

Court of Appeals No. 35706-2-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

**IN RE: PERSONAL RESTRAINT PETITION OF
AARON MICHAEL DAVIS**

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

**PIERCE COUNTY SUPERIOR COURT
NO. 03-1-04572-3**

**THE HONORABLE JOHN A. MCCARTHY,
Presiding at the Trial Court.**

OPENING BRIEF OF PETITIONER

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I. ASSIGNMENTS OF ERROR

1. Mr. Davis was denied his constitutional right to effective assistance of counsel at trial.
2. Mr. Davis received ineffective assistance of appellate counsel in his previous appeal.

II. ISSUES PRESENTED

1. Was it effective assistance of counsel for Mr. Davis' trial counsel to propose an instruction on self-defense which misstated the law of self-defense? (Assignment of Error No. 1)
2. Was it effective assistance of trial counsel for Mr. Davis' trial counsel to fail to object to the jury being given the "first aggressor" jury instruction? (Assignment of Error No. 2)
3. Was it ineffective assistance of appellate counsel for Mr. Davis' previous appellate counsel to fail to raise the issue that Mr. Davis received ineffective assistance of trial counsel for proposing erroneous jury instructions regarding self defense? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

Factual and Procedural background

Appellant Davis adopts and incorporates the factual and procedural background as set forth in Mr. Davis' Personal Restraint Petition, the Response Brief of the State, and the decision entered by this court on October 18, 2005, in cause number 31910-1.

IV. ARGUMENT

1. **Mr. Davis received ineffective assistance of counsel requiring his convictions to be vacated and his case remanded for a new trial.**

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (*citing State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)).

The remedy for ineffective assistance of counsel is remand for a new trial. *See In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

- A. It was ineffective assistance of counsel for Mr. Davis’s trial counsel to propose jury instruction number 31.

At trial, Mr. Davis’ defense to the charge of assault was that he acted in self defense. RP 528. Accordingly, the jury in this case was given jury

instructions 29 through 32 which instruct the jury on the law regarding the ability of an individual to use force in self defense. CP 84-131.

Under RCW 9A.16.020, “The use [of] force upon or toward the person of another is not unlawful...Whenever used by a party about to be injured...in preventing or attempting to prevent an offense against his or her person...in case the force is not more than is necessary.” “[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

Here, jury instruction 29 provided, in pertinent 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 necessary.” CP 84-131. (Emphasis added).

Jury instruction 21 defined bodily injury as “physical pain or injury, illness or an impairment of physical condition.” CP 84-131.

Under Washington law, the use of force in self defense is justified if the defendant reasonably believed he was about to be injured. RCW 9A.16.020; *State v. Woods*, 138 Wn.App. 191, 201, 156 P.3d 309 (2007); *State v. Rodriguez*, 121 Wn.App. 180, 185, 87 P.3d 1201 (2004) (“Self-

defense requires only a “subjective, reasonable belief of imminent harm from the victim.”). Deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or “great personal injury.” *Walden*, 131 Wn.2d at 474, 932 P.2d 1237.

Here, jury instruction 31 read as follows,

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 danger. Actual danger is not necessary for the use of force to be lawful.

CP 84-131. (Emphasis added).

Jury instruction 20 defined great bodily harm as, “bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes significant permanent loss or impairment of the function of any bodily part or organ.” CP 84-131. Jury instruction 20 was the only definition of “great bodily harm” provided to the jury.

The jury instruction which ultimately became jury instruction number 31 was originally proposed as jury instruction number 4 in the defendant’s proposed instructions. CP 260-280. Defendant’s proposed jury instruction number 4 was based on WPIC 17.04.

