

NO. 47804-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER POMA,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

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A. INTRODUCTION

Christopher Poma confronted a much larger and belligerent man who was taunting him and his younger brother. Afraid for himself and his brother when this man pushed him, Mr. Poma hit him two or three times in a split second incident.

At Mr. Poma's assault trial, the court instructed the jury on self-defense. But the court told the jury Mr. Poma had no right to self-defense if he acted aggressively first. It also told the jury that self-defense meant that Mr. Poma feared injury only to himself, not his brother. The prosecution told the jury that if they believed Mr. Poma "did it" at the moment they left the courtroom, then the State satisfied its burden of proof.

Established law bars using the aggressor instruction when the defendant did not intentionally act unlawfully to provoke the assault, but defense counsel did not object. Even though defense counsel argued Mr. Poma was defending his brother, he proposed instructions limiting lawful force to defending oneself, not another person. Because the law of self-defense was not accurately explained to the jury and defense counsel did not object to the State's incorrect depiction of the law, the jury did not understand the extent of Mr. Poma's right to act in self-

defense. Mr. Poma was denied a fair trial and his right to effective assistance of counsel.

B. ASSIGNMENTS OF ERROR

1. The court denied Mr. Poma his right to self-defense by improperly issuing the “first aggressor” instruction. CP 39 (Instruction 18).

2. The court denied Mr. Poma his right to have the jury determine whether he acted in lawful self-defense by limiting lawful force to a person who fears injury to himself, not injury to another person. CP 36, 38 (Instructions 15, 17).

3. Mr. Poma was denied his right to effective assistance of counsel under the Sixth Amendment and Article I, section 22 by his attorney’s failure to ensure the jury was accurately instructed on the law of self-defense.

4. The prosecution’s closing argument denied Mr. Poma a fair trial by misrepresenting its burden of proof and the requirement of jury deliberation, in violation of the Fourteenth Amendment and Article I, sections 21 and 22.

5. The cumulative trial errors denied Mr. Poma a fair trial.

6. The court lacked authority to impose legal financial obligations for expenses that were not actually incurred.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is improper to give a “first aggressor” instruction when the defendant did not provoke his need to act in self-defense by acting intentionally aggressively and unlawfully. Because the “first aggressor” instruction relieves the State of its burden to disprove self-defense, it may only be used sparingly for the proper factual scenario. Did the court dilute the State’s burden of proof when there was no basis to give a “first aggressor” instruction?

2. Lawful self-defense includes reasonably defending another person. The court’s definition of self-defense was limited to the defendant’s fear of injury to himself, without explaining the right to defend another person. Was the jury incorrectly instructed about the essential elements of lawful force when the defense presented testimony and argued that Mr. Poma was defending both himself and his brother?

3. The right to effective assistance of counsel includes a lawyer who understands the law and proposes accurate jury instructions. There is no tactical reason for decreasing the State’s burden of proof. Did defense counsel unreasonably propose inaccurate self-defense

instructions, and fail to object to the inapplicable aggressor instruction, which made it far harder for the jury to find Mr. Poma used lawful force?

4. The prosecutor carries a special prestige that makes a misrepresentation of the law substantially likely to affect the jury. The prosecution diluted its burden of proof and discouraged the jury from even beginning the deliberation process by telling them to make up their minds that Mr. Poma did it even before deliberating as a group. Was the prosecution's flagrantly improper argument likely to affect the jury?

5. Cumulative error may deny a person a fair trial even when one error alone is not enough to require reversal. Here, the jury was misled about the law of self-defense and its obligation to engage in meaningful deliberation. Did these errors, taken together, deny Mr. Poma a fair trial?

6. Discretionary legal financial obligations may only be imposed when expressly authorized. Incarceration fees and sheriff service fees are only permissible if actually incurred. Mr. Poma was not incarcerated and there was no evidence the sheriff fees were actually

incurred. Did the court lack authority to order these legal financial obligations?

D. STATEMENT OF THE CASE

Christopher Poma and his younger brother Dominic<sup>1</sup> played poker at the same table as Courtney Glover one night at the Oak Tree casino. 3RP 313.<sup>2</sup> Mr. Glover grew visibly angry and upset as he lost. *Id.* Mr. Glover seemed drunk; he cursed at Christopher and Dominic throughout the poker game and repeatedly called them “faggots.” *Id.* Mr. Glover left the poker table saying, “fuck you.” 3RP 316. Christopher told the casino’s floor supervisor that Mr. Glover was threatening them and using harsh language. 3RP 315.

