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STATE OF WASHINGTON

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NO 32729-5-II.
Cowlitz County No 04-1-00819-8.

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH LEE KYLLO

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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2. GOVERNMENTAL MISCONDUCT AND TRIAL COURT ERROR DENIED MR. KYLLO A SPEEDY TRIAL.

3. THE TRIAL COURT ERRED IN GIVING AN AGGRESSOR/ PROVOKER INSTRUCTION.

4. MR. KYLLO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL REPEATEDLY MISSTATED THE LAW OF SELF DEFENSE.

5. MR. KYLLO WAS DENIED DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL WHEN THE COURT SENTENCED HIM AS A PERSISTENT OFFENDER WITHOUT A JURY DETERMINATION OF HIS PRIOR OFFENSES.

6. MR. KYLLO WAS DENIED DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL WHEN THE COURT MADE FACTUAL DETERMINATIONS PERTAINING TO THE EXISTENCE OF HIS PRIOR CONVICTIONS WHICH ARE REQUIRED TO BE MADE BY A JURY.

7. THE COURT ERRED IN SENTENCING MR. KYLLO AS A PERSISTENT OFFENDER WHERE THE STATE FAILED TO PROVE THE EXISTENCE OF HIS PRIOR CONVICTION FOR ASSAULT IN THE SECOND DEGREE BY A PREPONDERANCE OF THE EVIDENCE.

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7. THE STATE FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT MR. KYLLO HAD A PRIOR CONVICTION FOR ASSAULT IN THE SECOND DEGREE.

C. STATEMENT OF THE CASE

The Cowlitz County Prosecuting Attorney charged Kenneth Lee Kylo by Amended Information with one count of Assault in the Second Degree, alleged to have occurred on June 12th, 2004. CP 47. The Information alleged that Mr. Kylo recklessly inflicted substantial bodily harm on Mr. Robert Mickens by “ripping away Robert Mickens’ ear with the defendant’s teeth.” CP 47. Mr. Kylo was arraigned on June 17th, 2004. RP (6-17-04), 3. Initially, Mr. Kylo was represented by Lisa Tabbut. RP (6-17-04). On July 20th, 2004, Ms. Tabbut was relieved as counsel due to an apparent conflict of interest which had developed.¹ RP (7-20-04), 3. On July 22nd, 2004, Ms. Debra Burchett was apparently appointed, although the court made reference not only to her but her “group.” RP (7-22-04), 4. Ms. Burchett, for reasons not stated in the record, was not appointed. RP (8-3-04), 4. On August 3rd, 2004, Mr. Kylo apparently was represented by Mr. Michael Frey, who had been appointed on July 27th, 2004, although at that hearing Mr. Frey was

¹ Although not reflected in the Report of Proceedings, the conflict which developed pertained to Mr. Kylo’s motion to withdraw his guilty plea in cause number 03-1-01563-3, in which he claimed Ms. Tabbut ineffectively represented him. The denial of that motion was initially appealed under cause number 32804-6-II, but subsequently dismissed at the request of Mr. Kylo.

allowed to withdraw because Mr. Kylo would not sign a speedy trial waiver with a commencement date of October 3rd, 2004. RP (8-3-04), 3-4. Mr. Frey refused to represent Mr. Kylo because Mr. Frey, for unknown reasons, could not commence the representation until October 3rd, 2004. RP (8-3-04). The court found good cause to continue the case because of the “conditions that Mr. Kylo is setting on counsel’s representation,” and put the matter over for two weeks to review the status of counsel. RP (8-3-04), 4.

On August 17th, 2004, Mr. Clifford Kuhn appeared on behalf of Mr. Kylo. RP (8-17-04), 3. The attorneys and the court concluded that speedy trial commenced on August 3rd, 2004, based on the disqualification of Mr. Frey, and would expire on October 4th, 2004. RP (8-17-04), 3. The court set trial for September 27th, 2004. RP (8-3-04), 6.

On September 2nd, 2004, a pre-trial hearing was held before the Honorable Stephen Warning. RP (9-2-04). At this hearing, material witness Kenny Stevens was discussed. Mr. Kuhn noted that Mr. Stevens would need to be available and in the county jail (as opposed to an institution) at the time of trial, and noted that he had served him with a subpoena. RP (9-2-04), 4. Ms. Shaffer, representing the State, informed the court that Mr. Stevens was lodged in the jail at that time, that he was TRO’d to Cowlitz County for the purpose of testifying at the trial, and

there was no order to ship him back. RP (9-2-04), 4-5. Mr. Kuhn indicated that was satisfactory, and the court stated: "As long as we're sure we're gonna keep him here 'till then, so make sure—," at which point Ms. Shaffer said "That matter is going to be addressed later today." RP (9-2-04), 5.