Numerous Washington Courts have held that the “great bodily harm” language contained in WPIC 17.04 is an incorrect statement of the law of self

defense. In *Woods*, Mr. Woods was convicted of third degree assault while armed with a deadly weapon. *Woods*, 138 Wn.App at 194, 156 P.3d 309. On appeal, Mr. Woods argued his trial counsel was ineffective for proposing the self defense jury instruction given in his case which was based on WPIC 17.04. *Woods*, 138 Wn.App at 196, 156 P.3d 309. The jury in Mr. Woods' trial was given two instructions, instruction 12 and 13, which were virtually identical to jury instructions 29 and 31 given to Mr. Davis' jury. *Woods*, 138 Wn.App at 199-200, 156 P.3d 309. The *Woods* court agreed with Mr. Woods that the "act on appearances" instruction based on WPIC 17.04 was an erroneous statement of the law of self-defense:

Mr. Woods correctly contends that instruction 13 [the instruction based on WPIC 17.04] exceeded the bounds of the law in requiring the jury to find that he believed he was in actual danger of great bodily harm. Instruction 13 is inconsistent with instruction 12, and it is an erroneous statement of the law of self-defense. Even in homicide cases, the defendant does not have to establish that he reasonably feared great bodily harm. *See, e.g., Walden*, 131 Wn.2d at 475 n. 3, 932 P.2d 1237 (the instruction defining justifiable homicide as well as the "act on appearances instruction" must use the term "great personal injury" and not "great bodily harm").

This distinction is meaningful. "Great personal injury is an injury that would produce severe pain and suffering"; whereas "great bodily harm is injury creating probability of death or causing significant serious permanent disfigurement, or creating significant permanent loss or impairment of the function of a bodily part or organ." *State v. Freeburg*, 105 Wn.App. 492, 504, 20 P.3d 984 (2001). Because great bodily

harm is an injury far more severe than great personal injury, the *Freeburg* court held it “imperative” that trial courts use the correct language. *Id.* at 507, 20 P.3d 984; *see also State v. Corn*, 95 Wn.App. 41, 975 P.2d 520 (1999) (great bodily harm instruction not harmless).

But a more significant problem here is that WPIC 17.04 sets out the standard for self-defense-albeit incorrectly-applicable in deadly force cases. As set forth above, in cases not involving death, the use of force is justified if the defendant reasonably believed he was about to be injured. Instruction 13 wrongly instructed the jury that the type of injury Mr. Woods had to fear in order to defend himself was one involving great bodily harm. If the distinction between great bodily harm and great personal injury is significant, the distinction between great bodily harm and mere injury is even more so.

State v. L.B., 132 Wn.App. 948, 135 P.3d 508 (2006) supports our position. *L.B.* involved a juvenile charged with fourth degree assault. Before issuing its ruling, the trial court noted that WPIC 17.04 permits a defendant to act in self-defense if he had a reasonable belief he was in danger of great bodily harm. *Id.* at 951, 135 P.3d 508. Division One of this court ruled that WPIC 17.04 was not an accurate statement of the law, explaining:

According to the plain language of RCW 9A.16.020(3), a person has a right to use force to defend himself against danger of injury, “in case the force is not more than is necessary.” The term “great bodily harm” places too high of a standard for one who tries to defend himself against a danger less than great bodily harm but that still threatens injury. Where the defendant raises a defense of self-defense for use of nondeadly force, WPIC 17.04 is not an accurate statement of the law because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in

mere injury.

Id. at 953, 135 P.3d 508 (emphasis added).

In light of *Walden*, *Freeburg*, and *L.B.*, there was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law. The instruction eased the State of its proper burden of proof on self-defense, and Mr. Woods was prejudiced because the jury may have applied the more stringent "actual danger of bodily harm" language rather than the accurate "reasonably believes he is about to be injured" language.

Woods, 138 Wn.App at 200-202, 156 P.3d 309.

Similarly, in *Rodriguez*, the court found that it was ineffective assistance of counsel for Mr. Rodriguez's trial counsel to propose a jury instruction based on WPIC 17.04 which included the "great bodily harm" language where the jury was also instructed that, "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." *Rodriguez*, 121 Wn.App. at 184-188, 87 P.3d 1201. The "great bodily harm" definitional instruction given to the jury in *Rodriguez* is identical to jury instruction 20 given in this case.