Two days later, when the Pomas were using the casino’s bathroom, Mr. Glover approached Christopher and said, “Look at these faggots. So do you guys hold each other’s dicks?” 3RP 318; *see also* 1RP 173-74 (Mr. Glover recalled saying, “Wow, you and your boyfriend even go to the bathroom together. . . . What, do you guys hold each others’ dicks?”).

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<sup>1</sup> Because the two men share the same last name, they will be referred to by first name when necessary to avoid confusion. Any reference to “Mr. Poma” refers to Christopher. No disrespect is intended.

Mr. Poma asked, “What’s your problem?” 3RP 318. Mr. Glover said, “we can go outside and settle this problem.” 3RP 318. Mr. Poma believed he meant they would talk, because he knew people were not supposed to raise their voices inside casinos. *Id.*

The three men went outside. During their conversation, Mr. Glover “started walking towards me and getting in my face,” Mr. Poma said. 3RP 319. Mr. Glover said, “you guys are a bunch of faggots,” in a “real aggressive” tone. *Id.* “And that’s when he chest-bumped me” as he was muttering “bad things” and getting closer and closer. *Id.* Mr. Poma said he “reacted” “real quick like a split-second” by punching Mr. Glover. *Id.* Mr. Poma hit Mr. Glover two times and he fell to the ground – it happened so fast Mr. Poma did not remember more and Mr. Glover did not remember it at all. 1RP 168, 182; 3RP 338-39. Mr. Poma did not know what Mr. Glover was capable of or whether he was armed under in his baggy clothes. 3RP 326-27. It was the first time Mr. Poma had been in a fight in his life, and he hit Mr. Glover to “keep him from hitting me or my brother.” 3RP 347.

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<sup>2</sup> The verbatim report of proceedings (RP) from trial and sentencing are contained in three consecutively paginated volumes and are referred to by the volume number designated on the cover page.

Mr. Glover was much larger than Christopher or Dominic; he weighed 265 pounds, while Christopher weighed 155 to 160 pounds and Dominic was 135 to 140 pounds. 1RP 200; 3RP 319-20. Mr. Glover was seven inches taller than Dominic and three inches taller than Christopher. *Id.* Mr. Glover was described by a casino employee as being too drunk to drive, while neither Christopher nor his brother had anything alcoholic to drink. 3RP 313, 320, 364.

Mr. Glover remembered little of the incident. 1RP 170. He admitted acting like “a smart ass” toward the Pomas because he was upset about losing to them in poker. 1RP 171, 174.

Mr. Glover said he went outside the casino to have a cigarette, not to fight anyone, and laughed when Mr. Poma said, “yeah, we’re faggots that are going to beat the shit out of you,” which Mr. Poma denied saying. 1RP 174; 3RP 334. Once outside, Mr. Glover claimed he “felt intimidated” because the Pomas were “in my face.” 1RP 179-80. Mr. Glover also said Dominic “kept coming toward me” while Christopher stayed off to the side and did not say anything. 1RP 180, 182. Suddenly, he was “knocked out” and did not remember how it happened. 1RP 182. He denied swinging at or pushing Christopher. 1RP 184.

Mr. Glover refused medical treatment and did not feel hurt when he left the casino. 1RP 188. He later realized his jaw and his rotator cuff bone were broken and spent several days in the hospital. 1RP 191-92.

The State charged Mr. Poma was second degree assault. CP 1. The court instructed the jury that the State bore the burden of disproving Mr. Poma acted in self-defense. CP 36. It also told the jury that Mr. Poma had no right to act in self-defense if he was the first aggressor and that self-defense was limited to defending himself from fear of injury, not defending another person. CP 36, 38.

Mr. Poma was convicted as charged. CP 42. He received a standard range sentence of four months incarceration, as well as \$30,187.03 in restitution, \$600 in mandatory legal financial obligations, and \$1045 in discretionary legal financial obligations. CP 48, 50.

E. ARGUMENT.

**1. Mr. Poma was denied his right to have the jury consider whether he acted in lawful self-defense because the jury was not accurately, fairly, and completely instructed on the law governing his right to act in defense of himself and others.**

*a. The right to act in self-defense is guaranteed by the constitution and strictly protected in Washington.*

“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); U.S. Const. amends. II, XIV. It is “deeply rooted” and “fundamental” to our concept of liberty. *McDonald*, 561 U.S.at 768.

