

**FILED**

**SEP 02 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29232-1

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

THE STATE OF WASHINGTON,

Respondent,

v.

PHILIP JEROME STRONG,

Appellant.

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

John C. Hillman  
Assistant Attorney General  
WSBA #25071  
Criminal Justice Division  
800 5th Avenue, Suite 2000  
Seattle, WA 98104  
206-464-6430

**FILED**

**SEP 02 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29232-1

---

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

---

THE STATE OF WASHINGTON,

Respondent,

v.

PHILIP JEROME STRONG,

Appellant.

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

John C. Hillman  
Assistant Attorney General  
WSBA #25071  
Criminal Justice Division  
800 5th Avenue, Suite 2000  
Seattle, WA 98104  
206-464-6430

## TABLE OF CONTENTS

I.	ISSUE PERTAINING TO ASSIGNMENT OF ERROR .....	1
II.	STATEMENT OF THE CASE .....	1
	A. Facts .....	1
	B. Procedure .....	4
III.	ARGUMENT .....	7
	A. The firearm sentencing enhancement should be affirmed because the trial court properly instructed the jury.....	8
	B. The firearm sentencing enhancement should be affirmed because the defendant failed to preserve a claim of jury instructional error.....	10
	1. The defendant waived a claim of error by declining to object at trial.....	11
	2. The claim of error does not involve constitutional error. ....	12
	3. The claimed error does not involve “manifest error” affecting a constitutional right.....	14
	4. The law of the case doctrine precludes review of the claims raised in this second appeal.....	17
	C. Any error in Instruction No. 23 was harmless error. ....	21
IV.	CONCLUSION .....	24

## TABLE OF AUTHORITIES

### Cases

<i>Folsom v. County of Spokane</i> 111 Wn.2d 256, 759 P.2d 1196 (1988).....	17
<i>Roberson v. Perez</i> 156 Wn.2d 33, 123 P.3d 844 (2005).....	17
<i>State v. Agguire</i> 168 Wn.2d 350, 229 P.3d 669 (2010).....	21
<i>State v. Barberio</i> 121 Wn.2d 48, 845 P.2d 519 (1993).....	18
<i>State v. Bashaw</i> 144 Wn. App. 196, 182 P.3d 451 (2008), <i>overruled</i> , 169 Wn.2d 133, 234 P.3d 195 (2010) .....	8, 9
<i>State v. Bashaw</i> 169 Wn.2d 133, 234 P.3d 195 (2010).....	passim
<i>State v. Brown</i> 147 Wn.2d 330, 58 P.3d 889 (2002).....	21
<i>State v. Ervin</i> 158 Wn.2d 746, 147 P.3d 567 (2006).....	9
<i>State v. Goldberg</i> 149 Wn.2d 888, 72 P.3d 1083 (2008).....	21
<i>State v. Kirkman</i> 159 Wn.2d 918, 155 P.3d 125 (2007).....	11, 14
<i>State v. McFarland</i> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10, 12
<i>State v. Morgan</i> ___ Wn . App. ___ (#67130-8-I, August 29, 2011).....	13, 16

<i>State v. Nunez</i> 160 Wn. App. 150, 248 P.3d 103 (2011).....	passim
<i>State v. O'Hara</i> 167 Wn.2d 91, 217 P.3d 756 (2009).....	12, 15
<i>State v. Rodriguez</i> ___ Wn. App. ___ (#26283-9-III, August 23, 2011).....	13, 15, 16
<i>State v. Ryan</i> 160 Wn. App. 944, 252 P.3d 895 (2011).....	16
<i>State v. Ryan</i> 160 Wn. App. 944, 252 P.3d 895 (2011), review granted, ___ Wn.2d ___ (August 9, 2011) .....	13
<i>State v. Sauve</i> 100 Wn.2d 84, 666 P.2d 894 (1983).....	17
<i>State v. Scott</i> 110 Wn.2d 682, 757 P.2d 492 (1988).....	10, 11, 12, 14
<i>State v. Siebert</i> 168 Wn.2d 306, 230 P.3d 142 (2010) (quoting <i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996)).....	8

**Rules**

CrR 6.15(c) .....	11
RAP 2.5(a) .....	11, 12
RAP 2.5(a)(3).....	12, 14, 17
RAP 2.5(c) .....	17, 18

**Other Authorities**

WPIC 160.00.....	passim
------------------	--------

## **I. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

A Ferry County jury found beyond a reasonable doubt that appellant Philip Jerome Strong was armed with a firearm at the time he committed the crime of manslaughter. Strong challenges the trial court's instruction to the jury on how to answer a special verdict form asking whether Strong was armed with a firearm. The jury answered "yes." Should the firearm sentencing enhancement be affirmed where (1) the trial court properly instructed the jury, (2) the alleged error was not preserved at trial, and (3) any error was harmless?

## **II. STATEMENT OF THE CASE**

### **A. Facts**

On March 29, 2007, Trent Irby traveled to Curlew, Washington. RP 75, 167-68. Irby stayed at the home of his adoptive mother, Melinda Jarrett, while in Curlew. RP 75, 168. On April 3, 2007, appellant Philip Jerome "Jeb" Strong ("defendant") shot Irby twice, killing Irby while he sat at Jarrett's kitchen table. RP 110, 773-74, 786, 805-816.

Irby worked as a carpenter for Rural Resources, a community action group that helped people with their carpentry needs. RP 74. Irby traveled from Colville to Curlew in late March 2007 in order to build the second story of a barn for a local resident. RP 328-29. Irby worked on this project during his stay in Curlew from March 29 - April 3, 2007.

RP 171-72, 328. Irby's friend Mark Kingsland visited Irby at Jarrett's house during Irby's stay in Curlew. RP 171-72. The defendant, a tenant on Jarrett's property, socialized with Irby and Kingsland during some of these visits. RP 85-87, 90-92, 169-70, 172-76, 282.

Tension developed between the defendant and Irby during Irby's stay in Curlew. Irby borrowed one of the defendant's vehicles without permission in order to get to work, which greatly upset the defendant. RP 173-74, 733. The defendant believed that Irby meant to displace him from his residence on Jarrett's property. RP 89-90, 282-83. On the day that the defendant killed Irby, he told Jarrett that he sensed a conspiracy between Irby and Jarrett to move the defendant off of the property. RP 287-88.

On April 3, Irby arrived at the Jarrett residence after a day of carpentry work. RP 100. Irby sat down at the kitchen table with a can of beer. RP 100, 105. Irby and his fiancée, Kelli Stout, discussed plans for the evening. RP 74, 100-01. During this conversation, the defendant entered through the back door of the residence. RP 101, 109. The defendant was carrying a loaded rifle. RP 101, 109.

The defendant walked up to Irby seated at the kitchen table and asked, "So, what do you think about today being your day to die[?]" RP 110. Irby did not understand the seriousness of the defendant's

intentions and responded, “Bring it on motherf---er.” RP 110. The defendant shot Irby in the chest from only a few feet away. RP 112. Irby crumpled to the floor. RP 113. The defendant walked over to Irby, who was prone on the floor, placed the barrel of his rifle against Irby’s back and fired again. RP 113-14, 461-62.

