

No. 47648-7-II  
Kitsap Superior Court No. 14-1-00280-5

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

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STATE OF WASHINGTON,  
Plaintiff-Appellee,

v.

ROBERT OSTASZEWSKI,  
Defendant-Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KITSAP COUNTY

The Honorable Jennifer Forbes, Judge

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APPELLANT'S OPENING BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The trial court erred in giving the “first aggressor” instruction.
2. The “drive-by” shooting statute is vague as applied to Ostaszewski.
3. Under the facts of this case, drive-by shooting and first degree assault are the same criminal conduct.

**II.**  
**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is the act of taking cell phone pictures of an individual in a public place during daylight hours “an intentional act reasonably likely to provoke a belligerent response” thereby justifying a “first aggressor” instruction?
2. Is the drive-by shooting statute vague as applied to Ostaszewski’s conduct?
3. Where both the first degree assault and the drive-by shooting occurred on November 12, 2013, at the same time and place against the same victim, should the two crimes have been considered the “same criminal conduct?”

**III.**  
**STATEMENT OF THE CASE**

Robert Ostaszewski was charged with attempted first degree murder, first degree assault, and drive-by shooting. CP 6-11. On November 12, 2013, Ostaszewski’s wife, Michelle, was working at Fred Meyer. A man and a woman came through her checkout line. When she asked if he had a rewards card, he

said “no but I have a 9 millimeter.” RP 321. Another employee told her this man and woman were living in the parking lot. RP 321. Michelle then reported the comment to other managers. RP 321. Michelle spoke to her husband at 12:15 p.m. RP 328. She told him about the incident. RP 329.

Ostaszewski said that Michelle told him she was doing okay. RP 624. But Ostaszewski could tell something was wrong. RP 624. Michelle said that she told her supervisor about the exchange. RP 625. Her voice was shaking and she sounded scared. RP 625. Ostaszewski became concerned and “fearful” about his wife. RP 627.

Ostaszewski went to Fred Meyer to see if she was okay. She told him there were people camped out in the parking lot in a black SUV. RP 628. He said he went back out to the parking lot to gather information so that his wife could contact the police. RP 630. He went back into the store and told his wife that “they were still in the area.” RP 632. That made his wife scared. *Id.*

Ostaszewski went back outside and took a picture of the front plate of the car where Joshua Johannessen and his girlfriend were living. Johannessen got out of his car and started towards the van. Ostaszewski saw a knife. RP 637. As he approached, he said: “What the ‘F’ are you doing taking pictures of me and my girlfriend?” RP 638. Ostaszewski held up his hand and said “back away” three times. RP 639. He could see Johannessen had something in his hand but could not tell what it was. *Id.* According to Ostaszewski, Johannessen

was “right up on me.” RP 640. He looked like he was “on something.” RP 640-

41. Johannessen said:

If you don’t shoot me now, I am going to climb in there and beat the ever-living “F” out of you.

RP 641.

After that remark, Ostaszewski was afraid. RP 642. He fired one shot to protect himself. RP 644. He fired two more shots at the ground. *Id.* All the shots were made while Ostaszewski was in the van. RP 645-46. He called 911. RP 646. He told the operator that Johannessen had a knife. RP 669. But he believed that Johannessen also had a 9 millimeter gun. RP 706.<sup>1</sup>

When the police arrived, Ostaszewski was arrested and his gun was seized. RP 196. He was calm and cooperative. RP 201.

Johannessen had a neck wound and an arm wound. RP 409-12. He was treated and released. RP 413.

The jury acquitted Ostaszewski of attempted murder but convicted him of first degree assault and drive-by shooting. CP 110-120. This timely appeal followed. CP 121-133.

A more detailed discussion of some of the facts will follow in the appropriate sections.

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<sup>1</sup> It later became clear that Johannessen was not the person who made the remark to Michelle in the store.

#### IV. ARGUMENT

##### A. THE TRIAL COURT ERRED IN GIVING THE FIRST AGGRESSOR INSTRUCTION

Ostaszewski argued that he acted in self-defense. The judge agreed to instruct the jury on self-defense but she also included a “first aggressor instruction.” Ostaszewski objected. RP 773.