In discussing why Mr. Rodriguez's trial counsel was ineffective for proposing those instructions, the *Rodriguez* court explained,

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 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 that 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.”

Rodriguez, 121 Wn.App. at 186, 87 P.3d 1201, citing *Walden*, 131 Wn.2d at 477, 932 P.2d 1237.

Mr. Davis’ case is almost identical to *Rodriguez*. Despite the clearly settled law on this issue, Mr. Davis’ trial counsel proposed jury instruction number 31 which included the incorrect “great bodily harm” language. RP 546-548.

Citing *Walden* and *Rodriguez*, Mr. Davis correctly argued in his pro-se Opening Brief that his trial counsel was ineffective for proposing jury instruction 31. Pro-se Opening Brief, p. 9-12.¹ Mr. Davis correctly pointed out that the Washington Supreme Court in *Walden*, and Division III in

¹ Unfortunately, the bulk of the deliberations regarding jury instructions occurred off the record and in the trial judge’s chambers. RP 546. However, trial counsel for Mr. Davis was afforded the opportunity the following day to put his objections to the jury instructions on the record. RP 546-548.

Rodriguez, explicitly disapproved of the use of the phrase “great bodily harm” in the “entitled to act on appearance” instruction contained in WPIC 17.04. Pro-Se Opening Brief, p. 9-10.

In its Response to Mr. Davis’ pro-se Opening Brief, the State properly concedes that Mr. Davis’ trial counsel was ineffective in failing to object to this instruction. State’s Response, p. 8. However, the State goes on to argue that because the issue of the instructional error was raised in a collateral attack rather than a direct appeal, Mr. Davis has the burden of demonstrating that “the error worked to his actual and substantial prejudice.” State’s Response, p. 8-9.

B. The ineffective assistance of counsel in proposing the incorrect jury instruction is a constitutional error which is presumptively prejudicial and requires vacation of Mr. Davis’ conviction and remand for a new trial.

Citing *In re Benn*, 134 Wn.2d 868, 940, 952 P.2d 116 (1998) and *In re St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992), the State argues,

in order to prove ineffective assistance of counsel, [Mr. Davis] must still prove that counsel’s deficient performance was prejudicial. In a direct appeal, there is a presumption of prejudice when instructional error occurs and it is the State’s burden to prove the error harmless. But this presumption does not exist in a collateral attack. On collateral review, the burden shifts to [Mr. Davis] to establish that the error was not harmless; in other words, to establish that the error was prejudicial. [Mr. Davis] must show “the error worked to his actual and substantial prejudice” in order to prevail on a

collateral review.

State's response, p. 8-9.

The State argues that, "[Mr. Davis] must show that he was actually and substantially prejudiced by the instructional error. In other words, to be entitled to relief, [Mr. Davis] has to show that the jury would have acquitted him had the court instructed them properly." State's Response, p. 9. The State is incorrect.

1. In re Benn *improperly expanded the holding of In re St. Pierre.*

In *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996), the Washington Supreme Court held,

Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard manifestly apparent to the average juror. In [*State v. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984)], for example, the court disapproved a jury instruction that adequately conveyed the reasonableness standard for self-defense but, by omitting a direction to consider all surrounding circumstances, failed to make that standard manifestly clear. **A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.**

LeFaber, 128 Wn.2d at 900, 913 P.2d 369. (Internal citations omitted) (emphasis added).

In *Benn*, Mr. Benn brought a motion to supplement his Personal Restraint petition to claim that the trial court's instruction on self-defense in

his case was erroneous under *State v. Hutchinson*, 85 Wn.App. 726, 938 P.2d 336 (1997) and *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996), and that his trial counsel represented him ineffectively by requesting the erroneous language. *Benn*, 134 Wn.2d at 884, 952 P.2d 116. The Supreme Court found that Mr. Benn's motion to supplement was time-barred, but went on to discuss *LeFaber* and its potential application to Mr. Benn's case:

Even if we could allow the defendant to raise this issue now, he would not be entitled to relief based on the instructional error. He relies on our holding in *LeFaber* that the erroneous instruction was presumptively prejudicial. *LeFaber*, 128 Wn.2d at 900, 913 P.2d 369. The issue was raised on direct appeal in *LeFaber*, however. There is no presumption of prejudice when an instruction is challenged in a personal restraint proceeding. See *In re St. Pierre*, 118 Wn.2d at 328-29, 823 P.2d 492. The petitioner "must show the error worked to his actual and substantial prejudice in order to prevail." *In re St. Pierre*, 118 Wn.2d at 329, 823 P.2d 492...As discussed above, the physical evidence refuted any plausible claim of self-defense. The failure of the instructions to clarify the subjective nature of the defense therefore could not have affected the verdict. The defendant was not actually and substantially prejudiced by the erroneous portion of the instruction.

Benn, 134 Wn.2d at 940, 952 P.2d 116.

In *St. Pierre*, the Washington Supreme Court held that, in a personal restraint petition,

The petitioner's burden to establish actual and substantial prejudice may be waived where the error gives rise to a conclusive presumption of prejudice. In dicta, we have previously suggested constitutional errors which can never be

considered harmless on direct appeal will also be presumed prejudicial for the purposes of personal restraint petitions. We now reject this proposition....we decline to adopt any rule which would categorically equate per se prejudice on collateral review with per se prejudice on direct review. **Although some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack**, the interests of finality of litigation demand that a higher standard be satisfied in a collateral proceeding...In the absence of per se prejudice, petitioner must show the error worked to his actual and substantial prejudice in order to prevail.

St. Pierre, 118 Wn.2d at 328-329, 823 P.2d 492. (Emphasis added).

Thus, *St. Pierre* rejected a rule that would make every constitutional error which was presumptively prejudicial on direct appeal also presumptively prejudicial on collateral attack. However, *St. Pierre* *did not* say that all constitutional errors which were presumptively prejudicial on direct review were not presumptively prejudicial on collateral attack. In fact, without identifying the errors to which it was referring, the *St. Pierre* court specifically held that “some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack.” *St. Pierre*, 118 Wn.2d at 329, 823 P.2d 492.

This interpretation of *St. Pierre* as acknowledging that some constitutional errors will be presumptively prejudicial in a collateral attack is supported by this court’s decision in *Riofta v. State*, 134 Wn.App. 669, 142 P.3d 193 (2006), where this court held that, in a personal restraint petition,

A petitioner may, however, collaterally challenge his conviction and sentence by raising genuinely new issues, whether constitutional or non-constitutional. To obtain relief based on a constitutional error, the petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the error. Under limited circumstances the petitioner's burden to establish actual and substantial prejudice may be waived when the error results in a conclusive presumption of prejudice.

Riofta, 134 Wn.App. at 687, 142 P.3d 193, (internal citations to *In re Pers.*

Restraint of Davis, 152 Wn.2d 647, 670, 101 P.3d 1 (2004), omitted). In

Davis, the Washington Supreme Court, citing *St. Pierre*, wrote,

Two types of challenges, constitutional or nonconstitutional errors, may be raised in a collateral attack on a conviction or sentence. To actually obtain relief on collateral review based on a constitutional error the petitioner must demonstrate by a preponderance of the evidence that petitioner was actually and substantially prejudiced by the error. Under limited circumstances “[t]he petitioner’s burden to establish actual and substantial prejudice may be waived where the error gives rise to a conclusive presumption of prejudice.” Although some errors that are per se prejudicial on direct appeal will also be per se prejudicial on collateral attack the interests of finality of litigation demand that a higher standard be satisfied in a collateral proceeding”. The standard of review on a nonconstitutional issue is different. Nonconstitutional error requires more than a mere showing of prejudice. We will consider nonconstitutional error only when “the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.”

Davis, 152 Wn.2d at 671-672, 101 P.3d 1, citing *In re St. Pierre*, 118

Wn.2d at 328, 329, 823 P.2d 492.

