

NO. 42618-8-II

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

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER EUGENE PAYTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 10-1-04626-9

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.¹

1. Did the trial court properly include a first-aggressor jury instruction where there was evidence that defendant provoked the underlying altercation?
2. Should this Court refuse to revisit an issue that was not preserved when defendant cannot show how the issue is a manifest error of constitutional magnitude?

B. STATEMENT OF THE CASE.

1. Procedure

On November 1, 2010, the State charged Christopher Eugene Payton (defendant) with one count of attempted murder in the first degree of Kurama Youkai, and one count of assault in the second degree of Gloria Morris, including deadly weapon and domestic violence enhancements on both counts. CP 1–2. The State amended defendant’s charges to include one count of assault in the first degree of Mr. Youkai with the same enhancements. CP 11–13.

¹ In addition to the issues above, defendant assigns error to the court’s order dismissing his charge of attempted murder in the first degree (Count 1) without prejudice. CP 190 (Motion and order for dismissal); Brief of Appellant 2, 10–17 (Assignment of error 1). The transcript is clear that the trial court, State, and defense actually intended the court to dismiss Count I with prejudice after the jury acquitted on the charge, and dismiss Count I-A (attempted murder in the second degree) without prejudice. RP 706–14; CP 165 (Verdict, Count I); CP 166 (Verdict, Count I-A). The State will seek entry of a clarified order in both this Court and the trial court.

Defendant's jury trial began on August 22, 2011, before the Honorable Vicki L. Hogan. RP 21. When the court asked for objections and exceptions to the proposed jury instructions, defendant objected to the giving of a first-aggressor instruction. RP 606. The court included the instruction over defendant's objection. RP 609; 8/30/2011 RP 6.²

The jury acquitted defendant of attempted murder in the first degree, but hung on the lesser included offense of attempted murder in the second degree. CP 165–66 (Verdict forms I and I-A). The jury found defendant guilty of the remaining counts—assault in the first and second degrees—and affirmatively found for both sentencing enhancements. CP 168–73. The trial court declared a mistrial as to the count of attempted murder in the second degree, dismissing the attempted murder charges without prejudice. CP 190–91; RP 711–14.

On September 23, 2011, the court sentenced defendant to 183 months, the high end of the standard range.³ CP 179 (Judgment and sentence, paragraph 4.5). This appeal timely follows. CP 192.

² The verbatim report of proceedings contains a separate hearing regarding the parties' proposed jury instructions. Because this hearing has been transcribed separately, the State will refer to it as "8/30/2011 RP" in its brief.

³ Defendant had an offender score of two and a standard range of 111–147 months for assault in the first degree, and a standard range of 12–14 months for assault in the second degree. CP 179 (paragraph 2.3). The court sentenced defendant to the high-end range on the first-degree assault conviction, running defendant's conviction for second-degree assault concurrently with the first. CP 182 (paragraph 4.5). The sentencing enhancements added 36 months, for a total of 183 months. CP 179, 182 (paragraph 4.5).

2. Facts

Defendant lived with his girlfriend, Gloria Morris, and her 28 year-old son, Kurama Youkai,⁴ at Ms. Morris' home in Tacoma, Washington. RP 103, 259. Ms. Morris' home had a master bedroom, and a children's room directly across the hall that had a bunk bed and a television for Ms. Morris' grandchildren. RP 111. Mr. Youkai slept in a makeshift space in the garage. RP 109. Ms. Morris owned a hatchet and kept it in her backyard by a woodpile next to the carport. RP 115–16, 263. She made sure to keep the hatchet outside, and on one occasion ordered defendant to remove it when he attempted to bring it into the home. RP 115–16, 264.

On the evening of October 30, 2010, Ms. Morris picked defendant up from work. RP 267–68. He gave her \$200 in cash for rent when he got into the car. RP 260–61, 474–75. Ms. Morris testified that defendant seemed agitated, and after a brief argument, she dropped him off at her house and went to visit some family in Puyallup. RP 269–70. In the meantime, defendant walked over to Albertson's, a local grocery store. RP 471–76.

Around 1:00 a.m., defendant called Ms. Morris as she was on her way home to pick him up. RP 273. As she pulled into Albertson's she saw defendant look up at her, and then hit the building in frustration. RP 273–

⁴ The verbatim report of proceedings interchanges "Kurama" and "Kumara."

