degree assault where the State failed to disprove beyond a reasonable doubt Reyes-Marquez's affirmative defense of self-defense? Assignment of Error No. 5.

C. STATEMENT OF THE CASE¹

1. Procedural history:

A jury convicted Juan Reyes-Marquez [Reyes-Marquez] of first degree assault, contrary to RCW 9A.36.011(1)(a), 9A.36.011(c).² The jury found that Reyes-Marquez was armed with a deadly weapon at the time of the commission of the crime, contrary to RCW 9.94A.602.³ The information

¹This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

²RCW 9A.36.011 provides:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

³RCW 9.94A.602 provides:

In a criminal case wherein there has been a special allegation and evidence

was filed by the State in Clark County Superior Court on February 9, 2006. Clerk's Papers [CP] at 1. An amended information was filed June 12, 2006. CP at 3.

The matter was tried to a jury, Superior Court Judge Diane Woolard presiding. Following conviction for first degree assault, Judge Woolard imposed on July 10, 2006 a standard range sentence of 147 months, including a 24 month deadly weapon enhancement. CP at 67-82. Timely notice of this appeal was filed August 2, 2006. CP at 84.

2. Substantive facts:

a. Overview of testimony

Law enforcement received a report on February 3, 2006, that a stabbing had occurred at a house located on Northeast 93rd Street in

establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, Billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

Vancouver, Washington. 1 Report of Proceedings [RP] at 59, 2RP at 165, 187.⁴ A car driven by Reyes-Marquez was stopped by Vancouver police on February 3, and he was taken into custody. 2RP at 166-67. Vancouver police officer Brian Viles testified that he obtained a Gerber or Leatherman type tool from Reyes-Marquez's right front pocket. 2RP at 168. Exhibit 45. The blade of the knife measured two and one half inches. 2RP at 194.

Humberto Tinajero-Gonzalez [Tinajero-Gonzalez] testified that he went to the house of Michelle Carrithers [Carrithers] with his friend Eduardo Sanchez-Ramirez [Sanchez-Ramirez] on February 3. 1RP at 97-98. He testified that Carrithers had called him at his house and said that she needed a ride to the store to buy cigarettes and pop. 1RP at 97. Sitting in the car outside her house, Tinajero-Gonzalez called her and told her that he had the ride she had asked for. 1RP at 98. He testified that she told him that she already had a ride, but that he should come inside the house and wait for her. 1RP at 99. He testified that Carrithers let him inside the house and then left in another vehicle. 1RP at 100. He stated that he sat on a couch after

⁴ The Verbatim Report of Proceedings consists of 2 volumes of transcripts [RP], which are referred to in this Brief as follows:

1RP April 25, 2006 CrR 3.5 Suppression Hearing, June 12, 2006 Jury Trial
2RP June 13, 2006 Jury Trial, June 14, 2006 Jury Trial, July 6, 2006 Sentencing Continuance, July 10, 2006 Sentencing Hearing

Carrithers left, and that Reyes-Marquez grabbed him by the neck and stabbed him. 1RP at 99, 101-02. He stated that Reyes-Marquez then ran out the front door and left in his car. 1RP at 103-05. Sanchez-Ramirez testified that Carrithers called 911. 1RP at 129. Tinajero-Gonzalez was taken to the hospital by ambulance. 1RP at 139. He remained in the hospital for two weeks. 1RP at 107.

Dr. Christoph Kaufman testified regarding the surgery and stated that Tinajero-Gonzalez had approximately 30 stab wounds, including seven to ten stab wounds to his front and seven to ten wounds to his back. 2RP at 214. He also had “so many stab wounds on his arms” that the doctor “got to 30 and [he] quit counting.” 2RP at 214. Some of the wounds were “at least four centimeters” in depth. 2RP at 214. A wound to his right kidney was four centimeters deep. He stated that a wound went into his heart. 2RP at 214. The wound to his heart was a potentially lethal injury. 2RP at 211-12, 214. He stated that had he not received immediate emergency treatment, there was a probability that he would have died. 2RP at 212.