The historically recognized “right of the defendant” to act in defense of himself or others exists when a person has a good faith belief there is apparent danger to himself or another person. *State v. Carter*, 15 Wash. 121, 123, 45 P. 745 (1896). It is viewed from the perspective of the defendant, based on the situation as appeared to him. *Id.*

A person does not have to be in actual danger to act in lawful self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

A person is entitled to defend himself if he reasonably believed he was

in danger of imminent harm, and uses an appropriate degree of force in response to that threat. *Id.*

Mr. Poma believed he was defending himself and his brother from aggressive, hostile, and drunken behavior by Courtney Glover. 1RP 201; 2RP 245-47, 256; 3RP 325, 364. The court agreed there was evidence Mr. Poma acted in reasonable self-defense and instructed the jury the prosecution had to disprove beyond a reasonable doubt that he was acting in self-defense. CP 36. But the jury was never able to fairly evaluate whether Mr. Poma acted in reasonable self-defense because it did not receive fair, accurate, and complete jury instructions.

*b. Jury instructions must accurately and completely inform the jury of the governing law and plainly set forth the prosecution's burden of proof.*

Self-defense instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllö*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. McCreven*, 170 Wn.App. 444, 462, 284 P.3d 793 (2012), *rev. denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Giving instructions that misstate the law of self-defense “amounts to an error of constitutional magnitude and is presumed prejudicial.” *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

A “first aggressor” instruction is permitted when a defendant commits unlawful conduct before the charged assault occurred, thus provoking the later need to act in self-defense. *State v. Brower*, 43 Wn.App. 893, 901, 721 P.2d 12 (1996). This instruction tells the jury that the accused person has no right to act in self-defense if he provoked an attack that necessitated his use of force. *Riley*, 137 Wn.2d at 909-10.<sup>3</sup> “[I]t is error to give such an instruction when it is not supported by the evidence.” *State v. Wasson*, 54 Wn.App. 156, 159, 772 P.2d 1039 (1989). Because giving this instruction erroneously has the effect of nullifying the right to act in self-defense, it constitutes an error of constitutional magnitude. *Riley*, 137 Wn.2d at 910 n.2; see *State v. Stark*, 158 Wn.App. 952, 960-61, 244 P.3d 433 (2010), *rev. denied*, 171 Wn.2d 1017 (2011); *State v. Birnel*, 89 Wn.App. 459, 473, 949 P.2d 433 (1998).

The “first aggressor” instruction is disfavored. *Riley*, 137 Wn.2d at 910 n.2; *Wasson*, 54 Wn.App. at 161 (“Few situations come to mind

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<sup>3</sup> The “first aggressor” instruction provided:

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,” quoting *State v. Arthur*, 42 Wn.App. 120, 125 n.1, 708 P.2d 1230 (1985)). Courts must “take care” when using this instruction and present it sparingly. *Riley*, 137 Wn.2d at 910 n.2. The instruction is disfavored and used with caution because it relieves the State of its burden of disproving self-defense. *Id.*

To qualify for the instruction, the defendant’s initial provoking act must be intentional; it must be an act that would reasonably provoke a belligerent response from the victim; and it must be related to the eventual assault for which the claim of self-defense arises. *State v. Birnel*, 89 Wn.App. 459, 473, 949 P.2d 433 (1998), *rev. denied*, 138 Wn.2d 1008 (1999) (disagreed with on other grounds, *In re Reed*, 137 Wn.App. 401, 408, 153 P.3d 890 (2007)); *Wasson*, 54 Wn.App. at 159.

Insulting or provoking words do not justify a “first aggressor” instruction. *Riley*, 137 Wn.2d at 910-12. It would “distort” self-defense

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No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense 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 acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. CP 39 (Instruction 18).

and render it “essentially meaningless” to treat a defendant’s words as sufficiently aggressive provocation to preclude the defendant from acting in self-defense. *Id.* at 911.

In *Wasson*, this Court ruled that a first aggressor instruction was improper when the defendant argued with a third person, the victim intervened, and the defendant fired his gun at the victim, claiming self-defense. 54 Wn.App. at 159. The defendant had not “acted intentionally to provoke an assault” from the victim. *Id.* By telling the jury that Mr. Wasson’s aggressive acts could eliminate his right to act in self-defense, the court nullified his right to defend himself. *Id.* at 160. This error required reversal.