74. He got into the car and said that she had arrived too quickly. RP 273–75. He told her that he was not ready to go home and asked her to drop him off at a nearby tavern. RP 275. Another argument ensued in the car. RP 274–75. She dropped defendant off at Pac 40, where he told her to come back to pick him up in an hour. RP 276. She returned after an hour to discover that the bar had closed, and defendant was nowhere to be found. RP 278–79. She drove around looking for defendant, texted him, and returned home after he failed to respond. RP 278–79.

When Ms. Morris returned home she saw her hatchet as usual next to the carport, and thought about chopping some wood for her stove. RP 336. She testified that she clearly remembered seeing the hatchet next to the woodpile before entering her home. RP 336. Because she felt a little sick, she decided to sleep in the spare room with the bunk bed so that she would not be disturbed while she slept. RP 279. She stuck a small note on the door, which explained her condition and asked others not to enter. RP 279.

Defendant called a little later, upset that she had not picked him up, screaming and cussing, “you better come F-ing get me or you are not going to like it when I get there.” RP 281. Ms. Morris told him that she was tired and sick, and that she had already tried picking him. RP 281. When defendant’s attitude became worse during a second conversation, she stopped answering his calls, retrieved a small handgun, put it next to her on the bed, and locked the doors. RP 281–83.

Mr. Youkai was sleeping in the garage when he heard defendant rattling the gate outside the house. RP 125. Mr. Youkai, who remained in his room in the garage, heard defendant pace around the house behind the garage towards the woodpile, and then back around the house to the front door. RP 125–26. Defendant barged into the home and pounded on the spare bedroom door. RP 284–85. Defendant repeatedly yelled at Ms. Morris to open the door, threatening that he was going to break it down and “bash some heads in,” and that “someone was going to die tonight.” RP 284–86, 327. Defendant continued pounding or kicking the door, breaking the doorframe. RP 284–85. Ms. Morris called 911. RP 285.

Figuring that assistance was on the way, Ms. Morris unlocked the door to try to defuse the situation. RP 286. Without hanging up she hid the phone under the covers of the bunk bed and hoped defendant did not know that she was on the phone with 911. RP 286–87, 293. Ms. Morris’ phone was still connected with 911, which resulted in an audio recording of the events. Ex 1.⁵ She opened the door and defendant came in, demanding that she go outside and retrieve the money that he had given her earlier for

⁵ Exhibit 1 has two 911 recordings (Track 1 and Track 2) on the disc, though only the first recording was admitted into evidence. CP 199 (Exhibits received in vault, P-1). Track 1 is Ms. Morris’ phone call to 911, and is 12 minutes and 39 seconds in length. Track 2 is defendant’s phone call to 911, and is four minutes in length. Defendant withdrew the second recording, and thus it is not part of the record. CP 199 (Exhibits received into vault, D-2). All time references pertain to Track 1, Ms. Morris’ 911 call.

rent. RP 287–89. She tried giving defendant the keys to her car and told him that she was sick and did not want to go outside. RP 290–91; Ex 1 (1:50–5:20). Ms. Morris sat down on the edge of the lower bunk while defendant stood over her carrying the hatchet under his arm. RP 291–93. When Ms. Morris stood up, defendant repeatedly hit her in the face, yelling, “shut the fuck up.” RP 294–97; Ex 1 (5:20–5:40). Ms. Morris began screaming for help, and clamored back onto the bed. RP 333–34.

Mr. Youkai heard the commotion from his room in the garage, so he grabbed his taser and ran to his mother’s aid. RP 126. When he entered the room, he saw defendant standing over his mother while she fumbled for her purse and phone. RP 128. Defendant was standing with the hatchet raised at shoulder level in his right hand, while grabbing Ms. Morris with his left hand. RP 128–30. Mr. Youkai jumped between the two and yelled at defendant to stop. RP 130. Defendant turned and immediately began hitting Mr. Youkai “like a machine” over the head with the hatchet while Mr. Youkai attempted in vain to use his taser. RP 130–31, 299–300; Ex 1 (5:40–6:10). Although Mr. Youkai toppled over after being hit, defendant continued to strike Mr. Youkai six more times. RP 131–32, 300, 355.

