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DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

ADRIAN CONTRERAS REBOLLAR

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 06-1-01643-4
The Honorable Ronald Culpepper, Judge

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

ADRIAN CONTRERAS-REBOLLAR
Appearing pro se
DOC #819639

Clallam Bay Corrections Center
1830 Eagle Crest Way
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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

A. Assignments of Error 1

B. Issues Pertaining to the Assignments of Error 1

II. STATEMENT OF THE CASE 3

A. Substantive Facts 3

B. Procedural History 6

III. ARGUMENT & AUTHORITIES 7

A. Mr. Contreras was denied his right to a fair trial when his attorney rendered ineffective assistance of counsel 7

IV. CONCLUSION 26

TABLE OF AUTHORITIES

CASES

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984).....8, 9, 20

State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995).....15, 16, 17

State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001).....21

Haines v. Kerner,
404 U.S 519, 92 S. Ct. 594, 30 L. Ed. 2d 652.....26

Hall v. Corporation of Catholic Archbishop,
80 Wn.2d 797, 498 P.2d 844 (1972).....22

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....8

State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003).....14

State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996)..8, 18, 20, 23, 25

State v. Lewis, 6 Wn. App. 38, 491 P.2d 1062 (1971).....26

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)..7, 20, 25

State v. Penn, 89 Wn.2d 63, 568 P.2d 797 (1977).....10, 12

State v. Riley, 137 Wn. App. 904, 976 P.2d 624 (1999).....17

State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004).....21, 22

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....7, 15, 18, 25

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).....15

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997).....9, 22

State v. Wanrow, 88 Wn.2d 248, 937 P.2d 548 (1977).....15, 23

State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997)....12, 13, 17

State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007).....8, 9

CONSTITUTIONAL PROVISIONS

U.S. CONST. amd. VI.....7

U.S. CONST. amd. XIV § 1.....7, 8

WASH. CONST. art. 1, § 3.....7, 8

WASH. CONST. art. 1, § 21.....7

WASH. CONST. art. 1, § 22.....7

WASH. CONST. art. 1, § 22 (amd. X).....7

STATUTES

RCW 9A.16.020 (3).....9

OTHER AUTHORITIES

WPIC 17.02.....13

WPIC 17.04.....13, 19

WPIC 17.05.....13, 23

WPIC 2.04.01 at 22 (2d ed. 1994).....19

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Mr. Contreras' counsel was ineffective for failing to propose a "Defense of Another" instruction to the Jury.

2. Mr. Contreras' counsel was ineffective in giving misleading instructions regarding self-defense, and gave a "No Duty to Retreat" instruction.

B. Issues Pertaining to the Assignments of Error

1. was counsel ineffective when there was Sufficient substantial evidence that allowed Contrer-ras to argue to the Jury that he acted in "Defense of Another," but did not propose the instrunction? (Assinment of Error 1)

2. Were "Great Bodily Harm" was defined for the Jury as a neccessary element to prove assault in the First degree, was it misleading when read with "Great Personal Injury" which was left undefin-ed for the Jury? (Assinment of Error 2)

3. was counsel ineffective in proposing a "No Duty to Retreat" instruction were evidence did

not warrant that instruction, and defendant had asked for the proper definition of "Neccessary" to be submitted to the Jury? (Assingnment of Error 2)

II. STATEMENT OF THE CASE

A. Substantive Facts

The charges in this case stem from a shooting in the early morning hours of April 12, 2006. (RP3 120)[1] Adrian Contreras Rebollar (Contreras) asserted that he acted in self-defense because he believed Solis was going to shoot him and his passenger Regina Hernandez. (01/22/07 RP 162, 164; RP7 859-61, 872, 875-76; RP8 1006, 1008) Descriptions of the events leading up to the incident differ.