Similarly, in *Brower*, the defendant threatened the victim with a gun after the victim and defendant’s companion argued. This Court explained that Mr. Brower was only “the aggressor” in terms of committing the charged assault. *Id.* at 902. But by including this instruction, the court “effectively deprived him of his theory of self-defense; the jury was left to speculate as to the lawfulness of this conduct prior to the assault.” *Id.*

Like *Brower*, *Wasson*, and *Riley*, Mr. Poma’s assaultive *conduct* only occurred in the course of the actual assault, not in an earlier

provocation. The first aggressor instruction improperly eliminated his right to act in self-defense.

*c. Mr. Poma was not the aggressor and did not create the necessity of acting in self-defense.*

The prosecution agreed Mr. Glover acted obnoxiously, crudely, and offensively toward Mr. Poma before the charged assault. Mr. Glover was upset about losing poker games to Mr. Poma and his brother, and he responded by bating Christopher and Dominic over the course of two nights. Mr. Glover was drunk, belligerent, and purposefully tried to provoke the two men.

Mr. Glover outweighed Mr. Poma by more than 100 pounds and was several inches taller than Mr. Poma. 3RP 401. Mr. Poma's brother was even more slightly built, weighing 135 to 140 pounds, far less than Mr. Glover's 260 pounds; and he stood at a 5'8", far shorter than Mr. Glover's 6'3". 3RP 319-20.

Mr. Poma asked Mr. Glover to explain why he was being so angry and rude. During this confrontation, Mr. Glover chest-bumped or pushed Mr. Poma and Mr. Poma hit Mr. Glover in response. 3RP 320. Mr. Glover denied using any force and claimed Mr. Poma punched him out of the blue. 1RP 182. Under either scenario, no one testified that

Mr. Poma intentionally acted to provoke Mr. Glover's use of force, causing Mr. Poma's response and triggering his own need to act in self-defense.

Mr. Glover blamed Dominic for instigating the verbal confrontation, saying he felt intimidated when the diminutive Dominic pressed him to explain his hostility. 1RP 182, 184. Words alone do not constitute an act of aggression and may not be the basis for a first aggressor instruction. *Riley*, 137 Wn.2d at 911-12. And even if they did, Dominic's exchange of words with Mr. Glover does not make Christopher the aggressor. There was no allegation, or jury instruction, that would let the jury premise their verdict on Mr. Poma's culpability for his brother's potentially aggressive words or conduct. *See* RCW 9A.08.020 (explaining the law of liability for the conduct of another).

To be a first aggressor, the defendant's acts, not his words, must create the defendant's later need to defend himself. *Riley*, 137 Wn.2d at 912. The only factual dispute was whether Mr. Glover used or threatened force before Mr. Poma hit him.

The Supreme Court cautioned courts against using the first aggressor instruction. *Riley*, 137 Wn.2d at 912 n.2. Improperly giving

the instruction is reversible error due to its resulting devastating effect on the jury's consideration of self-defense. *Id.* at 902.

Yet the court gave this instruction to Mr. Poma's jury even though there was no evidence of wrongful aggressive acts by Mr. Poma before the ultimate assaults. Mr. Poma's failure to walk away when Mr. Glover bated him by making crude remarks does not render him the first aggressor for whom self-defense is unavailable.

Mr. Poma did not propose the first aggressor instruction, but he did not object to it. By eliminating his right to act in self-defense for improper reasons, the instruction is not a mere definitional instruction for a term but rather absolves the State of its burden of disproving self-defense. *Riley*, 137 Wn.2d at 910 n.2; *see, e.g., State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (error defining term relevant to self-defense not a constitutional defect when it does not discourage jury from considering whether State proved absence of self-defense beyond a reasonable doubt). An erroneous first aggressor instruction constitutes a deprivation of a constitutional right to act in lawful self-defense and is a manifest constitutional error that should be presumed prejudicial. *See LeFaber*, 128 Wn.2d at 900.

The first aggressor instruction diluted the State's burden of proof. Erroneously giving this instruction to the jury, combined with the errors below, denied Mr. Poma a fair trial. Alternatively, counsel's failure to object to this instruction offers another reason why Mr. Poma received ineffective assistance of counsel as explained below.