The Supreme Court in *Benn* read *St. Pierre* too broadly when it cited

St. Pierre for the proposition that, “There is no presumption of prejudice when an instruction is challenged in a personal restraint proceeding.” *Benn*, 134 Wn.2d at 940, 952 P.2d 116. The *Benn* court read *St. Pierre* as holding that no constitutional error which is presumptively prejudicial on direct review will be presumptively prejudicial on collateral attack. This is directly contrary to the language of *St. Pierre* that “some errors which result in per se prejudice on direct review *will also be* per se prejudicial on collateral attack.” *St. Pierre*, 118 Wn.2d at 329, 823 P.2d 492. (Emphasis added). While the *St. Pierre* court unfortunately did not identify which constitutional errors would be presumptively prejudicial on both direct review and on collateral attack, it clearly did hold that *some errors would be* presumptively prejudicial in both cases. This interpretation is confirmed by the holdings of *Riofta* and *Davis*.

Further, *St. Pierre* involved an issue of faulty charging documents and is not instructive on whether or not an erroneous jury instruction is presumptively prejudicial in a personal restraint petition. *St. Pierre* is not authority for the proposition it was cited to support in *Benn*, and the *Benn* court erred in so citing *St. Pierre*.

Benn was the only authority cited by the State to support its argument that Mr. Davis must still demonstrate that the ineffective assistance of counsel caused him actual and substantial prejudice. As discussed above, the court in

Benn misinterpreted and the holding of *St. Pierre* and was incorrect in ruling that all errors which are presumptively prejudicial in a direct appeal are not presumptively prejudicial in a collateral attack. The State's assertion that Mr. Davis must demonstrate actual and substantial prejudice lacks support and, as discussed below, is contrary to the law of Washington.

2. *Where a personal restraint petitioner can establish that he received ineffective assistance of counsel by his trial counsel proposing an incorrect jury instruction on the law of self-defense, that petitioner has met his burden to establish a per se constitutionally prejudicial error requiring a new trial.*

As the court wrote in *Davis*, following *St. Pierre*, a petitioner in a Personal Restrain Petition who alleges constitutional error bears the burden of demonstrating by a preponderance of the evidence that the petitioner was actually and substantially prejudiced by the error. *Davis*, 152 Wn.2d at 671-672, 101 P.3d 1. However, some errors that are per se prejudicial on direct appeal will also be per se prejudicial on collateral attack, and under limited circumstances the petitioner's burden to establish actual and substantial prejudice may be waived where the error gives rise to a conclusive presumption of prejudice. *Davis*, 152 Wn.2d at 671-672, 101 P.3d 1.

In this personal restraint petition, Mr. Davis is raising a claim of ineffective assistance of counsel on grounds that his trial counsel proposed

jury instructions which misstated the law on self defense.

The constitutional standard for a violation of the right to counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner [seeking relief in a personal restraint petition on grounds of ineffective assistance of counsel] must show that defense counsel's conduct was deficient, i.e., that counsel's performance fell below an objective standard of reasonableness.

In re Elmore, 162 Wn.2d 236, 251, 172 P.3d 335 (2007).

An appellant alleging ineffective assistance of counsel in a direct review must also meet the *Strickland* test in order to be granted relief:

To establish a claim of ineffective assistance of counsel [in a direct appeal], the defendant must show: (1) that counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances based on the record established below; and (2) the deficient performance 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. Rainey, 107 Wn.App. 129, 135, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028, 42 P.3d 974 (2002) *citing Strickland*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Thus, where a defendant seeks relief from his sentence on grounds he received ineffective assistance of counsel, the defendant has the same burden in a personal restraint petition as he has in a direct appeal.

As discussed above, in *LeFaber*, a direct appeal, the court held, "A

jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” *LeFaber*, 128 Wn.2d at 900, 913 P.2d 369. Thus, as the State has conceded, trial counsel who proposes an incorrect instruction on self defense renders ineffective assistance of counsel and the ineffective assistance results in presumptive prejudice to the defendant of a constitutional magnitude.