Reyes-Marquez testified that he met Carrithers at Carl’s Jr., where they both worked. 2RP at 241. They started a dating relationship about two and one half years prior to the incident. 2RP at 241. After they had been together for one year they separated for four months, during which time she

started seeing Tinajero-Gonzales. 2RP at 242. After Tinajero-Gonzales left for Mexico they started seeing each other again. 2RP at 242.

Reyes-Marquez stated that he went to her house at 8 or 9 p.m. on February 3. 2RP at 243. Carrithers went to the store in Reyes-Marquez's car at 9:00 p.m. 2RP at 244. Tinajero-Gonzalez and Sanchez-Ramirez arrived in a car. 2RP at 244. Tinajero-Gonzalez knocked on the door. 2RP at 245. Tinajero-Gonzalez was looking for Carrithers, and Reyes-Marquez told him that she was not at home. 2RP at 245. He testified that Tinajero-Gonzalez's "demeanor was a little aggressive" and he insisted that Carrithers was at home. 2RP at 245. Reyes-Marquez testified that he pushed him aside and entered the house, and that he then pushed Tinajero-Gonzales against the wall, and Tinajero-Gonzalez hit him with his fist on the side of his head. 2RP at 246-47. Reyes-Marquez hit him back, and he fell to the floor. 2RP at 247. He stated that after Tinajero-Gonzalez fell, he pulled a knife out of his left pocket. 2RP at 247. He testified that he saw Tinajero-Gonzalez trying to get up and he "rushed towards him and I grabbed him by the hand and I pinned him against the wall." 2RP at 247. He grabbed Tinajero-Gonzalez's hand and he dropped the knife and then tried to get it again. 2RP at 248. They struggled for the knife and Reyes-Marquez got it. 2RP at 248. They continued to fight, and as they did, Reyes-Marquez hit him with the

hand he used to hold the knife, stabbing him. 2RP at 249. He testified that the fight ended in the back yard. 2RP at 250. Tinajero-Gonzales fell on the ground and did not get up. 2RP at 250. Carrithers and Sanchez-Ramirez came into the back yard, and Tinajero-Gonzalez told Eduardo to get his brother, Gustavo Tinajero-Gonzalez. 2RP at 251. Reyes-Marquez retrieved his car keys and then left in his vehicle. 2RP at 252.

b. Reyes-Marquez's statements to law enforcement

Detective Rick Buckner of the Clark County Sheriff's Department was dispatched to Carrither's residence in response to the report of the stabbing. 1RP at 3. Reyes-Marquez was arrested and transported to the Vancouver Police Department. 1RP at 5. Vancouver police officer Shane Hall read Reyes-Marquez his warnings written in Spanish pursuant to *Miranda*⁵ RP at 11, 13, 17, 18-20. Officer Shane Hall testified that Reyes-Marquez appeared to understand his rights and that he agreed to waive his rights. 1RP at 20.

Officer Hall testified that Reyes-Marquez told him that on February 3 he went to his girlfriend Carrithers' house and that they were going to go out. 2RP at 179. He stated that Reyes-Marquez told him that while he was at her

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

house, he saw by checking caller ID that Tinajero-Gonzalez had called multiple times. 2RP at 179. Carrithers left the house to the store to get cigarettes, and Tinajero-Gonzalez called again while she was out. 2RP at 179. He testified that Reyes-Marquez told him that he looked outside and saw a car parked outside the house, and then Tinajero-Gonzalez came to the door. 2RP at 180. Reyes-Marquez told him that he told Tinajero-Gonzalez to leave Carrithers alone. 2RP at 180. He told the police that they started to fight and Reyes-Marquez became angry and he stabbed Tinajero-Gonzalez multiple times. 2RP at 180. He stated that Tinajero-Gonzalez ran out and fell onto the porch and that Reyes-Marquez went out and saw him there. 2RP at 180. He stated that he stopped attacking him at that point. 2RP at 180. Carrithers came home at that point and that he got scared that he left in his car. 2RP at 180.

c. Suppression hearing

Judge Woolard heard the defense motion to suppress Reyes-Marquez's alleged statements to law enforcement on April 25, 2006. 1RP at 1-36. Judge Woolard found that statements made to law enforcement were admissible at trial. 1RP at 29.