The first shot to the chest cleaved Irby’s liver in half and the bullet embedded in his back. RP 471. The first shot would have taken Irby’s life even with immediate care by an experienced surgeon. RP 471-72. The second shot through Irby’s back “pulpified” Irby’s right lung and the right side of Irby’s heart before exiting Irby’s chest. RP 481. The second shot also would have taken Irby’s life even with immediate medical intervention. RP 482. The medical examiner determined that the cause of Irby’s death was two penetrating gunshot wounds. RP 489.

Irby’s girlfriend Kelli Stout stepped into the bathroom to hide from the defendant after she witnessed the murder. RP 115-16. The defendant fled the scene while Stout hid in the bathroom. RP 815. Stout emerged from the bathroom after the defendant fled and she called 911. RP 815. Stout’s hysterical 911 call triggered a response from the Ferry County Sheriff’s Office, the Washington State Patrol, and the United States Border Patrol. RP 385-86.

The defendant afterwards admitted to several civilian witnesses

that he had shot Trent Irby. RP 196-97, 210. The defendant testified at trial that he left his 30-30 rifle on the ramp to his trailer after he shot Irby. RP 817. Police found the defendant's rifle on his front porch. RP 360, 402. A fired cartridge casing was found inside the chamber of the defendant's rifle and collected by police. RP 403, 407. A fired cartridge casing was also found and collected near Trent Irby's body. RP 398, 553. A firearm's examiner from the State Patrol Crime Lab determined that both the cartridge casing found near Irby and the cartridge casing from the chamber of the defendant's rifle were casings of cartridges fired from the defendant's rifle. RP 615, 617. The defendant's shoes were removed from his feet and collected when he was arrested. RP 595. Blood spatter on the defendant's shoes was identified as Trent Irby's blood. RP 639. The shape of the burn mark around the contact wound on Irby's back was the same as the shape of the tip of the barrel of the defendant's rifle. RP 463.

**B. Procedure**

The State charged the defendant with premeditated murder in the first degree and further alleged that the defendant was armed with a firearm at the time of the crime. RP 2; CP 3-4. The defendant was tried for murder in January 2008. During this first trial, the jury was provided with a special verdict form asking if the defendant was armed with a

firearm at the time of the crime. CP 146-165. The jury was instructed that it must be unanimous in order to answer the special verdict form “yes.” CP 146-165 (Instruction No. 18) (**Appendix A**). The jury was not instructed that it had to be unanimous in order to answer the special verdict form “no.” CP 146-165 (Instruction No. 18) (**Appendix A**).

The first jury found the defendant “guilty” of the lesser-degree crime of murder in the second degree. CP 167-178. The first jury also answered “yes” to the special verdict form asking if the defendant was armed with a firearm during the commission of the crime. CP 166. The defendant appealed. CP 18-39.

In his first appeal, the defendant did not assign error to the jury instruction for the firearm sentencing enhancement. CP 21, 29-30; *Brief of Appellant*, #26855-1-III (**Appendix B**). The defendant’s conviction was reversed for an instructional error unrelated to the firearm sentencing enhancement. CP 18-39.

A second jury trial was held in July 2010. RP 54, 850. The State presented uncontroverted evidence that the defendant twice shot Irby with a firearm. RP 110-114, RP 461-62. The defendant testified and admitted that he twice shot Irby with his rifle, but he asserted that he acted in self-defense after Irby pointed a pistol at him. RP 773. During closing

argument, defense counsel conceded that the defendant shot Irby with a firearm:

the defense has been clear on that that Strong shot Irby. But, what about the central question in this case of whether or not Irby was armed?

RP 955. There was no dispute at trial that the defendant was armed with a firearm when he caused Irby's death; the only issue at trial was whether or not the defendant shot Irby in self-defense.

The defendant did not object to any of the proposed jury instructions used during the second trial; nor did the defendant propose alternative instructions pertaining to the firearm enhancement. RP 875-80; CP 88-98. The defendant was specifically asked by the court if he had an objection to Instruction No. 23 and his counsel responded "no." RP 879.

The Court's Instruction No. 23 was identical to Instruction No. 18 from the first trial and instructed the jury in part:

Because this is a criminal case, in order to answer any special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

CP 124. In conjunction with Instruction No. 23, the jury was provided with a special verdict form that provided:

Was the defendant PHILIP J. STRONG armed with a firearm at the time of the commission of the crime of manslaughter in the first degree?

CP 135. Instruction No. 22 advised the jury that it could ask questions of the court, in writing, if there was any confusion about the jury instructions. CP 122-123.<sup>1</sup> The jury never expressed any confusion about Instruction No. 23 or the Special Verdict Form for Manslaughter in the First Degree.

The jury found the defendant guilty of manslaughter in the first degree. RP 1002-03; CP 134. The jury further found beyond a reasonable doubt that the defendant was armed with a firearm when he committed the crime of manslaughter. CP 135.

The trial court imposed a standard range sentence that included a mandatory 60-month firearm sentencing enhancement. CP 136-44. This appeal follows. CP 145. The defendant's only claim of error is that the 60-month firearm enhancement was erroneous due to an allegedly faulty jury instruction.

### **III. ARGUMENT**

The court should affirm the firearm sentencing enhancement for three reasons. First, the trial court properly instructed the jury on how to answer the special verdict form. Second, even if the trial court gave erroneous instructions, the error was not preserved for appeal. Third, any error was harmless given the facts of this case.

---

<sup>1</sup> "If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly."

**A. The firearm sentencing enhancement should be affirmed because the trial court properly instructed the jury.**

Jury instructions are proper if they “allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *State v. Siebert*, 168 Wn.2d 306, 315, 230 P.3d 142 (2010) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). Where sentencing enhancements are alleged, Washington’s common law requires that the trial court inform the jury that it must unanimously find the presence of the aggravating sentencing factor. *State v. Nunez*, 160 Wn. App. 150, 161-62, 248 P.3d 103 (2011); *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). The jury need not be unanimous to find the absence of a sentencing factor. *Bashaw*, 169 Wn.2d at 147.

Accordingly, it is error to instruct the jury that it must be unanimous in order to answer a special verdict form “no” when considering a sentencing factor. In *State v. Bashaw*, the trial court used WPIC 160.00 (**Appendix C**) in a case where the sentencing factor of selling drugs within 1,000 feet of a school bus stop was alleged. *State v. Bashaw*, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008), *overruled*, 169 Wn.2d 133, 234 P.3d 195 (2010). The trial court utilized WPIC 160.00 and instructed the jury:

in order to answer the special verdict form ‘yes’, you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer ‘no.’*

*Bashaw*, 144 Wn. App. at 198-99 (emphasis added). The Washington Supreme Court held that WPIC 160.00 erroneously required the jury to be unanimous in order to find that the State did not prove a fact necessary for a sentencing enhancement. *Bashaw*, 169 Wn.2d at 145-48.