Ms. Morris grabbed the gun from her bed and tried shooting defendant, but the pistol did not work. RP 299–300. When defendant finally stopped assaulting Mr. Youkai, Ms. Morris got up and ran to assist her son. RP 131–33, 300–02. Upon Ms. Morris and Mr. Youkai’s request, defendant called 911 for an ambulance. RP 304.

When officers arrived, they arrested defendant and sent Mr. Youkai to the hospital. RP 304–05, 391. Mr. Youkai suffered severe injuries, requiring doctors to reattach his ear, restructure his skull by inserting permanent plates into his forehead, and stitch each of the wounds. RP 142, 202–03. Officers observed that Ms. Morris also had injuries, including a swollen, bloody nose and a cut below her eye. RP 395, 422–23.

Defendant testified that prior to the assault, he had placed weapons throughout Ms. Morris' home because he had concerns about the safety of the neighborhood. RP 461. He testified that the hatchet was one of those weapons, and that he had stashed it in the spare bedroom. RP 467, 542, 544. When officers searched the home, they found no other weapons in the house. RP 374, 384.

At trial, defendant claimed that his brutal attack on Mr. Youkai was in self-defense. RP 506–07. Defendant denied punching or pushing Ms. Morris. RP 500. Defendant testified that he was unarmed while arguing with Ms. Morris, and that he was just trying to see what she doing on the bed when Mr. Youkai came in unannounced and tased him from behind. RP 501–03. Without seeing his attacker, defendant said that he fell to the ground, grabbed the hatchet from a near dresser, and started blindly swinging it at his attacker. RP 503–07. Defendant alleged that he did not know Mr. Youkai's identity until he turned on the lights. RP 506–07. Both Mr. Youkai and Ms. Morris testified that there was enough light—either

from the television or a lamp on the television—to see what was going on in the room. RP 129–30, 297.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INCLUDED A FIRST-AGGRESSOR INSTRUCTION BECAUSE THERE WAS EVIDENCE THAT SHOWED DEFENDANT PROVOKED THE ALTERCATION⁶

This Court reviews a trial court’s choice of jury instructions for an abuse of discretion. *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). A trial court abuses its discretion only where its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court does not abuse its discretion by including a jury instruction where there is evidence from trial that supports giving the instruction. *See State v. Riley*, 137 Wn.2d 904, 909–10, 976 P.2d 624 (1999). “When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455–56, P.3d 1150 (2000) (citing *State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878 (1994), *overruled on other grounds*, *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997)).

Generally, the right to self-defense cannot be invoked by a person who provokes an altercation. *Riley*, 137 Wn.2d at 909; *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). A first-aggressor instruction is appropriate where there is credible evidence that the defendant provoked the need to act in self-defense. *Riley*, 137 Wn.2d at 909–10. The instruction is particularly warranted where there is evidence that defendant drew a weapon first. *Riley*, 137 Wn.2d at 910; *State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987). A first-aggressor instruction is proper even if there is “*conflicting evidence* as to whether the defendant’s conduct precipitated a fight.” *State v. Wingate*, 155 Wn.2d 817, 822, 122 P.3d 908 (2005) (quoting *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999)).

Where the defendant assaults a person, and then assaults a third party who tries to intervene in the initial assault, a first-aggressor instruction is appropriate where the defendant’s actions were reasonably likely to induce the third party’s response. Compare *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992) (finding a first-aggressor instruction appropriate where defendant assaulted an intervening third party), and *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990) (accord), with *State v. Wasson*, 54 Wn. App. 156, 159–61, 772 P.2d 1039 (1989) (finding the evidence insufficient to support a first-aggressor

⁶ This argument addresses defendant’s assignments of error 2–4.

instruction where defendant assaulted an intervening third party who was unrelated to the initial dispute).

In *Davis*, the defendant was involved in a brief scuffle with a group of people before he returned to his apartment, retrieved a knife, and went back to confront the group. 119 Wn.2d at 660. When the defendant pushed a woman in the group, a third party—one of the woman’s friends—intervened by pushing the defendant away. *Id.* The defendant responded by stabbing the third party. *Id.* The Washington State Supreme Court determined that a first-aggressor instruction was proper because there was evidence that defendant struck first, and that defendant’s actions were reasonably likely to provoke a belligerent response from the group of friends. *Id.* at 666.