To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense, i.e., the statutory elements of reasonable apprehension of great bodily harm and imminent danger. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). In order to establish self-defense, a finding of actual danger is not necessary. The jury instead must find only that the defendant reasonably believed that he or she was in danger of imminent harm. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. *Janes*, 121 Wn.2d at 238.

Aggressor instructions are disfavored. *State v. Birnel*, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), *review denied*, 138 Wn.2d 1008, 989 P.2d 1141 (1999), *overruled on other grounds as noted in In re Pers. Restraint of Reed*, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Courts should use care in giving

an aggressor instruction because it impacts a claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Indeed, “[f]ew situations come to mind where the necessity for an aggressor instruction is warranted.” *State v. Arthur*, 42 Wn. App. 120, 125, n.1, 708 P.2d 1230 (1985). Whether the trial court erred in giving the aggressor instruction is a question of law reviewed de novo. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948, 951, *review denied*, 173 Wn.2d 1003, 271 P.3d 248 (2011).

In this case, the prosecuting attorney argued that

[I]f you believe that Mr. Johannessen came up to that vehicle before the defendant’s aggression . . . then that is all you need to know. Then the defendant is the aggressor, and he doesn’t get self-defense.

RP 863. Specifically, she argued that the “act of surveilling somebody and taking pictures and invading somebody’s privacy” was the intentional act that caused Johannessen’s belligerent response. RP 863.

This is an inaccurate and overly simplistic statement of the facts. Taking the evidence in a light most favorable to the State, the testimony was that Johannessen saw Ostaszewski sitting in his van. He observed Ostaszewski point his camera at his car. RP 506. Johannessen took a picture of Ostaszewski taking a picture of him. RP 510. Johannessen opened the door of his vehicle and “stood up to see if he would notice me.” RP 509. When Ostaszewski did not

react, Johannessen “flipped him off.” *Id.* At that point Ostaszewski noticed, lowered his phone and “just stopped.” RP 506. Even though Ostaszewski had stopped taking any photographs, Johannessen threw his phone back to Laura and said to her, “This isn’t right . . . I’m going to go see what he’s doing.” RP 509.

When Johannessen approached, Ostaszewski’s window was open and he was staring straight ahead. He did not look at Johannessen and he was “shaking real bad.” RP 514. Ostaszewski said nothing but Johannessen saw a gun clip next Ostaszewski. RP 517. Rather than retreating, Johannessen said:

I don’t know what you’re doing, but if you’re going to shoot me,  
I hope you kill me because if you don’t, I’m going to come  
through the window.

RP 518.

As stated above, the initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force. For the victim’s use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm. Thus, mere words alone do not give rise to reasonable apprehension of great bodily harm. *Riley*, 137 Wn.2d at 912. Similarly, the act of lawfully and passively taking pictures of another person in a public place, in daylight, is not an intentional act likely to provoke a belligerent response. If Ostaszewski’s lawful, passive acts can justify Johannessen in using force in response and

preclude Ostaszewski from self-defense, the right of self-defense would be rendered essentially meaningless.

The court erred in giving the aggressor instruction because it was not supported by the evidence. The error is constitutional in nature and cannot be deemed harmless unless the State proves it is harmless beyond a reasonable doubt. *Birnel*, 89 Wn. App. at 473; *State v. Stark*, 158 Wn. App. 952, 961, 244 P.3d 433 (2010), *review denied*, 171 Wn.2d 1017, 253 P.3d 392 (2011).

Here, the error was not harmless. An improper aggressor instruction is prejudicial because it guts a self-defense claim. Here, the jury was told that because Ostaszewski took a picture of Johannessen's vehicle, he could not claim self-defense. The jury clearly concluded that Ostaszewski did not intend to kill Johannessen. But they could not consider whether he was acting in self-defense as to the assault and drive-by shooting charges because of the instruction. Thus, this Court must reverse the convictions on Counts 2 and 3.

**B. THE DRIVE-BY SHOOTING STATUTE IS VAGUE AS APPLIED TO OSTASZEWSKI'S CONDUCT**

The drive-by shooting statute requires a nexus between the use of a car and the use of a gun. *State v. Locklear*, 105 Wn. App. 555, 560, 20 P.3d 993 (2001), *aff'd on other grounds*, *State v. Rodgers*, 146 Wn.2d 55, 43 P.3d 1 (2002). A person of ordinary intelligence would not know without guessing that the required nexus exists in this case.