Here, unlike *Bashaw*, the jury was not instructed that it had to be unanimous in order to answer the special verdict form “no.” CP 124. The State’s proposed instructions specifically omitted the offending language identified in *Bashaw*. The trial court gave the State’s proposed instruction, without objection from the defense or proposal of a different instruction from the defense, which properly instructed the jury that it only had to be unanimous to answer the special verdict form “yes.” CP 88-98; CP 124; RP 875-880. Jurors are presumed to follow the court’s instructions. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

The trial court instructed the jury in a manner that was not misleading, correctly stated the law, and allowed all parties to argue their theory of the case. The court imposed the firearm sentencing enhancement based upon a properly returned factual finding by the jury. The firearm sentencing enhancement should be affirmed.

**B. The firearm sentencing enhancement should be affirmed because the defendant failed to preserve a claim of jury instructional error.**

An appellant must preserve an issue for appeal with an objection at trial. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Failure to object at trial prevents the trial court from correcting an error and leads to needless appeals and additional trials. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Appellate courts will generally refuse to address a claim raised for the first time on appeal unless the claim involves “manifest constitutional error.” RP 2.5(a)(3); *McFarland*, 127 Wn.2d at 332-33.

Here, the court should decline to review the defendant’s claim of error asserted for the first time on appeal. First, the defendant waived a claim of error when he declined to object to Instruction No. 23 or propose an alternative instruction. Second, the claim of error is not a constitutional claim that can be raised for the first time on appeal. Third, the claim of error does not involve “manifest error” affecting a constitutional right that may be raised for the first time on appeal. Finally, the law of the case doctrine precludes review because the defendant did not object to the same jury instruction at his first trial or claim error in his first appeal.

///

///

**1. The defendant waived a claim of error by declining to object at trial.**

Appellate courts will not approve a party's failure to raise an objection at trial that could have identified the error and allowed the trial court to correct it. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). A decision not to object may be tactical and if raised on appeal only after losing at trial may necessitate a new trial with substantial consequences to all parties. *Id.* Accordingly, an appellate court may refuse to review a claim of error raised for the first time on appeal. RAP 2.5(a).

CrR 6.15(c) specifically requires the parties to make a record of exceptions to the jury instructions before the court instructs the jury. The duty of a party to preserve error has specific applicability to the failure to challenge jury instructions. *Scott*, 110 Wn.2d at 685.

Here, the trial court discussed the proposed instructions with both parties outside the presence of the jury as required by CrR 6.15(c). The defendant did not object to the court's proposed instruction related to the special verdict form, Instruction No. 23. RP 875-80. The defendant did not propose an alternative jury instruction. CP 88-98. The defendant's decision to accept the instruction given by the trial court deprived the trial court of the opportunity to address and/or correct the alleged error the

defendant now raises for the first time on appeal. The court should decline review of this claim of error pursuant to RAP 2.5(a).

**2. The claim of error does not involve constitutional error.**

The Rules of Appellate Procedure provide an exception to the general rule requiring an objection at trial. RAP 2.5(a)(3) allows an appellant to raise a claim of “manifest error affecting a constitutional right” for the first time on appeal. However, an appellant must identify a constitutional error in order to obtain review under RAP 2.5(a)(3). *McFarland*, 127 Wn.2d at 333. Appellate courts refuse to hear claims of error first raised on appeal absent a showing of constitutional error. *Scott*, 110 Wn.2d at 688. Appellate courts do not assume that claimed errors meet the constitutional threshold for the exception to RAP 2.5(a)(3). *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Here, the defendant suggests that his appeal involves a constitutional due process issue that that can be raised for the first time on appeal. *Brief of Appellant* at pp. 4-6.<sup>2</sup> The defendant’s challenge to Jury Instruction No. 23 is not a constitutional claim.

---

<sup>2</sup> Division One disagreed with this court and held that the same instructional error alleged by Strong implicates due process and is manifest constitutional error. *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011). A different panel of Division One rejected *Ryan*. *State v. Morgan*, \_\_\_ Wn . App. \_\_\_ (67130-8-I, August 29, 2011). This court recently reaffirmed *Nunez* in *State v. Rodriguez*, refusing to address a *Bashaw* claim for the first time on appeal. \_\_\_ Wn. App. \_\_\_ (#26283-9-III, August 23, 2011). The Washington Supreme Court recently accepted review of both *Nunez* and *Ryan*.

First, neither the federal nor Washington State Constitutions provide textual support for a violation of due process based upon a jury instruction that required jury unanimity in order to find the absence of a sentencing factor. *Nunez*, 160 Wn. App. at 159-60. In fact, this Court noted that the Washington State Supreme Court based its decision in *Bashaw* on common law and policy considerations, not constitutional law. *Nunez*, 160 Wn. App. at 161-63 (“this is not constitutional error”); *State v. Morgan*, \_\_\_ Wn App. \_\_\_ (#67130-8-I, August 29, 2011) (“the right at issue is based in Washington common law”); *See also Bashaw*, 169 Wn.2d at 146 n.7 (rejecting a constitutional basis for the court’s holding).

This court has already concluded that the claim of error raised in the present appeal is not manifest constitutional error that may be raised for the first time on appeal. *State v. Rodriguez*, \_\_\_ Wn. App. \_\_\_ (#26283-9, August 23, 2011); *State v. Nunez*, 160 Wn. App. at 161-63. Division One reached the same conclusion. *State v. Morgan*, \_\_\_ Wn. App. \_\_\_ (#67130-8-I, August 29, 2011); *Contra State v. Ryan*, 160 Wn. App. 944, 948, 252 P.3d 895 (2011), *review granted*, \_\_\_ Wn.2d \_\_\_ (August 9, 2011).

Second, “[t]he requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the

defendant must be acquitted.” *Scott*, 110 Wn.2d at 690. Here, the jury instructions informed the jury of the essential elements of the crime, and that the jury must be unanimous in order to answer the special verdict form “yes.” Instruction No. 23 properly informed the jury that it must unanimously agree that the State proved the firearm enhancement beyond a reasonable doubt in order to answer the special verdict form “yes.” The instruction did not include the error identified in *Bashaw* where the jury was told that it must be unanimous in order to answer the special verdict form “no.” The jury instructions in this case complied with the requirements of due process and avoided the error identified in *Bashaw*.

The instructional error alleged in this case is a claim of non-constitutional error that cannot be raised for the first time on appeal. The court should decline review.

**3. The claimed error does not involve “manifest error” affecting a constitutional right.**

The exception for “manifest constitutional error” set forth in RAP 2.5(a)(3) is interpreted narrowly. *Kirkman*, 159 Wn.2d at 934. The exception requires the appellant to demonstrate actual prejudice at trial before an appellate court will consider a constitutional error raised for the first time on appeal. *Id.* at 935.

“Manifest error affecting a constitutional right” is constitutional

error “so obvious on the record” that it warrants appellate review. *O’Hara*, 167 Wn.2d at 99-100. “It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecution or trial counsel could have been justified in their actions or failure to object.” *O’Hara*, 167 Wn.2d at 100. Rather, “to determine if an error was practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100.