At a hearing on Tuesday, September 7th, 2004, the Honorable Jill Johanson ordered Mr. Stevens to be returned to Shelton. RP (9-7-04). As the hearing began, Deputy Prosecutor Heiko Coppola informed the court that this regarded Mr. Kylo's case. RP (9-7-04), 3. The only parties present were the State and counsel for Mr. Stevens. RP (9-7-04). Mr. Kuhn was not present, nor was any mention made by the parties of his need or right to be there. (RP 9-7-04). Counsel for Mr. Stevens asked the court to sign an order allowing Mr. Stevens to return to Shelton because "He has completed everything he needs to do in the arguments; he's ready to be moved out." RP (9-7-04). At that point the court asked: "Who is Mr. Kylo's attorney? I mean, has he had an opportunity to interview him, and does the State need to interview him? I don't know why he was here." RP (9-7-04), 5. Counsel replied: "I don't know why they couldn't walk up to the jail in the last three weeks. If they haven't been up there in three weeks, they're not gonna get up there at all." RP (9-7-04), 5. The court asked Mr. Coppola "Why did we bring him here, and has he fulfilled his

responsibilities?” (RP (9-7-04), 5. Mr. Coppola replied: “I don’t know if he’s fulfilled his responsibilities, but he is a witness, I believe, for both the State, and also for the Defense, at least according to what was said at pre-trial last week.” RP (9-7-04), 6. The court said “Well, I don’t see any reason why we can’t send him back and bring him back here.” RP (9-7-04), 6. Mr. Coppola replied “Well, I don’t know if—if his—Mr. Kyllø’s counsel has had an opportunity to interview him, and I—I know—I’m sure Ms.—I don’t know if Ms. Shaffer’s had a chance to chat with him either, so—,” to which the court replied “If he’s been here three weeks,” to which Mr. Coppola replied “Well, Judge, again, I’m standing in on someone else’s matter.” RP (9-7-04), 6-7.

The court then ordered that Mr. Stevens would depart on the chain that Friday, and told Mr. Coppola to notify the parties that if they wanted to speak to Mr. Stevens, they needed to do it by Friday. RP (9-7-04), 7. Beyond general ambivalence, the State never formally objected at any time in this hearing to Mr. Stevens’ request to be transported from the Cowlitz County jail.

On September 21st, 2004, Ms. Shaffer submitted, and Judge Johanson signed, an order returning Mr. Stevens to the Cowlitz County jail. CP 31. The order stated that Mr. Stevens was to be brought back on or before September 27th, 2004. CP 31.

On September 23rd, 2004, the State moved for a continuance of the trial date because DOC was unable, on the six days notice it was given by the State, to return Mr. Stevens to Cowlitz County by the trial date of September 27th, 2004. RP (9-23-04). Ms. Shaffer advised the court that in spite of its earlier order that Mr. Stevens would have to stay in the Cowlitz County jail until the case was tried, "...Judge Johanson overruled this court's decision, and ordered that Ken Stevens be shipped back to Shelton." RP (9-23-04), 4. Ms. Shaffer further claimed that Mr. Stevens was shipped back over the State's objection, which was not the case. RP (9-23-04), 5. Ms. Shaffer and Mr. Kuhn both reiterated that Mr. Stevens was a critical witness and under subpoena. RP (9-23-04), 5. Ms. Shaffer asked that the trial be continued to October 6th, 2004, two days past the expiration of speedy trial.² Mr. Kuhn objected in principle to any continuance because Mr. Kylo was insistent that he be brought to trial within the speedy trial period. RP (9-23-04), 6. Mr. Kuhn noted, however, that Mr. Kylo was left with no choice but to agree because Mr. Stevens was the most critical witness in his defense and they could not possibly proceed without him. RP (9-23-04), 6. The court found good

² For purposes of the Statement of Facts, Appellant refers to October 4th as the expiration of speedy trial, simply because that is the expiration date the attorneys and the court were operating on. However, Appellant maintains in his argument that the speedy trial clock should not have been reset to zero on August 3rd, 2004, because Mr. Frey should not have been allowed to withdraw as counsel.

cause to continue based on the unavailability of Mr. Stevens, finding that his unavailability was "...through no fault of either side." RP (9-23-04), 7.