The court in *Wasson*, however, found a first-aggressor instruction inappropriate where the defendant shot a third party who intervened in a dispute between the defendant and the defendant’s cousin. 54 Wn. App. 156, 157–58, 772 P.2d 1039 (1989). In *Wasson*, the defendant was angry at his cousin for making advances on his girlfriend, so he revved his car engine in an alley outside of his cousin’s home. *Id.* at 157. The defendant’s cousin came out, smashed the defendant’s car window, and entered a brief melee with defendant. *Id.* A friend of a neighbor saw the argument, approached the two, and asked them to calm down. *Id.* The third party proceeded to beat up the defendant’s cousin, and when the third party turned towards the defendant, the defendant shot him. *Id.* The

reviewing court determined that a first-aggressor instruction was inappropriate because there was uncontested evidence that the defendant did nothing to provoke the third party prior to the shooting. *Id.* at 159–60 (“Perhaps there is evidence here of an unlawful act by [defendant], a breach of peace. However, there is no evidence that [defendant] acted intentionally to provoke an assault from [third party].”). The court concluded that the provoking act was not related to the eventual assault to which self-defense was claimed. *Id.* at 159. The court did note, however, that there could be circumstances where the defendant’s actions could provoke a third party to the defense of others—though these were not the circumstances here. *Id.* at 160–61.

The court’s instructions to the jury in this case state:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense [*sic*] and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s act and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 137 (Instruction No. 16).⁷

⁷ This instruction essentially reflects the first-aggressor instruction approved by the Washington State Supreme Court in *Riley*. See 155 Wn.2d at 821.

The trial court properly instructed the jury because the evidence overwhelmingly showed defendant provoked Mr. Youkai to respond to his mother's aid. Additionally, defendant's provoking act was directly related to the eventual assault as to which defendant claimed self-defense.⁸ Mr. Youkai testified that from the garage he could hear his mother screaming in the spare bedroom. RP 118–19, 126. He ran into the room to see defendant assaulting his mother, pinning her down on the bed with one hand, poising the hatchet in the air with the other. RP 128–30, 182. The evidence showed that defendant was in the act of assaulting Ms. Morris, including Mr. Youkai's eyewitness account, RP 128–30, Ms. Morris' testimony, RP 291–94, the officers' testimony regarding Ms. Morris' injuries to her face, RP 395, 422–23, and the recording of the 911 call, Ex 1 (5:20–5:45). That defendant's actions provoked Mr. Youkai to protect his mother is further evidenced by Mr. Youkai's statement, "I wouldn't have come at him if he hadn't had the hatchet and was trying to punch my mother in the face." RP 178. After considering this evidence, and arguments from each party, the trial court included a first-aggressor instruction. RP 606–09; 8/30/2011 RP 6. The trial court's decision was not manifestly unreasonable nor was it based on untenable grounds.

The trial court's decision to include the instruction was also proper because there was evidence that defendant drew a weapon first. RP 128–30, 182. It does not matter that defendant testified that he had not assaulted Ms. Morris and that he did not initially have the hatchet in his hands when Mr. Youkai entered the room, as this does nothing more than create *conflicting evidence* as to whether defendant's actions precipitated a fight. A first-aggressor instruction is still proper in such circumstances. See *Wingate*, 155 Wn.2d at 822.

At the core of defendant's argument is whether the defendant's acts of aggression towards one person can be transferred to a third party, who is subsequently provoked into a fight based on the defendant's actions. Defendant incorrectly asserts that the court, when imposing a first-aggressor instruction, is limited only to reviewing "the entire interaction between two people" (i.e., the defendant and the person he initially assaults). Brief of Appellant 23. The legal authority on this issue is not so narrowly construed. Rather, the court must determine whether defendant's actions were reasonably likely to induce a third party to respond. See *Davis*, 119 Wn.2d at 666; see also *Wasson* 54 Wn. App. at 159–61. Here, defendant was armed with a hatchet and was in the act of assaulting Mr. Youkai's mother when Mr. Youkai entered the room.

⁸ Defendant asserted self-defense only against his attack on Mr. Youkai. RP 501–07.

Surely defendant's actions were reasonably likely to induce a belligerent response.