On the afternoon of April 11, 2006, Contreras accompanied Solis to his court appearance in Puyallup, and afterwards they parted company. (RP4 404, 406; RP7 840) After his court appearance Solis testified he went to a friends home and traded half a gram of dope to buy a .50 caliber rifle, which according to him it didn't work because he tried to fire it in a place he would not disclose. (RP4 410-11, 424-25) Contreras testified that they went to Hernandez's home after Solis' court appearance, and that Hernandez and Solis

[1] Citations to the trial transcripts contained in volumes numbered 1 through 8 will be to the volume number followed by the page number (RP# ##). Citations to the remaining volumes will be to the date of the proceeding followed by the page number (DATE RP ##).

took drugs. (RP7 841-42) As he was leaving, Hernandez got into his his car and said Solis was trying to touch her. (RP7 846) Contreras and Hernandez drove away, but Solis followed. (RP7 846-47) Contreras testified that he tried to get away from Solis, but he kept following them. (RP7 848) Contreras eventually parked, and Solis parked behind him. Solis looked mad, and Contreras thougt he was upset about Hernandez leaving with Contreras. (RP7 848-50)

According to Contreras, Hernandez got out of his car and started going off on Solis. (RP7 850) They argued, and when she returned, Hernandez told Contreras that Solis had tried to hit her with a crowbar. (RP7 850-51) Contreras then drove to Shawna's home, a mutual friend. (RP7 851) Hernandez then told Contreras he had to drop her off were Solis picked her up at. (RP7 854) She ended up driving back to East Tacoma, but, went to a Concrete's home instead to try and spend the night there. (RP7 855) Ahria Kelley was there and asked to be driven to the alley. (RP5 526-27; RP7 856-57) Both Kelley and Contreras testified Hernandez drove them there. (RP5 486; RP7 856)

Contreras and Hernandez testified that Solis was angry with his bandana covering his face and his visor rolled down.

(RP4 270-71; RP7 858-59) Hernandez indeed testified she was the first one to exit Contreras' car. (RP4 271)

Contreras testified that once Hernandez was out, Solis then pointed what appeared to be a shotgun at Hernandez. (RP7 859) Thereafter, Solis came after Contreras. (RP4 268-69; 270-73; 312; RP7 859-60) Hernandez got in the driver seat of Contreras' vehicle because According to her "I had to get out of there," and "I was scared." (RP4 276)

Hernandez managed to drive them to a friend Yessica Rosas' home. (RP4 276; RP7 865) Contreras and Hernandez eventually left Rosas' house and drove away. (RP4 288; RP5 575; RP7 869) At the same time, Solis' veicle was approaching them. (RP4 288, 414) Several factors cortributed to Contreras' fear that Solis was going to shoot him and Hernandez. (01/22/07 RP 162; 164) The first being: Solis made an illegal turn at a turn-around and headed straight towards them. (RP7 871-72) He was trying to identify who it was when he noticed the barell of a gun. (RP7 873; 910) It was raining and Solis' car was approaching them with his

driver's side window rolled down. (RP5 665; RP7 875) Solis' car sped up and Contreras saw its headlights turn off. (RP7 871-72) He believed that was a sign that Solis was preparing to commit a drive-by shooting. (RP7 872) He was afraid for his life and the life of Hernandez. (RP7 872) Contreras reached for his gun, ducked, and fired towards Solis' car. (RP7 875) He testified he was only trying to protect himself and Hernandez. (RP7 875-76) He did not feel that he had any other alternative because the only way out of the neighborhood was to pass Solis' car. (RP7 879)

B. Procedural History

The State charged Contreras by Information with two counts of first degree assault (RCW 9A.36.011(1)(a)), while armed with a firearm (RCW 9.94A.310/.510), and one count of second degree unlawful possession of a firearm (RCW 9.41.040(2)(a)(i)). (CP 1-2)

Contreras agreed to plead guilty to unlawful possession of a firearm, in order to avoid ~~intruction~~ introduction at trial of his prior felony convictions. (01/17/07 RP 12-52; CP 19-22)

The Jury convicted Contreras of both counts of first

degree assault, and found that he was armed with a firearm during commission of both crimes. (RP8 1046-47; CP 108-13). This appeal follows. (CP 129)