The following findings of fact and conclusions of law were entered August 11, 2006 regarding the CrR 3.5 motion:

I. Undisputed Facts

1. The defendant was arrested by police officers on February 3, 2006. He was subsequently transported to the Vancouver Police Department central precinct for an interview by detectives.
2. The defendant speaks the Spanish language and is not fluent in the English language.
3. Officer Shane Hall took Spanish courses in school from 7th through 12th grades, attended the Latter Day Saints Language Training Center Spanish Immersion Program in 1992, spent two years on a religious mission to Mexico requiring speaking in the Spanish language from 1992 to 1994, received a BA degree in Spanish from Idaho State University in 1998, was a Oregon State Police certified Spanish communication facilitator from 2000-2003, and was an assistant instructor for a Law Enforcement Spanish survival Course in 2006.
4. On February 2, 2006 Officer Hall interpreted an interview of the defendant conducted by detectives Buckner and O'Mara. He translated the detective's English questions into Spanish and the defendant's Spanish answers into English.

5. Prior to the beginning of the interview the defendant was read his *Miranda* warnings in Spanish off a department issued card by Officer Hall. The defendant understood his warnings, waived the, agreed to answer the detectives questions and to have his interview tape recorded.
6. There was no indication that the defendant was under the influence of alcohol or drugs at the time of his interview.
7. No threats or promises were made to the defendant in relation to his being interviewed.
8. The defendant's responses to the questions he was being asked were appropriated in the sense that they reflected an understanding of the question and were one of a series of response a person might make to the question asked.

II. Disputed Facts

None.

III. Conclusions as to the Disputed Facts

Not Applicable.

IV. Conclusions as to Whether the Statement is Admissible and the Reasons Therefore

1. Officer Hall is a qualified Spanish / English interpreter based on his prior education in and experience with the Spanish language.
2. The defendant understood his *Miranda* warning and made a knowing and intelligent waive of his right to remain silent and agreed to answer the questions that the detectives asked him.
3. The statements made by the defendant to the detectives on February 3, 2006 will be admissible at trial.

Supplement Clerk's Papers at 1-3.

d. Jury instructions

The trial court gave instructions on self-defense, including an instruction that Reyes-Marquez was entitled to act on appearances:

The instruction defining "great bodily harm" was Instruction No. 10:

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.

CP at 50. Appendix A.

The self-defense instruction was Instruction No. 14:

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.

CP at 54. Appendix B.

Neither counsel noted exceptions to requested instructions not given or objected to instructions given. 2RP at 273.

e. Verdict

The jury found Reyes-Marquez guilty of first degree assault while armed with a deadly weapon. 2RP at 314. CP at 200, 201, and 202.

3. Sentencing:

The matter came on for sentencing on July 10, 2006. 2RP at 318-24.

Reyes-Marquez was given an opportunity for allocution, which he did through an interpreter. 2RP at 320.

The court sentenced Reyes-Marquez to a standard range sentence of 147 months, with credit for 156 days served. 2RP at 321. CP at 67.

D. ARGUMENT

**1. THE TRIAL COURT USED “COMBINED”
INSTRUCTIONS THAT HAVE BEEN FOUND
TO BE CONSTITUTIONALLY DEFECTIVE**

The trial court erred because it instructed the jury using “combined” instructions previously found constitutionally defective in *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004). See also, *State v. Marquez*, 131

Wn.App. 566, 127 P.3d 786 (2006).

Jury instructions on self-defense “must more than adequately convey the law.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The instructions, when read as a whole, must make the relevant legal standard manifestly apparent to the average juror. *Rodriguez*, 121 Wn.App. at 185, (quoting *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Self-defense requires only a subjective, reasonable belief of imminent harm. *State v. LaFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

In *Rodriguez*, Division Three addressed the error arising from “combined” jury instructions. In the context of first degree assault, the *Rodriguez* trial court similarly defined "great bodily harm" to mean "probability of death, or which causes significant serious permanent disfigurement...." As here, the *Rodriguez* trial court did not give a separate instruction accurately defining "great bodily harm" for purposes of establishing self defense. *Rodriguez*, 121 Wn.App. at 186. Reversing *Rodriguez*'s conviction, Division Three reasoned,

[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.