This Court has already decided several times that the instructional error alleged in this case is not “manifest constitutional error” allowing appellate review for the first time on appeal. *State v. Rodriguez*, \_\_\_ Wn. App. \_\_\_ (#26283-9-III, August 23, 2011); *Nunez*, 160 Wn. App. at 163-65. In *Nunez*, this Court reviewed a similar jury instruction for actual prejudice and found no “consequences on the record that should have been apparent to the trial court.” *Nunez*, 160 Wn. App. at 163. The Court noted that the instruction conformed to the recommended pattern instruction (WPIC 160.00), and that the instructions allowed the jury to properly consider the issue. *Nunez*, 160 Wn. App. at 163. This court followed *Nunez* in *Rodriguez*, *supra*. Division One reached the same conclusion in

*State v. Morgan*, \_\_\_ Wn. App. \_\_\_ (#67130-8-I, August 29, 2011), but the opposite conclusion in *State v. Ryan*, *supra*.

The alleged instructional error in this case is even less “manifest” than the error alleged in *Nunez*. In *Bashaw*, the Washington State Supreme Court found defective the same jury instruction—WPIC 160.00—that was given in *Nunez*. That instruction was not given in the present case. Indeed, the trial court specifically removed the misstatement of the law found in the pattern instruction when it instructed the jury in the present case. CP 124. The Washington Supreme Court has never disapproved of the instruction used in this case.

Like *Nunez*, the jury in the present case made all of the required findings and applied the proper burden of proof in answering the special verdict form. The Court should follow *Nunez*, *Rodriguez*, and *Morgan* and find no “consequences on the record that should have been apparent to the trial court.” *Nunez*, 160 Wn. App. at 163.

There is no question in the present case that the trial court could have addressed and, if necessary, corrected the defendant’s claimed error had an objection been raised. The trial court was never given the opportunity to consider the issue now raised on appeal. Instead, the defendant agreed that the instruction should be given. The Court should not review the claim.

**4. The law of the case doctrine precludes review of the claims raised in this second appeal.**

Even where RAP 2.5(a)(3) allows an appellant to raise an issue for the first time on appeal, the court may reject the appeal under the law of the case doctrine if the appellant failed to present it in an earlier appeal. *State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988). “[E]ven though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in the second appeal.” *Sauve*, 100 Wn.2d at 87. Courts generally consider new issues in a second appeal only when refusal to hear the claim would result in manifest injustice or the law has changed between the appeals. *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

RAP 2.5(c) sets forth a limited restriction on application of the law of the case doctrine:

**Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would be best served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

In *State v. Barberio*, the Washington Supreme Court explained that RAP 2.5(c) does not always allow the appellant to raise an error that was not raised in a prior appeal:

This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

*State v. Barberio*, 121 Wn.2d 48, 50, 845 P.2d 519 (1993).

Here, the defendant's claim of error is no longer an appealable question. The trial court did not "exercise its independent judgment and review and rule again" on the propriety of Instruction No. 23. Rather, there was no issue to resolve because the defense agreed that the court should give the modified WPIC 160.00 proposed by the State. It should be noted that the Supreme Court's decision in *Bashaw* was already published when the trial in this case took place.<sup>3</sup> The parties agreed that the modified WPIC 160.00 was proper and the trial court gave it as

---

<sup>3</sup> The Supreme Court published its opinion in *Bashaw* on July 1, 2010. Trial in *State v. Strong* began on July 7, 2010. RP 10. The jury instruction conference was held on July 12, 2010. RP 850-880.

Instruction No. 23. CP 124; RP 833,<sup>4</sup> 879, 901-02.

The law of the case doctrine precludes review of the issue raised in the present appeal. The trial court gave the same instruction in the first trial that the defendant now claims was error at his second trial. CP 146-165 (Instruction No. 18, **Appendix A**). The defendant did not challenge the instruction at his first trial or in his first appeal.<sup>5</sup> The defendant's failure to appeal the issue deprived this Court of the opportunity to address and correct the error prior to the second trial. Instruction No. 18 from the first trial became the law of the case and was given as Instruction No. 23 at the second trial. Without objection from the defendant, the trial court understandably gave the same instruction at the second trial. The trial court was not asked to review and rule on the propriety of the jury instruction at the second trial. The defendant's decision not to object to the jury instruction issue at the first trial, or claim error during the first appeal, frustrates the principles of judicial economy and finality that the law of the case doctrine was intended to serve.

The defendant's second appeal involves neither of the circumstances by which courts usually justify a decision to hear a new issue in a later appeal. First, no manifest injustice would occur if this court declined to review the defendant's claim of error because it was

---

<sup>4</sup> [DEFENSE COUNSEL]: Everything that [the prosecutor] had looked good.

<sup>5</sup> See "*Brief of Appellant*," COA# 26855-1-III, (**Appendix B**).

undisputed at trial that the defendant was armed with a firearm when he committed the crime for which he was convicted. The defendant admitted at trial that he used his own loaded rifle to twice intentionally shoot and fatally wound Trent Irby. The defendant's testimony followed overwhelming evidence presented by the State that the defendant used a firearm to intentionally shoot and kill Irby.

The fact that the defendant was armed with a firearm at the time of the crime inheres in the jury's verdict finding the defendant guilty of manslaughter. The only means of causing Irby's death alleged or proved was by shooting. That the defendant shot Irby while armed with a firearm was not in dispute. The only issue at trial was whether the defendant shot Irby in self-defense. Refusing to review whether Instruction No. 23 was erroneously worded does not result in a manifest injustice because the instruction only affected the jury's consideration of whether the defendant was armed with a firearm, a fact that could not be and was not disputed. Overwhelming evidence proved beyond any doubt that the defendant was armed with a firearm when Trent Irby was killed.

Second, no change in the law occurred between the defendant's first appeal and his second appeal. Although the Supreme Court published *Bashaw* during the interim between the first and second appeals in this case, *Bashaw* did not change the law. *Bashaw*, 169 Wn.2d at 145.

According to the Supreme Court, *Bashaw* merely reaffirmed prior rulings: “[t]he rule we adopted in *Goldberg* and reaffirm today serves several important policies.” *Id.* at 146, (citing *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2008)) (emphasis added).

Instruction No. 23 became the law of the case when the same instruction was neither objected to by the defendant at the first trial nor challenged in the first appeal. The court should decline review of the defendant’s claim of error.

**C. Any error in Instruction No. 23 was harmless error.**

An erroneous jury instruction is generally subject to constitutional harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). A jury instructional error is harmless if the appellate court is satisfied “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *State v. Bashaw*, 169 Wn.2d at 147. Even misleading instructions do not require reversal unless the complaining party can show prejudice. *State v. Agguire*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). A jury instruction that incorrectly informs the jury that it must be unanimous in order to answer “no” to a special verdict form for purposes of an aggravating sentencing factor is subject to harmless error analysis. *Bashaw*, 169 Wn.2d at 147.