1. *A penal statute is void for vagueness as applied if a person of ordinary intelligence would not understand without guessing that the statute applies to the defendant's conduct.*

Under the Due Process Clauses of the Fourteenth Amendment and the Washington Constitution<sup>2</sup>, a penal statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary and subjective enforcement. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Const. art. 1, § 3; U.S. Const. amend. 14.

Under this doctrine, “a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”

*American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 612, 192 P.3d 306 (2008) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926))).

A vagueness challenge to a statute that does not implicate First Amendment rights must be considered in light of the facts of the specific case

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<sup>2</sup> The Fourteenth Amendment provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” Article 1, §section 3 of the Washington Constitution provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

before the court. *American Legion Post #149*, 164 Wn.2d at 612. The statute must be tested by inspecting the actual conduct of the party who challenges the statute. *Id.* In determining whether the statute is sufficiently definite, “the provision in question must be considered within the context of the entire enactment and the language used must be ‘afforded a sensible, meaningful, and practical interpretation.’” *Id.* at 613 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

“The statute is not unconstitutionally vague if the ‘defendant’s conduct falls squarely within [its] prohibitions.’” *Locklear*, 105 Wn. App. at 559 (quoting *State v. Smith*, 111 Wn.2d 1, 10, 759 P.2d 372 (1988)).

2. *The statute is impermissibly vague as applied to Ostaszewski’s case, as a person of ordinary intelligence would not understand his conduct amounted to “drive-by” shooting.*

The drive-by shooting statute provides:

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9A.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

(2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

RCW 9A.36.045.

The drive-by shooting statute requires a nexus between the use of a car and the use of a gun. *Locklear*, 105 Wn. App. at 560. In *Locklear*, the Court explained that a person of ordinary intelligence would understand that the required nexus exists when a person fires a gun from inside a car. *Id.* The statute provides that a person commits the felony “when he or she recklessly discharges a firearm . . . and the discharge is . . . from a motor vehicle.” RCW 9A.36.045(1). Further, RCW 9A.36.045(2) permits the trier of fact to infer recklessness when a person “unlawfully discharges a firearm from a moving motor vehicle[.]”

*Locklear* also explained that a person of ordinary intelligence would understand that the required nexus exists “when a shooter is transported to the scene in a car, gets out, and fires from within a few feet or yards of the car.” *Locklear*, 105 Wn. App. at 560. RCW 9A.36.045(1) provides that a person commits the felony

when he or she recklessly discharges a firearm . . . and the discharge is . . . from the immediate area of a motor vehicle that was used to transport the shooter or the firearm . . . to the scene of the discharge.

But *Locklear* does not support the conclusion that a person of ordinary intelligence would understand that the required nexus exists in a case such as this, where the shooter is transported to the scene, parks the car, exits, enters a

store, and then returns to the parking lot several minutes later and sits down in his car to take pictures.

*Locklear* explained that the required nexus between the use of a gun and the use of a car includes both a spatial and temporal component. *Locklear*, 105 Wn. App. at 560, n.8. In *Locklear*, the spatial component was not met where the defendant was transported to the scene in a car, exited the car, walked two blocks, and fired a gun at an occupied house. *Id.* at 556. Similarly, here, the temporal component is not met where the defendant was transported to the scene in a car, parked the car, exited, entered a store, met with his wife and then returned to the parking lot. Further, Ostaszewski did not form an intent to shoot the gun until after the altercation began in the parking lot, well after Ostaszewski arrived in the car. The presence of the car was only incidental to the crime. A person of ordinary intelligence would not understand, without guessing, that Ostaszewski's actions amounted to drive-by shooting.

The conclusion that a person of ordinary intelligence would not understand without guessing that Ostaszewski's conduct amounted to drive-by shooting finds further support in the ordinary meaning of the term "drive-by" shooting. The statutory name for the crime is "drive-by shooting." RCW 9A.36.045. The ordinary meaning of "drive-by" is "carried out from a moving vehicle." *Merriam-Webster's Online Dictionary*, <http://www.merriamwebster.com/dictionary/drive-by>. Thus, in ordinary

understanding, “drive-by” does not mean carried out from outside a vehicle several minutes after parking the car, exiting, going inside a store, and then returning to the car.