*d. The jury was not instructed that Mr. Poma acted lawfully if he was reasonably defending his brother, even though he testified he was defending his brother and defense counsel's closing argument focused on his defense of his brother.*

*i. The jury instructions defined lawful self-defense as limited to Mr. Poma, even though he was also defending another person.*

Self-defense is not limited to defending oneself from a threat of force – it also applies when defending another person. RCW 9A.16.020(3). A person who reasonably believes another person is about to be injured “is justified in using force necessary to protect that person even if, in fact, the party whom he is defending was the aggressor.” *State v. Bernardy*, 25 Wn.App. 146, 148-49, 605 P.2d 791 (1980).

When there is some evidence in the record that the defendant's use of force was due to his apprehension of danger to another person, a “defense of others” instruction must be given. *Id.* “[A] trial court is

bound to give an instruction on a party's theory of the case when, as in this situation, there is evidence to support it" even if the evidence would also support a guilty verdict. *Id.*

In defining the essential requirements for force to be lawful, the court told the jury that the use of force is lawful "when used by a person who reasonably believes that *he* is about to be injured." CP 36 (Instruction 15, emphasis added).

Similarly, Instruction 17 explained that a person has a right to stand his ground if the person reasonably believes "*he* is being attacked." CP 38 (emphasis added). Instruction 16 stated that "a person is entitled to act on appearances in defending himself or another" but it did not explain that defense of another may constitute the lawful use of force. CP 37. No other instruction explained the lawful use of force occurs when reasonably perceiving another person is in danger.

*ii. The incomplete instruction defining self-defense was proposed by defense counsel, which was unreasonable, illogical, and deficient performance of counsel.*

Mr. Poma testified that when he hit Mr. Glover, "I was more afraid for my little brother" and for "our safety." 3RP 325. He felt it was his "place to protect" his brother. 3RP 325. Defense counsel asked

Mr. Poma, “When you hit him, was it your intention to hurt him or keep him from hurting you?” and Mr. Poma responded, “Keep him from hurting me or my brother.” 3RP 347.

Mr. Poma explained he was older than Dominic and his brother was quite small, physically. 3RP 319. Given Mr. Glover’s crude and drunken behavior over the span of two nights, Mr. Poma feared for his brother’s safety even more than his own. 3RP 325.

Defense counsel argued in closing that Mr. Poma was defending himself and his brother. He argued to the jury that a “person has a right to defend himself or another from injury or attack.” 3RP 406. He further argued, “We do know that Chris Poma was trying to keep him from getting hurt or from -- or himself from getting hurt and his brother from getting hurt. That’s what he told you.” 3RP 407; *see also* 3RP 408-09 (“Chris Poma told you he thought he was about to get hurt or his brother was about to get hurt, and was trying to defend and stop that from happening.”)

Yet defense counsel did not propose the “defense of other” jury instruction. CP 12. The pattern jury instruction includes bracketed language for use when a person is lawfully aiding a person who he reasonably believes is about to be injured, but defense counsel did not

request such language. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (3d Ed).

Based on the limited instruction sought by defense counsel, the court defined self-defense as the lawful use of force “when used by a person who reasonably believes that *he* is about to be injured.” CP 36 (Instruction 15, emphasis added). The court’s instructions did not permit the jury to find Mr. Poma acted lawfully if defending his brother and did not require the prosecution to disprove Mr. Poma was defending his brother.

Although Mr. Poma’s attorney proposed the self-defense instructions, if “instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review. *State v. Kyllö*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). Competent counsel conducts research and stays abreast of the law. *Id.* at 862. (“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.”). Deficient performance occurs when an attorney does not reasonably investigate the relevant law. *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend. VI; Const. art. I, § 22.

The failure to propose accurate and complete jury instructions is deficient performance. *Id.*; see *State v. Thomas*, 109 Wn.2d 222, 226-229, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where intent a critical trial issue). It is also deficient performance to propose an instruction - even a pattern instruction - where counsel had reason to know the instruction was incorrect or inapplicable to the specific situation. *Kyllo*, 166 Wn.2d at 865-869 (counsel deficient for proposing WPIC where proper research of case law would have indicated pattern instruction flawed); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering WPIC that allowed client to be convicted under a statute that did not apply to his conduct).

In *Kyllo*, the defense proposed a pattern instruction that overstated the degree of harm the defendant needed to fear to use lawful force. 166 Wn.2d at 863. This pattern instruction had been criticized in other cases. *Id.* Defense counsel's unreasonable failure to offer correct jury instructions misled the jury about the kind of harm the defendant had to fear before he could act in self-defense and reduced the State's burden of proof, which constituted deficient performance under the Sixth Amendment. *Id.* at 864.