III. ARGUMENT & AUTHORITIES

A. Mr. Contreras was denied his right to a fair trial when his attorney rendered ineffective assistance of councel.

Every criminal defendant is entitled to a fair trial by an impartial Jury. U.S. CONST. amends. VI, XIV § 1; WASH. CONST. art. 1 § 3, 21, 22. A defendant is also guaranteed effective assistance of council. U.S. CONST. amd. VI; WASH. CONST. art. 1 § 22 (amend. X); see also Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The defendant must demonstrate the absence of a legitimate or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. Deficient performance is performance "below an objective standard of reasonableness based on consideration of all the circumstances" (quoting McFarland, 127 Wn.2d at 334-35). The Strickland test requires a Showing that council's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. Strickland,

at 688.

For this first part of the test Contreras relies on State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007). The Court held counsel was ineffective due to an inacurate instruction on self-defense given likely affected the outcome of the trial. "The legal standard we apply to Jury instructions is: 'Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the Jury of the applicable law." (quoting Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2001). However, self-defense instructions are subject to heightened appellate scrutiny. State v. LeFaver, 128 Wn.2d 896, 913 P.2d 369 (1996). 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. See State v. Acosta, 101 Wash.2d 612, 619, 683 P.2d 1069 (1984).

Due process requires the State to prove every element of the crime charged beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). As stated above, where the

issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. Acosta 101 Wash.2d at 615-16. In Woods it was held: Where the State is relieved from proving the absence of self-defense, an error of constitutional magnitude results, which may be raised for the first time on appeal. (citing State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). RCW 9A.16.020(3) sets out the parameters of self-defense and "Defense of Another" in our State, wich are defined to be lawful.

Hernandez testified that she could have been dead the night of the incident. Also, over State's objection, she nodded in the affirmative when defense counsel asked "He saved your life, didn't he?", although it was objected, it was not stricken. (RP4 309). But in the same examination at hand, when she was being questioned about the incident in the alley, she again said that she "could have been dead." (RP4 312-13) Also going back into State's direct examination, Hernandez was asked to "show the Jury how he {Solis} let you know he had a gun?" She explained, when she reached over to him, Solis said "No, get away from me," she then asked him "what are you talking about?", Solis then aimed the rifle at her "And then I seen a gun, and he went like that." She also testified Solis was trying to shoot it. (RP4 272-73)

Hernandez then went on to say that after that took place in the alley she drove to Yessica Rosas' home, "because I had to get out of there." Also, "I was scared." (RP4 276) She testified "we were only at Yessica's for 15 minutes." (RP4 284) Miss Rosas testified we were at her house "Like ten minutes, like not that long, a couple minutes," when asked how long after we left the house she heard gunshots, she said "Right away." (RP5 575) When asked to build up from simpler ingredients (elaborate), she said "I went to my bed, and as soon as I went to my bed" in "a few seconds and I heard the gunshots go off." (RP5 575) Making it relevant to the extremely short amount of time that had elapsed from when Hernandez testified that, she could have been dead and was in fear for her life. Therefore, having to get in the drivers seat of Contreras' vehicle because "I had to get out of there." (RP4 276)

Under Washington law, an actor may use force to defend another if he sublectively believes the other is in danger and a reasonable person considering only the circumstances known to the actor would share his belief. State v. Penn, 89 Wn.2d 63, 66 568 P.2d 797 (1977).

Mr. Contreras testified that when he got to his friend Eric Vitas house, he greeted him at his front porch. (RP7 848) He then

then looked back at his car, he saw Hernandez looking back at Solis and they were "mad-dogging each other" and staring coldly at each other. (RP7 849) Mr. Contreras testified that when he asked Solis why he was following him, he did not respond and just kept looking straight into his car, just looking at Regina. Solis then said he was not following him, and "I want to see where that bitch is going," referring to Hernandez. Contreras also testified that, when Hernandez got out of his car to argue with Solis he saw her jump back a little bit, and when she returned, Hernandez told Contreras that Solis had tried to hit her with a crowbar. (RP7 850-51)