While *St. Pierre* does not identify which errors of constitutional magnitude are presumptively sufficiently prejudicial to warrant reversal when raised in a personal restraint petition, this court should find that a claim of ineffective assistance of counsel based on trial counsel’s proposal of jury instructions which incorrectly state the law of self defense is one such error.

The burden on the defendant to prove ineffective assistance of counsel is the same in both a direct review or a collateral attack. Therefore, if the giving of improper jury instructions would require remand in a direct appeal, that same erroneous jury instruction should require remand in a collateral attack. Whether the issue is raised in a direct appeal or in a personal restraint petition, the defendant has suffered the same prejudice and must meet the burden to establish ineffective assistance of counsel.

3. *Should this court find that the ineffective assistance of counsel is not presumptively prejudicial, Mr. Davis can still meet his burden to obtain relief in his collateral attack.*

The State argues that, because this is a collateral attack and not a direct appeal, “[Mr. Davis] must show that he was that he was actually and substantially prejudiced by the instructional error. In other words, to be entitled to relief, [Mr. Davis] has to show that the jury would have acquitted him had the court instructed them properly.” State’s Response, p. 9. The State is incorrect and cites the wrong standard of review.

In *In re Sims*, 118 Wn.App. 471, 73 P.3d 398 (2003), Mr. Sims was convicted of first degree manslaughter. *Sims*, 118 Wn.App at 473, 73 P.3d 398. The jury received an accomplice liability instruction which was later held to be erroneous in *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) and *State v. Roberts*, 142 Wn.2d 471 513, 14 P.3d 713 (2000). *Sims*, 118 Wn.App. at 473, 73 P.3d 398. In *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002), the Washington Supreme Court found that the error of giving the jury instruction which was found to be erroneous in *Cronin* and *Roberts* was subject to harmless error analysis. *Sims*, 118 Wn.App. at 473, 73 P.3d 398.

In its opinion on Mr. Sims’ personal restraint petition, Division 1 of the Court of Appeals discussed the burdens of proof in a personal restraint petition where the petitioner alleges instructional error:

[I]n a PRP, the burden shifts to the defendant to show prejudice:

On direct appeal, the burden is on the State to establish beyond reasonable doubt that any error of constitutional dimensions is harmless.

On collateral review, we shift the burden to the petitioner to establish that the error was not harmless; in other words, to establish that the error was prejudicial. Whereas the State's burden on direct appeal is beyond reasonable doubt, the petitioner's burden on collateral review should be beyond the balance of probabilities. Thus, in order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error.

To show prejudice, however, a defendant does not necessarily have to prove that he would have been acquitted but for the error. Rather...a defendant is prejudiced by a trial error if there is a "reasonable probability" that the error affected the trial's outcome and the error undermines the court's confidence in the trial's fairness. Thus, although the barrier to relief is greater than on direct appeal, we will still reverse if we have a "grave doubt as to the harmlessness of an error.

Sims, 118 Wn.App. at 476-477, 73 P.3d 398. (Internal citations omitted)
(emphasis added).

Thus, a petitioner's burden in a personal restraint petition alleging constitutional error is to demonstrate that more likely than not he was prejudiced by the error. Further, a defendant does *not* have to prove that he would have been acquitted but for the error; a defendant is prejudiced by a trial error if there is a "reasonable probability" that the error affected the trial's

outcome and the error undermines this court's confidence in the fairness of the trial.

Unlike the error in *Sims* which was reviewable under a harmless error standard, the error which occurred in Mr. Davis' case is a constitutional error which, as discussed above, on direct appeal is presumptively sufficiently prejudicial to require a new trial.

Should this court find that the prejudice caused to Mr. Davis by the ineffective assistance of counsel in this case is not presumptively sufficiently prejudicial to warrant a new trial when raised in a personal restraint petition, there is a "reasonable probability" that the error affected the trial's outcome.

As the State outlined in its Response Brief, there were two factual scenarios presented to the jury as to the assault in this case: the State's version of events that Ms. McCorrister pulled the can of pepper spray out of her purse and tried to spray Mr. Davis (possibly unsuccessfully) and Mr. Davis stabbed her (RP 49-50); or Mr. Davis' scenario that Ms. McCorrister successfully sprayed Mr. Davis in the neck, face, eyes, and mouth with mace and he saw the can of mace and swung at it in self defense when he could no longer breathe. RP 447-448, 528.