In *Bashaw*, the jury had to answer a special verdict form asking

whether Bashaw sold drugs within 1,000 feet of a school bus stop. *Bashaw* at 137. At trial, Bashaw contested the means used to calculate distances between the bus stop and the alleged drug transaction. *Id.* at 139. Witnesses testified that at least one of the sales may have occurred more than 1,000 feet from the nearest bus stop. *Id.* Whether Bashaw was within 1,000 feet of a bus stop was a disputed factual issue squarely before the jury. The jury was erroneously instructed that it had to be unanimous in order to answer the special verdict form “no.” On appeal, the court conducted a harmless error analysis and concluded that it could not find the instructional error harmless beyond a reasonable doubt because whether Bashaw was within 1,000 feet of the bus stop was a contested factual issue at trial. *Id.* at 147-48.

In the present case, unlike *Bashaw*, overwhelming and uncontroverted evidence demonstrates that the jury would have reached the same verdict even with a different instruction. There was no factual dispute that the defendant was armed with a firearm at the time he shot Trent Irby. Eyewitness Kelli Stout testified that the defendant shot Irby twice with a rifle. RP 110-13. The medical examiner testified that Irby died as a result of two gunshot wounds. RP 471-72, 482. The medical examiner matched the barrel of the defendant’s rifle to the burn marks on the outside of the gunshot wound on Irby’s back. RP 463. The Crime Lab

conclusively identified a fired cartridge casing found next to Irby's body as having been fired from the defendant's rifle. RP 615. Blood spatter on the defendant's shoes was Irby's blood. RP 639. The defendant took the stand and admitted that he shot Irby while Irby sat at the kitchen table; and once again in the back while Irby lay on the ground. RP 773-74. The defendant admitted that after the killing he left the rifle he used to shoot Irby on his porch. RP 817. Police found the defendant's rifle on his porch. RP 360, 402. During closing argument, defense counsel conceded that the defendant shot Irby with his rifle, but argued that he acted in self-defense. RP 955.

The verdict of "guilty" in this case necessarily included a unanimous jury finding that the defendant used a firearm to shoot and kill Irby. In *Bashaw* and *Nunez*, the special finding at issue involved a factual finding separate and apart from the essential elements of the charged crime—delivery of a controlled substance. The jury found that both defendants sold drugs, but the jury also had to determine if the defendants did so within 1,000 feet of a bus stop. Unlike *Bashaw* and *Nunez*, the special finding here was not "separate" from the charged crime.

The special finding in the present case involved the actual means used to commit the crime of manslaughter. The only evidence of cause of death was gunshot wounds; the only evidence of what caused the gunshot

wounds were the defendant's acts of shooting Irby. No evidence suggested, and no party argued, that Irby was killed by means other than being shot by the defendant. The jury's unanimous verdict of "guilty" for manslaughter in the first degree necessarily included a finding beyond a reasonable doubt that the defendant used a firearm to shoot Irby, i.e., the defendant was armed with a firearm at the time he committed the crime.

Any perceived error in failing to instruct the jury that it did not need to be unanimous to answer "no" on the special verdict form had no effect on the outcome of the trial. Evidence that the defendant was armed with a firearm at the time of the crime was agreed, overwhelming, and undisputed. The jury would have answered "yes" to the special verdict form even if Instruction No. 23 was worded to instruct the jury to answer "no" if they could not agree on whether or not the defendant was armed with a firearm. The alleged jury instructional error was harmless beyond a reasonable doubt.

#### **IV. CONCLUSION**

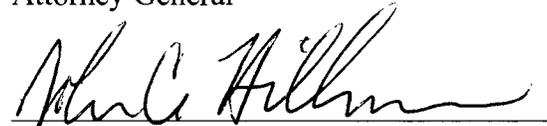
Instruction No. 23 properly stated the law, was not misleading, and allowed the defendant to argue his theory of the case. The court should decline review because the claimed error is raised for the first time on appeal and does not involve "manifest error affecting a constitutional right." Finally, any error was harmless because the instruction had no

affect on the outcome of the trial. The judgment and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 31 day of August, 2011.

ROBERT M. MCKENNA  
Attorney General

By:



JOHN HILLMAN, WSBA #25071  
Assistant Attorney General

# **Appendix A**

Instruction No. 18

INSTRUCTION NO. 18

You will also be given a special verdict form. If you find the defendant not guilty on both verdict forms A and B, do not use the special verdict form. If you find the defendant guilty on either verdict form A or B, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

# **Appendix B**

Brief of Appellant, #26855-1-III

No. 26855-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

PHILIP J. STRONG,

Defendant/Appellant.

APPEAL FROM THE FERRY COUNTY SUPERIOR COURT  
HONORABLE ALLEN C. NIELSON

---

BRIEF OF APPELLANT

---

SUSAN MARIE GASCH  
WSBA No. 16485  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

## TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	8
	1. The requested jury instructions for first and second degree manslaughter were warranted where the evidence supported a rational inference that Mr. Strong acted only recklessly or negligently in causing the death of another person.....	8
	2: The aggressor instruction was prejudicial.....	13
D.	CONCLUSION.....	18

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Beck v. Alabama</u> , 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)..	9
<u>State v. Arthur</u> , 42 Wn. App. 120, 124, 708 P.2d 1230 (1985).....	14
<u>State v. Bencivenga</u> , 137 Wn.2d 703, 709, 974 P.2d 832 (1999).....	12
<u>State v. Birnel</u> , 89 Wn. App. 459, 949 P.2d 433 (1998)...	13, 14, 15, 16, 17
<u>State v. Bowerman</u> , 115 Wn.2d 794, 806, 802 P.2d 116 (1990).....	9
<u>State v. Brower</u> , 43 Wn. App. 893, 896, 721 P.2d 12 (1986).....	14, 15, 16

<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)...	8, 12, 13
<u>State v. Hughes</u> , 106 Wn.2d 176, 190, 721 P.2d 902 (1986).....	10
<u>State v. Irons</u> , 101 Wn. App. 544, 549, 4 P.3d 174 (2000):.....	16
<u>State v. Jones</u> , 95 Wn.2d 616, 623, 628 P.2d 472 (1981).....	9, 10
<u>State v. Kidd</u> , 57 Wn. App. 95, 100, 786 P.2d 847, <i>rev. denied</i> , 115 Wn.2d 1010 (1990), <i>rev. denied</i> , 138 Wn.2d 1008 (1999), <i>abrogated on other grounds by In re. Pers. Restraint of Reed</i> , 137 Wn. App. 401, 408, 153 P.3d 890 (2007).....	13, 14, 16, 17
<u>State v. Riley</u> , 137 Wn.2d 904, 908-10, 976 P.2d 624 (1999).....	13, 14
<u>State v. Schaffer</u> , 135 Wn.2d 355, 957 P.2d 214 (1998)....	9, 10, 11, 12, 13
<u>State v. Snider</u> , 70 Wn.2d 326, 327, 422 P.2d 816 (1967).....	12
<u>State v. Wasson</u> , 54 Wn. App. 156, 159, 772 P.2d 1039, <i>rev. denied</i> , 113 Wn.2d 1014, 779 P.2d 731 (1989).....	14, 16
<u>State v. Workman</u> , 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).....	9

**Statutes**

RCW 9A.08.010(2).....	9
RCW 9A.32.060(1)(a).....	9
RCW 9A.32.070.....	9
RCW 10.61.006.....	8

**Other Resources**

WPIC 16.04.....	14
-----------------	----

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in refusing to instruct the jury on first and second degree manslaughter as lesser included offenses to the premeditated and second degree murder charges.