Rodriguez, 121 Wn.App. at 186 (quoting *Walden*, 131 Wn.2d at 477).

In February, 2006, this Court found in *State v. Marquez*, 131 Wn.App. 566, 127 P.3d 786 (2006), that an identical instruction of “great bodily harm” and a similar instruction for defense of others was erroneous, and reversed Marquez’s conviction. In *Marquez*, the instruction for defense of others given was:

A person is entitled to act on appearances in defending another, if that person believes in good faith and on reasonable grounds that another 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.

The self-defense instruction given in the case at bar provided:

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.

CP at 54.

In the present case, the trial court instructed the jury that Reyes-Marquez was entitled to act on appearances in defending himself if he “believe[d] in good faith and on reasonable grounds that he [was] in actual danger of great bodily harm . . .” Instruction 14, CP at 54. As was the case

in *Rodriguez* and *Marquez*, the trial court instructed the jury by defining "great bodily harm" only in the context of first degree assault, without redefining it in the context of self defense.

The court defined "great bodily harm" to mean "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." Instruction 10, CP at 50. As a result, the combined instructions, especially in the absence of a separate "great bodily harm" instruction specifically tailored to self defense, improperly increased the likelihood of Reyes-Marquez's conviction for first degree assault. When taken together, the instructions allowed the jury to find that the assault was justified only if Reyes-Marquez reasonably believed that he was in actual danger of being killed or would have suffered from serious permanent disfigurement or impairment—the definition of great bodily harm contained in Instruction 10 in the context of first degree assault.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and inform the jury of the applicable law when read as a whole. *Rodriguez*, 121 Wn.App. at 184-85. As was the case in *Rodriguez* and *Marquez*, in Reyes-Marquez's case the trial court did not give an additional instruction defining "great

bodily harm” for purposes of “self defense.” Reyes-Marquez did not object to the trial court's failure to give such an instruction; therefore the jury received only the definition of “great bodily harm” applicable to proving first degree assault. Here, the combination of instructions is fatally flawed and creates the precise problem that required reversal in *Rodriguez* and *Marquez*.

a. The error was not harmless.

The error is presumptively prejudicial. *State v. Walden*, 131 Wn.2d at 473, 932 P.2d 1237 (a jury instruction that misstates the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial).

See also, *Marquez*.

2. REYES-MARQUEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel for Reyes-Marquez proposed the following instruction regarding appearances:

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.

CP at 33.

Counsel proposed no additional instruction regarding self-defense or great bodily harm. There is no conceivable strategic purpose for using the

“combined” instructions in a self-defense case, since the instructions lower the State’s burden of proof and increases the likelihood of conviction. *Rodriguez*, 121 Wn.2d at 187. Therefore, counsel’s performance in proposing the appearances instructions was deficient. *Rodriguez*, 121 Wn.2d at 187. Moreover, this deficient performance prejudiced Reyes-Marquez. The erroneous instructions lowered the State’s burden and increased the probability of conviction. Therefore, Reyes-Marquez was denied effective assistance of counsel, as was the case in *Rodriguez*. *Id.* at 188.

3. **THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT REYES-MARQUEZ OF ASSAULT IN THE FIRST DEGREE**

In a criminal sufficiency claim the defendant admits the truth of the State’s evidence and all inferences that may be reasonably drawn from them. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

In a criminal matter, the State must prove every element of the crime

charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Self-defense is an affirmative defense to a charge of assault. *See State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984):

Self-defense is defined by statute as a lawful act. *See* RCW 9A.16.020(3). It is therefore impossible for one who acts in self-defense to be aware of facts or circumstances “described by a statute defining an offense.” RCW 9A.08.010(1)(b)(i). This is just another way of stating that proof of self-defense negates the knowledge element of second degree assault.