In fact, it does not appear that the legislature envisioned the application of drive-by shooting to a case like this one. The crime was added in the Omnibus Drug Act, 1989 Wash. Legis. Serv. 271. The preamble states that:

The legislature finds that increased trafficking in illegal drugs has increased the likelihood of “drive-by shootings.” It is the intent of the legislature in sections 102, 109, and 110 of this act to categorize such reckless and criminal activity into a separate crime and to provide for an appropriate punishment.

*Id.* at § 108.

Ostaszewski’s actions had nothing to do with drug trafficking. And, if the statute is not confined to its intended purpose – to punish drug traffickers – prosecutors could add this crime to virtually any assaultive conduct with a firearm.

This Court should find that drive-by shooting was impermissibly vague as applied to Ostaszewski’s actions.

C. UNDER THE FACTS OF THIS CASE, THE FIRST DEGREE ASSAULT AND THE DRIVE-SHOOTING WERE THE “SAME CRIMINAL CONDUCT”

Multiple current offenses are presumptively counted separately in determining a defendant’s offender score unless the trial court finds that current offenses encompass the “same criminal conduct.” RCW 9.94A.589(1)(a).

Crimes constitute the “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The legislature intended the phrase “same criminal conduct” to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If any one of the factors is missing, the multiple offenses do not encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Moreover, because a finding by the sentencing court of same criminal conduct always favors the defendant, “it is the defendant who must establish [that] the crimes constitute the same criminal conduct.” *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219, 223 (2013).

Ostaszewski was convicted of first degree assault of Joshua J. Johannessen and drive-by shooting. Both offenses occurred on November 12, 2013, at the same time and place against the same victim. Both offenses required Ostaszewski to act with intent to inflict a serious injury to Johannessen. Thus, the two counts should have been considered the “same criminal conduct.”

Although a defendant generally waives the right to argue on appeal that multiple convictions constitute the same criminal conduct if he did not raise the issue below, the Court of Appeals will reach the issue if the trial attorney’s failure to argue same criminal conduct amounts to ineffective assistance of counsel. *State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

Defense counsel renders ineffective assistance of counsel when he fails to argue

that the current offenses encompass the same criminal conduct when the evidence and case law would support a same criminal conduct finding.

*Saunders*, 120 Wn. App. at 825. Such is the case here.

The determination of whether crimes encompass the same criminal conduct involves both a finding of fact and an exercise of trial court discretion. *State v. Nitsch*, 100 Wn. App. 512, 519-21, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000). When the court is not asked to make that determination, the issue is not preserved for review. *Id.* In this case, counsel's failure to preserve the issue constitutes deficient performance.

There is no legitimate tactical reason for counsel's failure to ask the court to make a same criminal conduct determination. Ostaszewski would only have benefitted from such a request and could not have suffered adverse consequences.

Prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Applying the facts to the law, Ostaszewski's prior counsel was ineffective in failing to raise this issue. Moreover, this failure was prejudicial to Ostaszewski. Because these two counts should not be counted separately, Ostaszewski's criminal history score should be calculated as "0." This would reduce his sentencing range for the first degree assault to 93-123 months. Thus, the present sentence of 189 months is

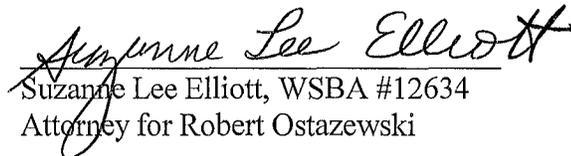
beyond the proper sentence and must be reduced to 123 months, at the very least. Remand for resentencing is required. *Saunders*, 120 Wn. App. at 824- 25.

V.  
**CONCLUSION**

For the reasons stated above, this Court should reverse Ostaszewski's conviction and sentence and remand for a new trial or, in the alternative, a new sentencing.

DATED this 30th day of December, 2015.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by email and First Class United States Mail, postage prepaid, one copy of this brief on the following:

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