2. The trial court erred in denying defendant's exception to inclusion of an aggressor instruction

*Issues Pertaining to Assignments of Error*

1. Were the requested jury instructions for first and second degree manslaughter warranted where the evidence supported a rational inference that only the lesser included offense was committed to the exclusion of the greater offense?

2. Did the trial court abuse its discretion in allowing a first aggressor instruction where the allegedly provoking act of carrying an open rifle into the house was the act leading to the charge of murder?

**B. STATEMENT OF THE CASE**

Philip "Jeb" Strong entered the back door of the house holding his rifle, its lever totally opened. RP 225, 228, 249-50, 1085. Down the hallway, Trent Irby was sitting at the dining room table. RP 216, 228-29, 1086. Within a short time, Irby was dead. RP 215, 279, 431-32, 435, 495, 500, 504, 838. It was not disputed that Mr. Strong fired two shots – one into Irby's chest and a second shot into his upper back. RP 1088-90. The

jury was asked to decide *why* the shots were fired. Court's Instructions to the Jury at CP 116-134.

The State believed the killing was premeditated or at least second degree intentional murder. RP 1266-1304, 1335-51. Mr. Strong argued he acted in self-defense. RP 1304-35.

Jeb, a 60-year old man, had lived in the Curlew, Washington area for 35 years. RP 980. From 1998 to 2006, he lived on Linda Kyle's property on Tonasket Creek Road. RP 296. In October 2006, Jeb moved up the road about a half-mile into a trailer on Melinda Jarrett's 40-acre property. RP 296, 312, 315, 980-81. He'd known the Jarrets for a number of years before Mr. Jarrett died in 2006 and considered them friends with whom he'd visit. RP 312,314, 981. Although he had a bad back as well as other disabilities and didn't pay rent, Jeb acted as caretaker for Melinda Jarret and had full run of the property and dwellings. RP 316, 980-81. The trailer was located approximately 12-15 yards in back of the main house. RP 191. Jeb owned several Subaru and other vehicles and worked on cars including Melinda's at the property. RP 325, 982, 990, 1059, 1063-64.

Irby had earlier lived at Melinda's for a year beginning in spring 2005, and did carpentry work for her. RP 313-316. Jeb first met Irby

when Mr. Jarrett and he came to Jeb's place to get car parts and Irby left with the parts but never paid for them. RP 982.

A few days before the fateful shooting, Irby came to stay at Melinda's house. He and his girlfriend Kelly Stout were living in Colville, but he needed a place to stay a few days while doing a carpentry job at the Second Hand Store located a mile from Melinda's place. RP185-88, 321. On Friday, March 30, 2007, Mark Kingsley drove Irby, who didn't have a car, to Melinda's house. RP 189. When Jeb came out of his trailer to let his puppy out, Irby asked him a question and then went inside the house. Jeb and the puppy returned to the trailer and Jeb settled in his big chair with the TV on to take his daily nap after work. RP 987-88. He awoke to a big racket as Irby stood in front of him with "that famous grin," demanding "Are you going to give me a ride to the store." RP 989. Irby apparently said there was another guy with him who was in the house, but Jeb thought it was weird because he hadn't seen a car or anyone else. RP 988. Jeb said he would, and drove Irby down to the store. RP 989.

After they returned, Jeb took the puppy out and worked on Melinda's car in the driveway, with his back to the house. Irby came out of the house, pacing the driveway behind Jeb's back and talking about

guns. Jeb wondered if Irby was just talking to himself or perhaps trying to scare Jeb into giving him a gun. RP 990-91.

The evidence in part further reveals the following. Mr. Strong had heard bad things about Irby, including his threatening and bullying behavior. RP 298, 968-69, 971, 983, 991-92. Irby had a reputation for violence and quarrelsomeness. RP 361, 932-33. Irby knew Melinda kept a pistol in her house. 326-28, 331, 351, 1066. Irby had pointed a gun at Mr. Strong, taken his car without permission and also confronted him several times. RP 324, 397, 996-99, 1002-1004, 1016.

Mr. Strong believed Mark Kingsley was connected to the Hell's Angels, that their horseplay and repeated comments to him reflected Irby's "wannabe" gang status, and felt Kingsley and Irby fed off of each other to mock him. RP 398, 405-06, 407-08, 1002-07, 1009-14, 1022-25, 1049-53, 1069-70. Mr. Strong expected Kingsley to come over to the house the night of the shooting because he'd been there three of the four prior nights. RP 389-90, 394-95, 396-97, 400-01, 1069, 1075

Mr. Strong felt increasingly taunted by Irby and became more fearful of the over-all situation, telling his friends about it and his need to get out of a bad situation. RP 991-93, 348, 348-49, 364, 880, 888, 892, 895, 903, 935, 995; 1008, 1016-18, 1048, 1054-56, 1058, 1063. Mr.

Strong fretted over Irby and didn't want to stay at the trailer, so he looked every day and asked his friends about another place to live. Several offered him a place to stay. RP 935, 991-96, 1014-16, 1056, 1060-61. Friends helped him move much of his property and some of his animals away from the trailer within a day or two of the shooting. RP 298-99, 300, 306-09, 867-68, 880-81, 887, 1016-18, 1063-66. Mr. Strong was a quiet, not very big guy with some physical disabilities, and had a reputation for truthfulness. RP 411-12, 881.

By Monday afternoon, Jeb had decided he had to leave. RP 1068-69, 1077. After taking more of his belongings to store at Linda Kyle's place, he returned to the trailer. RP 1077-83. He didn't see much more to move. RP 1084. As he left, Jeb decided to first call from the phone in the house to see if he could still stay at his friend's house that night. RP 1084-85. He grabbed the remaining rifle to take with him to his friend's, first ejecting the bullet in it and opening the chamber. RP 1085.

Later that evening, after the shooting, Mr. Strong turned himself in at a roadblock below the scene. RP 426, 441-42. The Amended Information alleged Mr. Strong committed first degree premeditated murder while armed with a firearm. CP 47-48. The jury was instructed as

to first degree premeditated murder and a lesser included of second degree murder. CP 121, 124-27; RP 1161-62.

The State did not oppose the giving of a self-defense instruction. CP 128; RP 1162, 1240. Over defense objection, the jury was given a first aggressor instruction, as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill 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 130; RP 1162, 1166-68, 1241-43. The trial court concurred with the State and refused to give first and second degree manslaughter instructions that Mr. Strong had requested. RP 1189-95, 1201-120.

After closing argument, the jury was sent out to deliberate around noon. RP 1353. The jury submitted six inquiries during deliberations. CP 89-93, 95. The 4<sup>th</sup> inquiry submitted at 9:10 p.m. indicated "We the jury are trying to come up with a verdict, however we are currently deadlocked and feel a break outside could help our frame of mind." CP 92.<sup>1</sup> In its 5<sup>th</sup> inquiry, the jury stated "We are locked in our positions and would like to

---

<sup>1</sup> The Court's response says that the bailiff took the jury for a walk. CP 92.

go home, sleep, and deliberate again in the morning;" they were allowed to do so. CP 93.