Both Contreras and Kelley testified that Hernandez drove the the car to the alley to drop Kelley off. (RP5 485-86; RP7 855-56) According to Contreras when Hernandez drove the car to the alley she suddenly hoped out the car to see Solis. He was looking through the rearview mirror when he saw Solis point the rifle at Hernandez. To Contreras subjective impression it appeared to be a shotgun and not a rifle. (RP7 859; 906-07) Contreras being Solis' friend tried to get out, unarmed, to see why his friend was acting like that; and that all he knew was "I tried to hop out because Regina's life was in danger." Contreras concluded that his relationship with Solis had deteriorated

due to the methamphetamine he had induced earlier with Hernandez. (RP 7 860-61)

Mr. Contreras testified that as Hernandez drove away from the alley he was trying to calm her down because she was terrified. She also mentioned to Contreras "Man, I almost died; I could have died, you ~~you~~ Know. How come you didn't do nothing? I could have died." And that she had been shot four times, twice in her legs, and that that's how people die; that's how people get Killed. (RP7 863-64)

Hernandez then drove to Yessica Rosas' house. (RP4 276-77; RP7 865) Hernandez said she drove there without Knowing whether Contreras Knew miss Rosas. (RP4 277) As stated earlier Mr. Contreras and Hernandez were only at their Friend's house for 10-15 minutes. (RP4 284; RP5 575) Mr. Contreras was afraid for his life and the life of Hernandez. (RP7 872) He believed Solis was going to Kill them with what he tought was a shotgun. (RP7 873)

In Washington it has been held the testimony, as given by the defendant, provides substantial evidence to support a "Defense of Another" instruction to the Jury. Penn, 89 Wash.2d at 64; see also State v. Kubicek, 5 Wash. App. 293, 486 P.2d 1098 (1971). In State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997), 'Each side is is entitled to have the Jury instructed on its theory of the case if

there is evidence to support that theory.' Thus, failure to instruct on self-defense, defense of others, and the lawful use of force, when warranted by the facts and requested by the defense, constitutes reversible error. Williams, 132 Wn.2d at 259.

When state and defense counsel sat down to discuss the proposed Jury instructions, defense counsel defferred to the State's Jury instructions if the prosecutor would incorporate his for the final redraft. (RP7 939) Defense counsel did not object to State's supplemental instructions regarding self-defense, and the lawful use of force which included WPIC 17.02 and WPIC 17.04, the "act on appearances" instruction. That instruction only provided that "a person is entitled to act on appearances in defending himself," and not another. (RP7 940) Those two instructions along with the declined "initial aggressor" were the only supplemental instructions proposed by the State, two which defense counsel deferred to. (02/01/07 CP 76-77)

Moving on to defense proposed instructions, apparantly ~~from~~ from the record, the only proposed instructions were, the two stated above along with 17.05 the "no duty to retreat." (RP7 949; 954) Thereafter, defense counsel stated he was satisfied with the redrafting and final instructions. (RP7 963)

Thus, once the Final set of 23 Jury instructions were completed, there were no objections by defense counsel to their proposal. (RP8 972)

Mr. Contreras contends trial counsel fell below an objective standard in Failing to propose a "Defense of Another" instruction Were evidence was presented that warranted the instruction. As mentioned in the argument above, there was no legitimate or tactical reasons for the alleged conduct and for failing to propose the instruction.

The instruction at hand would have read: "One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is Justified in using force neccessary to protect that person even, if, in fact, the person whom the actor is defending is the aggressor."

In State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003)., it was said: effective assistance of counsel includes a request For pertinent instructions which the evidence supports. (citing State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681 (1991)). Here there was ample evidence, both from Hernandez and Mr. Contreras, that would have allowed the Jury to decide that Contreras acted in defense of Hernandez.