The use of force is lawful when used by a person about to be injured. RCW 9A.16.020(3). A person’s right to use force is dependent upon what a reasonably cautious and prudent person in similar circumstances would have done and whether he reasonably believed he was in danger of bodily harm; actual danger need not be present. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980). Whether an individual acted in self-defense is typically a question for the trier of fact. *See State v. Fischer*, 23 Wn. App. 756, 759, 598 P.2d 742, *review denied*, 92 Wn.2d 1038 (1979).

When a defendant makes a claim of self-defense, he or she must set forth sufficient facts to establish the possibility of self-defense before the burden of proof shifts to the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Robbins*, 138 Wn.2d 486,

495, 980 P.2d 725 (1999), *see State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (“To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.”)

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required: “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

a. The prosecutor failed to meet his burden of disproving self-defense beyond a reasonable doubt

Since Reyes-Marquez’s defense at trial was self-defense, and since Reyes-Marquez produced evidence to support his claim of self-defense, the burden shifted to the prosecution to prove the absence of self-defense beyond a reasonable doubt.

Here, the State argued a “love triangle” theory, submitting that Carrithers lived with Tinajero-Gonzalez for a four month period after Tinajero-Gonzalez got back from Mexico, and that Reyes-Marquez attacked him out of jealousy. The State intimated that Carrithers was involved in the incident. The State contends that the actions of Carrithers, the wounds to his

back, and the fact that Reyes-Marquez left the house after incident point to someone who has violently attacked another, not someone who has acted in self-defense. 2RP at 290.

At best, this evidence merely raises a colorable argument that it is *possible* that Reyes-Marquez attacked Tinajero-Gonzalez first, but does not prove even by a preponderance of the evidence that this occurred in the manner described by Tinajero-Gonzalez.

The State failed to present sufficient evidence to establish beyond a reasonable doubt that Reyes-Marquez did not act in self-defense. Since self-defense is an affirmative defense to the charge of assault, and since the State failed to prove beyond a reasonable doubt that Reyes-Marquez did not act in self defense, this court must vacate his conviction and dismiss this case.

E. CONCLUSION

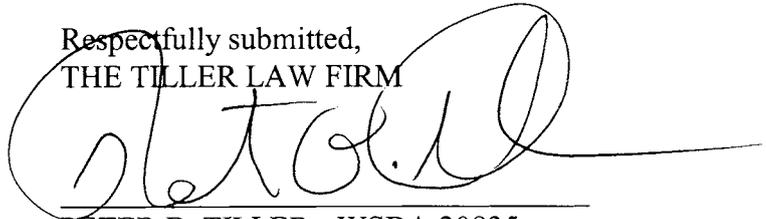
For the foregoing reasons, Reyes-Marquez respectfully requests that this Court reverse his conviction and order dismissal of the Information with prejudice.

In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

/ / /

DATED: December 27, 2006.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "P. Tiller", written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

PETER B. TILLER - WSBA 20835
Of Attorneys for Juan Reyes-Marquez

A

INSTRUCTION NO. 10

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.

B

Instruction # 14

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.

FILED
COURT OF APPEALS
DIVISION II

06 DEC 28 AM 11:20

STATE OF WASHINGTON
BY CMH
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JUAN REYES-MARQUEZ,

Appellant.

COURT OF APPEALS NO.
35185-4-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Juan Marques, Appellant, and Michael Kinnie, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on December 27, 2006, at the Centralia, Washington post office addressed as follows:

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Court of Appeals
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Tacoma, WA 98402-4454

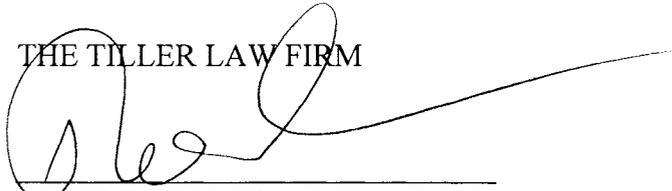
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A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over the printed name of the law firm.

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

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