Moreover, even if the court considered only the interactions between Mr. Youkai and defendant, there was evidence that defendant drew the first weapon, and in doing so provoked Mr. Youkai to respond with his taser. RP 129–31, Ex 1 (5:40–6:10). According to Mr. Youkai, he jumped in front of his mother in hopes of defusing the situation and yelled at defendant to stop. RP 130–32. At that point, Mr. Youkai stood between his mother and defendant, who had the hatchet raised high in the air. RP 130–32. This reasonably would have induced Mr. Youkai to respond. Notwithstanding defendant's testimony that Mr. Youkai randomly tased him from behind, RP 503–04, the court must review these conflicting versions of the incident in the light most favorable to the State.

Fernandez-Medina, 141 Wn.2d at 455–56. The instruction would be proper because according to Mr. Youkai, he was responding to an assault against himself. The trial court's reasoning was not manifestly unreasonable in this regard.

After considering argument from both parties on the issue, the court decided that the instruction was appropriate given the circumstances. RP 606–09. The trial court properly included the instruction because defendant's actions reasonably induced Mr. Youkai into a fight. The court

had evidence that defendant initiated an assault against Mr. Youkai's mother, which provoked Mr. Youkai to her aid. Defendant then viciously assaulted Mr. Youkai with a hatchet. There was also evidence that defendant provoked Mr. Youkai into the altercation by confronting Mr. Youkai with a hatchet when Mr. Youkai jumped between his mother and defendant. This Court should uphold the trial court's decision to include a first-aggressor instruction and affirm defendant's convictions.

2. THE COURT SHOULD REFUSE TO REVISIT AN ISSUE THAT DEFENDANT DID NOT PRESERVE AND DOES NOT SHOW HOW THE ALLEGED ERROR IS OF CONSTITUTIONAL MAGNITUDE

This court "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Generally, this Court will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. *See, e.g., State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. Fenwick*, 164 Wn. App. 392, 398, 264 P.3d 284 (2011); *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). The principle underlying this rule is to encourage efficient use of judicial resources, ensuring that "the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *Fenwick*, 164 Wn. App. at 398 (quoting *State v. Robinson*, 171 Wn.2d 292, 304–05, 253 P.3d 84 (2011)). The defendant carries the burden to identify where in the record an alleged error affected the

defendant's rights. See *Kirkman*, 159 Wn.2d at 926; see also RAP 9.2(b).

A trial court has statutory authority to order the forfeiture of property in a variety of circumstances. For example, among others, the court can order the forfeiture of dangerous weapons, RCW 9A.41.800, firearms, RCW 9A.41.098, controlled substances, RCW 69.50.505(1)(a), conveyances used to facilitate the sale or distribution of controlled substances, RCW 69.50.505(1)(d), drug paraphernalia, RCW 69.50.505(1)(f), imitation controlled substances, RCW 69.52.040, certain liquors, RCW 66.32.040, lewd matter, RCW 7A.48.090, and unauthorized recordings, RCW 19.25.050.

Defendant did not object when the court imposed the property forfeiture as a condition on his sentence. RP 720–22. Because defendant does not identify how the court's actions constitute a manifest error of constitutional magnitude, defendant cannot raise this issue for the first time on appeal. Defendant cites no authority that would support raising this issue absent defendant satisfying RAP 2.5(a).

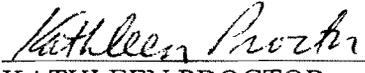
Moreover, defendant asserts the court violated its *statutory* authority, but does not show from the record on review what property—if any—was actually forfeited pursuant to this condition. It is impossible to assess whether the court was acting within its statutory authority without knowing what items of forfeited property are under dispute. The State respectfully requests this Court to uphold the property forfeiture as a condition of defendant's sentence.

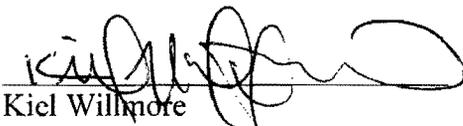
D. CONCLUSION.

The trial court properly instructed the jury with a first-aggressor instruction because there was evidence that defendant's actions reasonably induced Mr. Youkai into the altercation. Defendant provoked Mr. Youkai into the fight by assaulting Mr. Youkai's mother. There was also conflicting evidence that Mr. Youkai was merely responding to defendant's attack after defendant started hitting Mr. Youkai with the hatchet. The State requests this Court to affirm defendant's convictions. This Court should also deny defendant's challenge to the property forfeiture condition on his sentence because he did not preserve the issue below.

DATED: July 3, 2012.

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