Mr. Contreras asserts that a "Defense of Another" instruction to the Jury would have better enabled the trial attorney and/or a reasonable attorney, to argue the defense's theory of the case. And similar to State v. Wanrow, 88 Wash.2d 221, 559 P.2d 548 (1977)., Consequently, the Jury, without the failed proposed instruction, was not correctly apprised of the law, and defendant's attorney was unable to effectively argue their theory of the case. Defense counsel's failure to propose an instruction that is warranted by the evidence, that gives a complete and correct statement of the law, and that would be helpful to the defense may be deficient performance. State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987).

The prejudice prong of the test requires the defendant to prove there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would been different. (adopting test from Strickland, 466 U.S. at 687). However, defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, at 693.

A criminal defendant is generally entitled to a Jury instruction on the defense theory of the case. State v. Ager, 128 Wn.2d

85, 93, 904 P.2d 715 (1995). If a proposed instruction states the proper law and is supported by the evidence, it is reversible error to refuse to give the instruction. Ager, 128 Wn.2d at 93. Thus, there is a strong likelyhood that, if, a "Defense of Another" instruction would have been proposed, it would have been given, if not, it would have been reversible error not to give it. However, due to attorney's deficient performance, it was not proposed and Mr. Contreras was prejudiced by it.

Here the jury was told in opening statement by Mr. Berneberg that Contreras had acted in lawful self-defense and in defense of Hernandez. (01/22/07 RP 162, 164) But without the proper instruction the jury could not discuss yet alone deliberate on this issue as they were instructed on instruction #1: "It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be," and "You must disregard any remark, statement, or argument that is not supported by the evidence or law in my instructions." Thus, they were not given the chance to evaluate Contreras subjective impression that he acted in lawful defense of Hernandez.

This relieved the State of its proper burden of proof regarding self-defense, and defense of another. Thereby, prejudicial to Mr. Contreras because the Jury was allowed to, either, decide whether he acted out of fear for his own personal life or guilty as charged in Counts I and II. But under all the circumstances of the case, not whether he had lawfully [redacted] acted in defending an innocent bystander, his passenger Regina Hernandez.

It was extremely prejudicial because the challenged conduct denied the Jury to decide Mr. Contreras subjective impression that he acted in defending another, his passenger Regina Hernandez. As stated earlier, Failure to instruct on self-defense, defense of others, and the lawful use of force, when warranted by the facts and requested by the defense, constitutes reversible error. Williams, 132 Wn.2d at 259; Ager, 128 Wn.2d at 93; see also State v. Ladiges, 66 Wn.2d 273, 277, 401 P.2d 977 (1965); And 'Failure to give such instructions is prejudicial error.' State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999). Mr. Contreras contends due to counsel's deficient performance, the State was relieved from its proper burden of proof regarding his self-defense claim. Thus, deprived him of

his right to a fair trial.

Mr. Contreras next assignment of error includes counsel. was ineffective in giving missleading instructions regarding self-defense, and in proposing a "no duty to retreat" instruction. to the Jury were evidence did not warrant the giving of that instruction.

As stated in the previous argument: every criminal defendant is entitled to a fair trial by an impartial Jury. A defendant is also guranteed effective assistance of counsel.

Reasonable attorney conduct includes a duty to investigate the relevant law. Strickland, 466 U.S. at 690-91. Also its been held that "Jury instructions must more than adequately convey the law of self-defense," And "Read as a whole, the Jury instructions must make the relevant legal standard manifestly apparent to the average Juror." LeFaver, 128 Wn.2d at 900.

Here, the only injury defined for the Jury was "great bodily harm" which stated "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." Instruction #8.

But in Contreras self-defense instructions it was given another type of injury to decide, "great personal injury". This "great personal injury" derives from defense proposed "act on appearances" instruction, WPIC 17.04. (RP7 940) The proper definition of "great personal injury" is the definition provided by WPIC 2.04.01 at 22 (2d ed. 1994). "An injury that the {defendant} reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the {defendant} or another person." (quoting 11 WA Pattern Jury Instructions: Criminal) However, this definition was left undefined for the Jury. Thus, the Jury received only the definition of "great bodily harm" applicable only to proving assault in the first degree. This is the only definition of injury in the Jury instructions, and this definition if, and when, is read with the "act on appearances" instruction the problem becomes apparent. Based on the 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. Contreras had to believe he was in actual danger of probable death, or serious permanent disfigurement, or loss of a bodily part or function. Which "great personal injury"

does not require. Mr. Contreras contends counsel was ineff-ective for failing to give a definition of "great personal injury" in a pertinent issue of the case, and were the State defined "great bodily harm" as a required element to prove assault in the first degree.