Similarly, Mr. Poma had a well-established right to act in self-defense if defending another person. Inexplicably, defense counsel proposed and the court gave instructions explaining the law of self-defense as limited to defending himself, and not his brother, even though the testimony and argument of counsel were premised on Mr. Poma's fear of injury to both people. Defense counsel also failed to object to the first aggressor instruction, even though established law cautions against it unless the necessary factual predicate arises, as discussed above.

Where existing case law indicates that a jury instruction is incorrect or incomplete, even a pattern instruction, counsel's failure to "research or apply relevant law" constitutes deficient performance. *Kylo*, 166 Wn.2d at 868-69.

In a self-defense case, there is "no tactical reason for making it more difficult for [the defendant] to be acquitted on the basis of self-defense." *Kylo*, 166 Wn.2d at 870. Defense counsel unreasonably limited the State's burden of proof to Mr. Poma's defense of himself, and removed its burden of proving he was not reasonably defending his brother, even though Mr. Poma said he was defending his younger, slightly-built brother against a drunken, belligerent, and much larger

man. Had the jury been accurately instructed on the law of self-defense, it is reasonably likely that a different result would have occurred.

*e. The erroneous and incomplete jury instructions require reversal.*

By giving the inapplicable first aggressor instruction, without objection from defense counsel and without using the care mandated by *Riley*, the court effectively removed self-defense from the jury's consideration by telling the jury Mr. Poma did not have the right to act in self-defense because he acted aggressively. By failing to instruct the jury that self-defense also applied to Mr. Poma's fear for his younger and smaller brother when they faced a large, belligerent, drunken man, the jury further misunderstood Mr. Poma's right to act in self-defense.

Self-defense instructions are held to a high standard of clarity so that a lay person may properly apply this complex but well-established right. Even when there is evidence that could have supported the jury's verdict, it is reversible error to give an unwarranted first aggressor instruction. *Birnel*. Had defense counsel proposed the defense of others instruction, there was plain evidence supporting it.

Because self-defense was the critical question for the jury, and it was not given accurate information about the governing legal standard,

Mr. Poma did not receive a fair trial by jury. Defense counsel's unreasonable failure to ensure the jury was given proper instruction on this critical law is reasonably likely to have affected the outcome of the case, when the complaining witness was drunk, crude, and disorderly and Mr. Poma and his brother were outmatched by the complainant's hefty size and belligerent anger.

**2. The prosecution exacerbated the harmful effect of the erroneous instructions by diluting its burden of proof at the very end of closing argument.**

*a. The prosecution told the jury to reach a verdict without deliberating.*

Just before the jury left the courtroom to begin deliberations, the prosecutor trivialized its burden of proof and undermined the deliberative process. 3RP 414-15.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). They have a “position of power and prestige” in the eyes of the jury. *In re Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). “The prosecutor’s argument is likely to have significant persuasive force with the jury.” *Id.*, quoting *American Bar Association Standards for Criminal Justice* std. 3–5.8.

Because of his impact on the jury and role as a quasi-judicial officer, a prosecutor commits misconduct if it urges the jury to convict the defendant on an improper basis and this flagrant and ill-intentioned misstatement could not be cured by an instruction. *Id.*; see *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); U.S. Const. amend. XIV; Const. art. I, §§ 3, 21, 22.

It is well-established that a prosecutor may not mischaracterize the State's burden of proof in closing argument. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). In *Lindsay*, the prosecution improperly compared the State's burden of proof to a jigsaw puzzle or an everyday experience, which improperly trivialized and minimized its burden of proof. *Id.* at 436-37.

In *State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009), the prosecutor explained to the jury that having a reasonable doubt meant it must be able to give a reason why they doubted State's case and also compared the reasonable doubt standard to an everyday decision. These remarks improperly conveyed that the defendant had to supply a reason to avoid conviction and failed to convey the gravity of the State's burden and the jury's role in assessing its case. *Id.*

The prosecutor in the case at bar described the deliberative process sufficient to result in a guilty verdict as merely requiring the jury to “believe” that “he did it” when walking from the courtroom and picking a foreperson. 3RP 414-15. According to the prosecutor, to constitute an “abiding belief in the truth” as required in Instruction 3, the jurors need only believe Mr. Poma did it when stepping out of the courtroom and “still believe it” when you “pick your foreperson.” *Id.*<sup>4</sup>