A correct jury instruction would have told the jury that Mr. Davis was authorized to use deadly force to protect himself if he had an objectively

reasonable belief that he was about to suffer great personal injury. As discussed above, under *Woods*, "great personal injury is an injury that would produce severe pain and suffering." Therefore, the jury should have been instructed that Mr. Davis was authorized to use deadly force to protect himself where he had an objectively reasonable belief that he was about to suffer an injury that would produce severe pain and suffering.

Had the jury been properly instructed, the jury could have believed that Mr. Davis was being sprayed with mace that rendered him unable to breathe at the time he swung at the can of mace. RP 447-448. The jury could have found that Mr. Davis was facing or actually suffering an injury which caused severe pain and suffering, and therefore was entitled to use deadly force to protect himself. The jury could therefore have found Mr. Davis not guilty of the crime of assault.

However, under the erroneous instructions given to the jury, the jury would have had to find that Mr. Davis had an objectively reasonable belief that he was about to suffer a bodily injury that creates a probability of death or serious permanent disfigurement or significant permanent loss or impairment of the function of any bodily part or organ.

The State argues that the fact that the jury found Mr. Davis guilty of unlawful imprisonment indicates that the jury did not believe Mr. Davis'

testimony. State's Response, p. 10. This argument is flawed. The crime of unlawful imprisonment was committed entirely separate and apart from the assault. The unlawful imprisonment occurred when Mr. Davis forced Mr. McCorrister into the truck against her will and would not let her leave. That crime was committed separately from the assault. The assault occurred when Ms. McCorrister was stabbed. Had the jury been properly instructed, it could have found that Mr. Davis committed unlawful imprisonment by refusing to allow Ms. McCorrister to exit the truck, but that Mr. Davis was justified in acting in self defense when Ms. McCorrister sprayed him in the face with mace.

That the jury found Mr. Davis to be credible is indicated by the fact that Mr. Davis was charged with first degree kidnapping (CP 17-19) but the jury found Mr. Davis guilty of the lesser included crime of unlawful imprisonment. CP 200-211.

If the jury believed Mr. Davis' version of events, as is indicated by the verdict of guilty to the lesser included crime of unlawful imprisonment, the improper jury instructions precluded the jury from finding Mr. Davis not guilty of the assault on grounds he acted in self defense.

More likely than not, Mr. Davis was prejudiced by his trial counsel's ineffective assistance in proposing jury instructions which misstated the law of

self defense. There is a “reasonable probability” that the incorrect jury instructions affected the outcome of the trial.

This court should vacate Mr. Davis’ convictions and remand this case for a new trial.

2. It was ineffective assistance of counsel for Mr. Davis’ trial counsel to fail to object to the giving of the “first aggressor” jury instruction.

A defendant whose aggression provokes the contact eliminates his right of self-defense. *State v. Douglas*, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). A first-aggressor instruction is proper when the record shows that the defendant is involved in wrongful or unlawful conduct before the charged assault occurred. *Douglas*, 128 Wn.App. at 562-63, 116 P.3d 1012. Thus, a first-aggressor instruction is appropriate when there is credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant’s use of force in self-defense. *Douglas*, 128 Wn.App. at 563, 116 P.3d 1012 .

The Washington Supreme Court has held that first-aggressor instructions should be used sparingly:

[F]ew 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. 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) (citations omitted). It is error to give such an instruction if it is not supported by credible evidence from which the jury can conclude that it was the defendant who provoked the need to act in self-defense. *State v. Kidd*, 57 Wn.App. 95, 100, 786 P.2d 847, *review denied*, 115 Wn.2d 1010, 797 P.2d 511 (1990). The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim. *State v. Wasson*, 54 Wn.App. 156, 159, 772 P.2d 1039, *review denied*, 113 Wn.2d 1014, 779 P.2d 731 (1989).