Defendant is entitled to a correct statement of the law and should not have to convince the Jury what the law is. See Acosta, 101 Wn.2d at 621-22. Our Supreme Court has set a high threshold for clarity of Jury instructions: "The standard for clarity in a Jury instruction is higher than for a statute, while we have been able to resolve the ambiguous wording of {a statute} via statutory construction, a Jury lacks such interpretive tools and thus requires a manifestly clear instruction." LeFaver, 128 Wn. 2d at 913. Trial attorney was well informed of this, (01/18/07 RP. 74) nonetheless, he failed to give pertinent definitions regarding crucial, and pertinent issues of the case. Thereby, faling "below an objective standard of reasonableness based on consideration of all the circumstances." (quoting McFarland, 127 Wn.2d at 334-35)

And where, as here, self-defense Jury instructions are at issue, the court has stated that the instructions "Read as a

whole, the Jury instructions must make the relevant legal standard manifestly apparent to the average Juror." LeFaber, 128 Wn.2d at 900. (please excuse the earlier LeFaver the correct spelling is LeFaber)

Here there was also no legitimate or tactical reasons not to define "great personal injury" for the Jury. Mr. Contreras addressed the court and brought this to the defense attorney's attention with no avail. (RP8 972-74) Mr. Contreras relies in the argument in State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). There the Court reasoned the great difference between "great bodily harm" and "great personal injury."

Also Contreras relies partly in State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004). Division Three of this Court addressed the error arising from a similar combination of Jury instructions. In the context of First degree ~~ass~~ assault, the Rodriguez trial court similarly defined "great bodily harm." As here, the Rodriguez court did not give a seperate instruction accurately defining the proper injury for purposes of establishing self-defense. Rodriguez, 121 Wn. App. at 186. Reversing Rodriguez conviction, Division Three

reasoned {B}y defining great bodily harm 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 severe pain and suffering if it were inflicted. Rodriguez, 121 Wn. App. at 186; (emphasis added) see also Walden, 131 Wn.2d at 477.

It is well settled in Washington it is prejudicial error to give irreconcilable instructions upon a material issue in the case. Hall v. Corporation of Catholic Archbishop, 80 Wn. 2d 797, 804, 498 P.2d 844 (1972); see also Smith v. Rodene, 69 Wn.2d 482, 486, 418 P.2d 741, 423 P.2d 934 (1966). Where instructions are inconsistent or contradictory on a given material point, there use is prejudicial because it is impossible to know what effect they may have on the verdict. Hall, 80 Wn.2d at 804; Matteson v. Thiel, 162 Wash. 193, 298 P. 333 (1931); Babcock v. M&M Constr. Co., 127 Wash. 303, 220 P. 803 (1923).

Here the Jury instructions, when read as a whole, may have interpreted Mr. Contreras had to be in fear of death,

serious permanent disfigurement, or loss of a bodily part of function. It is impossible to discern which instruction the jury relied upon in determining Mr. Contreras subjective impression regarding self-defense and being in fear of 'an injury he reasonably believed... would have produce severe pain and suffering if it were inflicted...' "{w}hen instructions are inconsistent, it is the duty of the reviewing court to determine whether 'the jury was mislead as to its function and responsibilities under law' by that inconsistency... {w}here such inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misslead the jury in a manner prejudicial to the defendant" (emphasis added) (quoting Wanrow, 88 Wn.2d at 239). Thus, a "jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." (quoting LeFaber, 128 Wn.2d at 900).