These remarks fundamentally misstate the State’s burden of proof and undercut the deliberative process. Deliberations have not even started when the jurors leave the courtroom, but the prosecutor encouraged the jurors to make up their minds as they walked out of the courtroom before deliberations. *State v. Lamar*, 180 Wn.2d 576, 583-85, 327 P.3d 46 (2014). Further, an ““abiding belief in the truth of the

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<sup>4</sup> The prosecutor told the jury:  
I want to remind you of instruction 3. There's a final sentence in that. You go in, walk down here, you think about that, think about this as well. If from such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. If you take the walk down those two steps into that room and you believe when you leave here that he did and you go and sit in that room and pick your foreperson and you still believe it, the State has carried its burden. And we ask that you find him guilty of assault in the second degree.  
THE COURT: All right. Thank you, Mr. Laurine.

3RP 415-15.

charge’ connotes both duration and the strength and certainty of a conviction.” *State v. Osman*, \_ Wn.App. \_, \_ P.3d \_, 2016 WL 298802, at \*11 (Jan. 25, 2016). The requisite belief requires engaging in joint deliberations prior to reaching a verdict.

Jurors must reach the constitutionally required unanimous consensus “by a comparison of views, and by arguments among the jurors themselves among themselves,” without coercion and not by merely acquiescing to a majority view. *Id.* at 584-85 (quoting *inter alia*, *State v. Guzman Nunez*, 174 Wn.2d 707, 719, 285 P.3d 21 (2012)). It is the jurors’ “duty” to carefully consider “the views and arguments of their fellow jurors.” *Id.*

Deliberations require that,

each juror examines the evidence and the parties’ arguments about what the evidence means, in light of the jury instructions, and all of the jurors exchange their individual perceptions, experiences, and assessments.

*Id.*

As the *Lamar* Court further explained,

The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. . . . Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally

important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.

*Id.* at 585., quoting *People v. Collins*, 17 Cal.3d 687, 693, 552 P.2d 742, 131 Cal.Rptr. 782 (1976).

By describing an “abiding belief” as merely believing “he did it” as exiting the courtroom and then selecting a foreperson, the prosecution sent the message to jurors that no discussion or comparison of views was expected or needed. 3RP 414-15. Instead, they would merely be gathering in a room and casting a vote based on a momentary belief that “he did it.” Here, the State bore the burden of disproving Mr. Poma acted in self-defense, so believing “he did it” misled the jury about the decision it needed to make. Even if “he did it,” he was not legally culpable if he acted in lawful self-defense.

The prosecutor ensured his remarks would stay at the fore of the jurors’ minds because it was the very last thing they heard before deliberating. 3RP 415. Defense counsel was left without time to object as the State ended its closing argument with these remarks and the judge thanked the prosecution, so defense counsel had no chance to meaningfully respond. Even if he had objected, an instruction would

not have erased the memorable mental image conjured by the prosecutor of walking down two steps and into the jury room to simply state what the jurors already believed without additional discussion.

By minimizing its burden of proof and discouraging the jurors from engaging in the deliberative process, the prosecution exacerbated the error stemming from the limitations on the defense's ability to receive fair consideration of self-defense from the jury due to the incorrect and incomplete descriptions of the law.

*b. The cumulative error denied Mr. Poma a fair trial by competent counsel.*

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

Mr. Poma was a sympathetic young person trying to defend himself and his brother from a drunken, belligerent, and physically imposing bully. But the jury was not properly instructed on Mr. Poma's right to act in self-defense due to errors by the court, prosecutor, and defense counsel. These errors were exacerbated by the prosecution's efforts to discourage the jury from engaging in the acts necessary to

deliberation and from holding the State to its burden of proof. These errors, taken together, affected the jury's verdict and require a new trial.

**3. The court impermissibly imposed discretionary legal financial obligations that were not incurred in the case, notwithstanding Mr. Poma's indigence and large outstanding debt incurred by restitutions.**

*a. Incarceration fees may only be imposed if actually incurred and based on a specific finding of ability to pay, which did not occur in this case.*

Mr. Poma was out of custody throughout the pre-trial and trial proceedings. He was summoned to appear in court and was "booked and released" when the State filed its charge against him. Supp. CP \_\_, sub. no. 5. He remained out of custody at sentencing. 3RP 428.

Without discussion, the court ordered Mr. Poma to pay \$150 for incarceration fees. Incarceration fees are only a permissible fee based on actual cost and may not exceed \$100 per day. RCW 10.01.160(2); RCW 9.94A.760(2). The court only has authority to order costs that are "expenses specially incurred by the state in prosecuting the defendant" under RCW 10.01.160(2). *State v. Dias Ferias*, \_\_ Wn. App. \_\_, 362 P.3d 322, 323 (2015).