The jury reconvened the next day around 1:00 p.m. RP 1372-73. At 2.45 p.m., the jury inquired whether there was "another charge that we could consider" and could they be" instruct[ed] again on how to consider the evidence." The Court responded, "No, there are no other charges to consider" and they must rely on the instructions they've already been given. CP 95.

The jury submitted a verdict at 4:50 p.m. RP 1391. The jury acquitted Mr. Strong of premeditated murder (CP 135) but found him guilty of second degree murder. CP 136. The jury also found by special verdict that Mr. Strong was armed with a firearm at the time of the commission of the crime of murder. CP 137.

Based on an offender score of zero, the Court imposed a mid-standard range sentence of 168 months plus 60 months on the firearm enhancement, for a total prison term of 228 months (19 years). CP 148-49, 152..

## C. ARGUMENT

1. The requested jury instructions for first and second degree manslaughter were warranted where the evidence supported a rational inference that Mr. Strong acted only recklessly or negligently in causing the death of another person.

Under RCW 10.61.006, a defendant can be convicted of an offense that is a lesser included offense of the crime charged, without being separately charged. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). An instruction on a lesser included offense is warranted when two conditions are met: (1) each of the elements of the lesser offense must be a necessary element of the offense charged, and (2) the evidence in the case must support an inference that the lesser crime was committed to the exclusion of the greater crime. Id. at 454-55.

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.

Id. at 455-56. The court must consider all evidence presented by either side, not merely by the side requesting the instruction. Id. at 456. A defendant may be entitled to a lesser-included instruction even if his own testimony would establish a complete defense to all charges. Id. at 458-59. It is a violation of the federal due process clause to deny a lesser-included

instruction when the jury could rationally find that only the lesser was committed. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The elements of first degree manslaughter are causing the death of another and recklessness. RCW 9A.32.060(1)(a). The elements of second degree manslaughter are causing the death of another and criminal negligence. RCW 9A.32.070. The mental elements of recklessness and criminal negligence are lesser included mental states of intentionally. RCW 9A.08.010(2);<sup>2</sup> State v. Jones, 95 Wn.2d 616, 621, 628 P.2d 472 (1981). Therefore, both degrees of manslaughter are necessarily proven whenever intentional murder is proven. See State v. Schaffer, 135 Wn.2d 355, 356, 957 P.2d 214 (1998); State v. Bowerman, 115 Wn.2d 794, 806, 802 P.2d 116 (1990). Thus, first and second degree manslaughter meet the first prong of the Workman<sup>3</sup> test for lesser included offenses of premeditated and second degree murder.

As in the case at bar, Schaffer involved the defense theory of self-defense and the issue on appeal was the second or “factual” prong of Workman.

---

<sup>2</sup> “When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. . . .” RCW 9A.08.010(2).

The charges arise from an incident that occurred one night outside Celebrity's Club in Seattle. While dancing that evening, Schaffer had words with another patron, John Magee. When they left the club, Schaffer approached Magee, who shook his fist, swore at Schaffer, and threatened to kill him. When Magee moved his arm toward his back, Schaffer thought he was reaching for a gun. Schaffer drew his own gun and fired several shots. Two bullets struck Magee in the back and three in the legs. One bullet struck Magee's girlfriend in her little finger, and another struck a passerby in the foot. Magee died at the scene. He was not armed. Schaffer fled, but turned himself in to the police two days later. He told police he thought Magee was armed, and he acted in self-defense.

Schaffer, 135 Wn.2d at 357. Schaffer was charged with, among other things, premeditated murder. The trial court instructed on self-defense and second-degree murder, but declined to give Schaffer's proposed instructions on manslaughter. Id. at 356-57. He was convicted of second-degree murder. Id. at 356.

The Washington Supreme Court re-affirmed its prior holdings that “a defendant who reasonably believes he is in imminent danger and needs to act in self-defense, ‘but recklessly or negligently used more force than was necessary to repel the attack,’ is entitled to an instruction on manslaughter.” Schaffer, 135 Wn.2d at 358, *citing* State v. Hughes, 106 Wn.2d 176, 190, 721 P.2d 902 (1986) and State v. Jones, 95 Wn.2d at 623. The Court then turned to the facts of the case.

---

<sup>3</sup> State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

In its brief on appeal, the State said 'the evidence presented by the defense [showed] that for Schaffer, given his upbringing and his background, deadly force would be a reasonable act for someone in his position. Br. of Resp't at 53. The State thereby conceded there was sufficient evidence to permit the jury to find Schaffer acted in the reasonable belief he was in imminent danger. The additional evidence--that Schaffer shot the victim five times including twice in the back--was sufficient to support a finding that he recklessly or negligently used excessive force to repel the danger he perceived.

Schaffer, 135 Wn.2d at 358. Having determined there could be some basis for a claim of self-defense as well as some question as to the amount of force used by Schafer, the Court concluded the jury should have been instructed on manslaughter as a lesser included offense to the first degree murder alternative. Id.

Herein, the facts similarly warranted giving the requested manslaughter instructions. The State conceded Mr. Strong was entitled to an instruction on self-defense. The jury could have concluded that Mr. Strong was acting recklessly or negligently when he carried a firearm into Melinda Jarrett's house because he should have known that even if he did not point it, the simple carrying of the firearm would likely provoke a response from Irby. The evidence showed that Mr. Strong fired two rounds. The pathologist testified that Irby was likely incapacitated after the first shot. RP 824. Mr. Strong's fear and disorientation may have caused him to overlook that Irby no longer posed a threat at some point

during the struggle. The jury could have found that Mr. Strong was acting in self-defense but recklessly or negligently used more force than necessary by shooting Irby twice rather than once. Or, as posited in Schaffer, the jury may have believed Irby was in fact unarmed but that Mr. Strong recklessly or negligently used excessive force to repel the danger he *perceived*. Schaffer, 135 Wn.2d at 358.

It is not the function of the judge presiding at a jury trial to weigh and evaluate evidence and to deny a request for an instruction on the basis that the theory underlying the instruction is "inconsistent" with another theory that finds support in the evidence. It is "[a]n essential function of the fact finder [] to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." State v. Fernandez-Medina, 141 Wn.2d at 460-61, *citing* State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) (*citing* State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967)). When substantial evidence in the record supports a rational inference that the defendant committed only the lesser included offense to the exclusion of the greater offense, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied. Fernandez-Medina, 141 Wn.2d at 461.

Herein, Mr. Strong was tried for a crime to which first and second degree manslaughter are included offenses. There was sufficient evidence in the record to support a reasonable inference that he acted only recklessly or negligently. Mr. Strong was therefore entitled to have the jury consider those alternatives. The jury indicated some difficulty in reaching a unanimous verdict. The inquiry asking whether they could consider any other charges strongly suggests the jury did not believe that the facts fit into the two crimes they had been instructed on. For all these reasons, the trial court erred in refusing to give the requested instructions. The remedy is reversal and remand for a new trial on second degree murder for which the jury convicted him, with instructions on manslaughter if again supported by the evidence. Schaffer, 135 Wn.2d at 358-59; see Fernandez-Medina, 141 Wn.2d at 462.