Mr. Contreras last issue here is regarding counsel's proposal of a "no duty to retreat" instruction. It's instruction # 20, derived from WPIC 17.05. Here, counsel was ineffective in proposing it because the evidence did not warrant the giving of such instruction.

Conversely, a trial court should not give a "no duty to retreat" instruction where there is no evidence that the defendant could have avoided the use of force through a timely retreat.. see State v. Frazier, 55 Wash. App. 204, 777 P.2d 27 (1989).

Mr. Contreras testified the only way out of the neighborhood was getting past Solis' car which was comming straight at him. (RP7 879) Rosas' residence was in a cul-de-sac, and driving out of that cul-de-sac you run into another one, having to make a left turn to go up and out of the neighborhood. (RP7 870-71) Exhibit 52 was a diagram made by forensics wich many a witnesses relied on to explain this to the Jury.

In proposing this instruction, there was also no legitimate or tactical reasons why trial attorney wished to instruct the Jury. (RP7 949) Nowhere in Mr. Contreras' testimony was it stated that there was a possible way he could have avoided Solis. Mr. Contreras brought this to both his attorney and the court's attention stating the proper definition was "Neccessary." which stated exactly what the evidence supported. "Neccessary means that no reasonable alternative to the use of Force appeared to exist and that the amount of

force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time." (RP8 972-74) After Contreras addressed this to the court, the court asked the trial attorney "Are there other instructions you think I should give that I failed to give?" the attorney "I can't think of what they would be." (RP8 974)

Reasonable attorney conduct includes a duty to investigate the relevant law. Strickland 466 U.S. at 69-0-91. Here, the attorney did not investigate the proper (if any) definitions regarding self-defense. Thus, his performance fell "below an objective standard of reasonableness based on consideration of all the circumstances" (quoting McFarland, 127 Wn.2d 334-35.)

Mr. Contreras was prejudiced because: 'A jury instruction that misstates the law of self-defense is constitutional error and presumed prejudicial. LeFaber, 128 Wn.2d at 900. Also, it is prejudicial error to submit an issue to the jury where there is not sufficient evidence to support it. See State v. Heath, 35 Wn. App. 269, 666 P.2d 922 (1983). Their misleading and additionaly, Contreras

argues that instruction #20 could be considered as suggesting that he had an opportunity to retreat or could have retreated, wich according to the attorney, would have been the prudent thing to do. (RP8 1009) In State v. Lewis, 6 Wn. App. 38, 491 P.2d 1062 (1971). The defendant had a chance to escape the danger presented through a window. Nonetheless, this Court found that it was error to instruct the Jury that it should consider the availability of escape because the instruction unduly emphasized the circumstance of escape. Lewis, at 42.[2]

IV. CONCLUSION

Mr. Contreras was not granted his right to a fair trial because he was not provided effective assistance of counsel. His trial attorney was not acting as counsel and rendered ineffectively. He failed to propose a crucial instruction to properly and effectively establish the theory of the defense. Furthermore, he failed to define the proper definitions regarding self-defense. Thus,

[2] Contreras respectfully reminds this Honorable Appeals Court that allegations of pro se complaint are held to less strigent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

the Jury was not properly and adequately able to decide the case on the proper theories presented. Instead it was provided with misleading and unwarranted instructions. This prejudiced Mr. Contreras and relieved the State from it's proper burden of proof. For these reasons, Contreras' first degree assault convictions should be reversed.

Dated: May 11, 2008

ADRIAN CONTRERAS-REBOLLAR
Appearing Pro Se

CERTIFICATE OF MAILING

I certify under the penalty of perjury that on 05/11/2008 I caused to be plaiced in the mails of the United States, a copy of this document to: (1) Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA. 98402-4454; (2) Stephanie C. Cunningham, Attorney at Law, 4616. 25th AVE. NE., #552, Seattle, WA. 98105-4183; (3) Kathleen Proctor, Pierce County Prosecuting Attny. Office, 930 Tacoma AVE.S. Rm946, Tacoma, WA. 98402-2171.

ADRIAN CONTRERAS-REBOLLAR

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