There was no evidence at the sentencing hearing that the county actually incurred incarceration fees before Mr. Poma served his

sentence. In a different part of the judgment and sentence, the court did not enter a finding that Mr. Poma “has the means to pay” the costs of incarceration and did not order it. CP 49. This \$150 incarceration fee appears to contemplate pretrial incarceration, not for the later-imposed sentence, given the two different parts of the judgment that refer to incarceration fees. CP 48, 49. Because Mr. Poma was not incarcerated during trial or before trial, as well as the court’s failure to find Mr. Poma had the ability to pay incarceration fees, the court lacked authority to order he pay these fees. *See Dias Ferias*, 362 P.3d at 329.

*b. The court ordered Mr. Poma to pay Sheriff service fees without evidence they were actually incurred.*

The court ordered Mr. Poma pay \$445 in Sheriff service fees but did not rule that these fees were actually incurred as required. RCW 10.01.160(2). There was no mention of the State’s intent to request these fees during sentencing. The court did not mention it would be imposing these fees during the sentencing hearing. RCW 10.01.160 does not authorize the court to tax a criminal defendant with the costs of ordinary operation of the courts, prosecution, or police. *Dias Ferias*, 362 P.3d at 329. Given the dearth of information about how and when the Sheriff’s office actually incurred “service fees” in a

manner that was outside its regular expenses, these costs are not authorized. *Id.*

*c. Principles of due process bar the court from imposing financial penalties that are not actually incurred.*

Due process requires the State bear the burden of proof at sentencing. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. Because the prosecution bears the burden of proof at sentencing, it must present reliable evidence supporting the sentence requested. *Id.* Legal financial obligations are part of a sentence to which the State's due process obligation also applies.

The prosecution did not prove the State incurred the incarceration fees or sheriff service fees it requested Mr. Poma pay. Mr. Poma did not agree to pay unauthorized costs as part of his sentence. Having not been in jail before he was sentenced, it is hard to believe these costs were actually incurred. Having only a few witnesses in the case, it is hard to believe the service fees were as large as the State requested. Mr. Poma's failure to object to fees that were not even discussed at his sentencing hearing does not constitute an agreement to pay costs that are not authorized by statute. *Hunley*, 175 Wn.2d 913-15.

“A trial court’s obligation to follow the law remains the same regardless of the arguments raised by the parties before it.” *State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008). The LFOs that involve expenses that were not actually incurred should be stricken.

*d. No appellate costs are warranted in the event Mr. Poma does not substantially prevail.*

In the event Mr. Poma does not prevail in his appeal, he asks that no costs of appeal be authorized under RAP 14. *See State v. Sinclair*, \_\_ Wn.App. \_\_, \_\_ P.3d \_\_, 2016 WL 393719, \*4 (2016). Mr. Poma was indigent and entitled to court-appointed counsel at trial and on appeal. CP 48; *see* COA 47804-8-II, Statement of Arrangements (filed Sept. 3, 2015, with in forma pauperis motion and order attached). His court-appointed counsel verified that his financial condition had only worsened from the outset of the charges. *Id.* The sentencing court did not conduct any individualized inquiry into Mr. Poma’s ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). If Mr. Poma’s conviction is not reversed due to the unfair and incorrect instructions, he has a large restitution debt that he must repay, which is not waivable even if he lacks the ability to pay. CP 48.

This Court should deny any request that Mr. Poma pay the additional costs of the appeal.

F. CONCLUSION.

Christopher Poma's conviction should be reversed due to the incorrect jury instructions, ineffective assistance of counsel, and improper explanation of the State's burden of proof. At the least, the unauthorized legal financial obligations should be stricken and no costs of appeal imposed.

DATED this 18<sup>th</sup> day of February 2016.

Respectfully submitted,

*s/ Nancy P. Collins*  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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|----------------------|---|----------------|
| STATE OF WASHINGTON, | ) |                |
|                      | ) |                |
| RESPONDENT,          | ) |                |
|                      | ) |                |
| v.                   | ) | NO. 47804-8-II |
|                      | ) |                |
| CHRISTOPHER POMA,    | ) |                |
|                      | ) |                |
| APPELLANT.           | ) |                |

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2016.

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# WASHINGTON APPELLATE PROJECT

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## Transmittal Letter

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