The facts of this case did not support the giving of the first aggressor jury instruction. Ms. McCorrister testified that at the time she pulled the Mace from her purse and sprayed Mr. Davis with it, Mr. Davis was yelling at Rick out the window of the truck. RP 49, 112-113 Mr. Davis confirmed that at the time he was sprayed with Mace he was looking out the window and yelling for Rick and that he had no idea why Ms. McCorrister sprayed him. RP 447-448, 526-529. The testimony of both these witnesses indicate that Ms. McCorrister was the individual who initiated the attack which lead to Mr. Davis stabbing her arm in self defense. The jury was presented with no

evidence from which it could conclude that Mr. Davis provoked Ms. McCorrister to spray him with Mace. The evidence did not suggest that Mr. Davis provoked the attack. Rather, the evidence suggests that at the time he was attacked by Ms. McCorrister, he was facing away from her and yelling at another person.

Despite the lack of evidence of provocation by Mr. Davis and despite the fact that Mr. Davis' defense to the charge of assault was self defense, Mr. Davis' trial counsel failed to object to the jury being given the "first aggressor" instruction. Given the facts of the case and Mr. Davis' defense, it was not objectively reasonable, nor could it be considered legitimate trial strategy for Mr. Davis' trial attorney to fail to object to the giving of the "first aggressor" jury instruction.

3. It was ineffective assistance of appellate counsel for Mr. Davis' previous appellate counsel to fail to argue that Mr. Davis received ineffective assistance of trial counsel.

"If a petitioner raises ineffective assistance of appellate counsel on collateral review, he or she must first show that the legal issue that appellate counsel failed to raise had merit. Second, the petitioner must show that he or she was actually prejudiced by appellate counsel's failure to raise the issue." *In re Personal Restraint Petition of Dalluge*, 152 Wn.2d 772, 777-778, 100 P.3d 279 (2004), citing *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332,

344, 945 P.2d 196 (1997).

In Mr. Davis' direct appeal, Mr. Davis' appointed counsel failed to raise the issue of the improper self defense jury instructions. As discussed above, in *LeFaber*, the court held that, "A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." *LeFaber*, 128 Wn.2d at 900, 913 P.2d 369. Thus, the issue of the erroneous self defense instructions both had merit and, had it been raised by previous appellate counsel, would have resulted in a mandatory remand for a new trial. Mr. Davis was therefore prejudiced by his previous appellate counsel's failure to assign error to the erroneous jury instructions.

Similarly, Mr. Davis' previous appellate counsel failed to raise the issue that Mr. Davis received ineffective assistance of trial counsel if failing to object to the first aggressor instruction. Like the issue regarding the self-defense instructions, the issue regarding the first aggressor instruction had merit and would have resulted in remand of Mr. Davis' case for a new trial.

Mr. Davis received ineffective assistance of appellate counsel. "The remedy for ineffective assistance of appellate counsel is reinstatement of the appeal." *Dalluge*, 152 Wn.2d 772, 788, 100 P.3d 279, citing *In re Personal Restraint of Frampton*, 45 Wn.App. 554, 563, 726 P.2d 486 (1986). This court should reinstate Mr. Davis' appeal and allow new briefing.

V. CONCLUSION

For the reasons stated above, this court should either find Mr. Davis received ineffective assistance of counsel, vacate Mr. Davis' convictions, and remand his case for a new trial, or reinstate Mr. Davis' appeal and allow new briefing.

DATED this 3rd day of March, 2008.

Respectfully submitted,

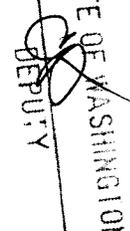


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CERTIFICATE OF SERVICE

The undersigned certifies that on March 3, 2008, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by U. S. Mail to: Aaron Michael Davis, DOC # 826869, North Fork Correctional Center, 1605 East Main Street, Sayre, Oklahoma 73662, true and correct copies of this Opening Brief. 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 March 3, 2008.


Norma Kinter

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