**2: The aggressor instruction was prejudicial.**

Aggressor instructions are disfavored. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) (citing State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, *rev. denied*, 115 Wn.2d 1010 (1990), *rev. denied*, 138 Wn.2d 1008 (1999), *abrogated on other grounds by In re. Pers. Restraint of Reed*, 137 Wn. App. 401, 408, 153 P.3d 890 (2007)).<sup>4</sup> An aggressor

---

<sup>4</sup> As the Supreme Court stated in State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999), "courts should use care in giving an aggressor instruction." Riley, 137 Wn.2d at 910 n.2

instruction should be given only where there is credible evidence from which a jury can determine beyond a reasonable doubt the defendant provoked the need to act in self-defense. State v. Riley, 137 Wn.2d 904, 908-10, 976 P.2d 624 (1999) (citing WPIC 16.04); Birnel, 89 Wn. App. at 472-73; CP 130. It is error to give an aggressor instruction if it is not supported by sufficient credible evidence for the jury to conclude that the defendant created the need to act in self-defense. Birnel, 89 Wn. App. at 473 (citing Kidd, 57 Wn. App. at 100).

The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, *rev. denied*, 113 Wn.2d 1014, 779 P.2d 731 (1989)(citing State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985)). The allegedly provoking act cannot be the act leading to the charge. Wasson, 54 Wn. App. at 159-60.

Furthermore, an aggressor instruction is not appropriate where the State's evidence only established that the defendant was the initial aggressor in terms of the unlawful assault (or killing) itself. In State v. Brower, 43 Wn. App. 893, 896, 721 P.2d 12 (1986), the defendant was convicted of assault for pointing a handgun at the victim during an

---

(quoting State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)) ("Few

argument. Brower claimed self-defense and testified that he pulled his gun only after the victim drew a weapon first. Brower, 43 Wn. App. at 897. The trial court issued an aggressor instruction over defense objection. Id. at 901. The appellate court reversed Brower's conviction, holding that the aggressor instruction should not have been given because there was no evidence that Brower was involved in any unlawful conduct that might have precipitated the incident. "If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper." Brower, 43 Wn. App. at 902.

The aggressor instruction was improper in this case under any factual theory. If before leaving the property Mr. Strong came into the house carrying his open rifle simply to call Wolfgang and verify he had a place to stay, as Mr. Strong testified, there is no evidence to show that Mr. Strong did anything to provoke Irby's aggressive action. Under Birnel and Brower, an aggressor instruction was not appropriate in that scenario.

If the jury disbelieved Mr. Strong, and found beyond a reasonable doubt that Mr. Strong came in intending to shoot Irby, then Mr. Strong would be the aggressor only in terms of the shooting itself. Under Brower,

---

situations come to mind where the necessity for an aggressor instruction is warranted.").

an aggressor instruction was not appropriate in that scenario. Either way, an aggressor instruction should not have been given.

The State used the aggressor instruction to support its own theory that Irby simply had no gun and Mr. Strong with premeditation bought the rifle inside to shoot Irby. The State had the burden to prove beyond a reasonable doubt that Mr. Strong did not act in self-defense. State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). To do that, the State had to prove beyond a reasonable doubt that Mr. Strong had no escalating and paralyzing fear that was triggered by Irby's pointing a pistol at him, as Mr. Strong testified. By using the erroneous aggressor instruction to eliminate consideration of the theory of self-defense, the State avoided its burden to disprove Mr. Strong's theory of self-defense.

It is reversible error to give an aggressor instruction when it is not supported by the evidence. Wasson, 54 Wn. App. at 161; Brower, 43 Wn. App. at 902. An improper aggressor instruction is prejudicial because it guts a self-defense claim. Birnel, 89 Wn. App. at 473; Brower, 43 Wn. App. at 902. This is constitutional error that cannot be deemed harmless unless the State proves it harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473 (*citing* Kidd, 57 Wn. App. at 101 n.5). An erroneous aggressor instruction is harmless only where it is clear beyond a reasonable

doubt that no reasonable juror could have found the defendant acted in self-defense. Kidd, 57 Wn. App. at 106.

Herein, Mr. Strong's self-defense claim was the central issue, and the evidence supported his claim. The State's theory was that Irby had no gun and Mr. Strong simply came into the house and killed him. Without the aggressor instruction, if the jury believed the defense theory of escalating and paralyzing fear of the victim, they could determine whether the second gun was present and whether Mr. Strong reasonably acted in self-defense. The jury might also conclude that his bringing an open but loaded rifle into the house showed an intent to kill Irby, in which case they would disregard the justifiable homicide instruction. However, *with* the aggressor instruction, the jury was precluded from even considering the defendant's claim of self-defense. Under the facts of this case, the parties could have effectively argued their theory of the case without the use of the aggressor instruction, and it was error to include the instruction.

Under the totality of the circumstances in this case, the erroneous issuance of an aggressor instruction was not harmless, and a new trial is required. Birmel, 89 Wn. App. at 474.

**D. CONCLUSION**

For the reasons stated above, the conviction should be reversed.

Respectfully submitted on August 25, 2008

A handwritten signature in cursive script, reading "Susan Marie Gasch". The signature is written in black ink and is positioned above a horizontal line.

Susan Marie Gasch, WSBA #16485  
Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
Plaintiff/Respondent, )  
vs. )  
PHILIP JEROME LI STRONG, )  
Defendant/Appellant. )

Ferry County No 07-1-00007-1  
Court of Appeals No. 26855-1-III

**AMENDED**  
PROOF OF SERVICE (RAP 18.5(b))

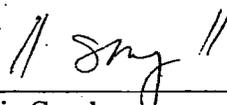
---

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 27, 2008, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the brief of appellant:

Philip Strong (#315397)  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay WA 98326-9723

John Christopher Hillman\*\*\*  
Att. General's Office, Criminal Justice  
800 - 5<sup>th</sup> Avenue, Suite 2000  
Seattle WA 98104-3188

On this date, I also mailed to Mr. Hillman the transcripts, consisting of Vols. I-VIII (1435 pages) and a separate volume (148 pages)

  
\_\_\_\_\_  
Susan Marie Gasch

# **Appendix C**

WPIC 160.00

Washington Practice Series TM  
Current through the 2010 Pocket PartsWashington Pattern Jury Instructions--Criminal  
2008 Edition Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S.  
Armstrong, Co-Chair, Hon. William L. Downing, Co-ChairPart  
XIV. Concluding Instructions**WPIC 160.00 Concluding Instruction—Special Verdict—Penalty Enhancements**

You will also be given [*a special verdict form*][*special verdict forms*] [for the crime of (insert name of crime)] [for the crime[s] charged in count[s] \_\_\_\_\_]. If you find the defendant not guilty [*of this crime*][*of these crimes*] [of (insert name of crime)], do not use the special verdict form[s]. If you find the defendant guilty [*of this crime*][*of these crimes*] [of (insert name of crime)], you will then use the special verdict form[s] and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.