The parties then discussed setting a new trial date. Initially, the court set it for October 6th, 2004, but Mr. Kuhn was already scheduled to conduct motions that day in Yamhill County, Oregon. RP (9-23-04), 7-8. Later in the hearing, however, Mr. Kuhn clarified that the Yamhill County matters were set for October 4th, not the 6th. RP (9-23-04), 11. This was in response to the parties concluding that this was more than a one day case, with Ms. Shaffer objecting to starting on the 6th because she had airline tickets to go out of town on the 7th. RP (9-23-04), 10. Mr. Kuhn also noted that on October 5th, he had major dental surgery scheduled. RP (9-23-04), 11. The parties finally agreed to start jury selection at 1:00 p.m. on the 4th (which would require Mr. Kuhn to be done with his motions in Yamhill County and back in Cowlitz County by 1:00), and resume trial on the 6th. RP (9-23-04), 12-13. Later in the hearing, trial in another cause number was also continued at the request of the defense, not to be confused with the case at bar.

On September 24th, 2004, the parties came back before the court to address the trial date. Mr. Kuhn asked to have the trial date reset because he felt he couldn't begin the trial on the afternoon of October 4th. RP (9-24-05), 3. Mr. Kuhn stated:

Your Honor, yesterday we picked some dates for trial, and I just— afterwards, I started to think about it, and I realize that this isn't going to work for me, my schedule. I have to be in Yamhill County..., it's three hours round trip—each time, each way. I'm gonna be six hours on the road. I'm gonna be exhausted by the time I get back, I probably wouldn't get back in time anyway, so I think we need to pick new dates.

RP (9-24-04), 3. Mr. Kuhn then requested a date any time between the 4th and the 24th of October. The court asked Mr. Kylo if he was agreeable to a date prior to October 27th for the trial, to which Mr. Kylo responded “yes.” The court said “Note the waiver through that date.” RP (9-24-04), 3. The court then set trial for October 25th, 2004. RP (9-24-04), 5.

Trial commenced on October 25th, 2004. Robert Mickens, the complaining witness, testified that on June 12th, 2004, he was in custody at the Cowlitz County jail. Trial RP II, 178. On that date, he was housed in the same unit of the jail as Mr. Kylo. Trial RP II, 179. Mr. Mickens testified that he was upset with Mr. Kylo and confronted him, using foul language. Trial RP II, 192. Mr. Mickens called Mr. Kylo a liar and a manipulator, because other people in the tank said that Kylo was talking behind Mickens' back. Trial RP II, 193. Mr. Kylo, according to Mickens, offered to beat up whoever said that because it wasn't true, but Mickens said “If you're going to beat up somebody, it's going to be me. I'm the one starting the issue; not them.” Trial RP II, 193. Mr. Mickens then proceeded to, in his words, “verbally attack” Mr. Kylo. Trial RP II,

194. He called Kylo a rat, a sex offender, a bully, and a piece of crap. Trial RP II, 194. Mickens' testified he probably called Kylo many more names he didn't enumerate. Trial RP II, 194. Mickens then said "You want something, let's just go, you and me heads-up, and get it over with." Trial RP II, 194.

Mickens testified that Mr. Kylo did not respond to his barrage of name calling, and "pretty much stayed over there where he was, and at first he was just bucking heads with me." Trial RP II, 194. Mickens then stated: "He didn't look for a fight. I'm not going to lie and say he did. I'm not going to do that at all. I did it, at that point, after that happened." Trial RP II, 194. After much more back and forth, and trading insults, Mickens came to the conclusion that Kylo didn't want to fight, so, in a continuing effort to bait him, Mickens said "You're nothing. You ain't nothing. If you want to go, let's go." Trial RP II, 196. Mickens further testified that he tried to draw Mr. Kylo away from where they could be seen by the cameras: "I was saying: 'Come on in here where there's no camera if we're going to fight. Go in here and fight.'...I didn't want to be in front of the camera. I didn't want nobody to get in trouble and get caught." Trial RP II, 197. After about twenty minutes, when Kylo still refused to fight Mickens, Mickens announced to the other inmates who

had been watching that he was going to go to sleep, because Kylo was a coward and wasn't going to do anything. Trial RP II, 198.

When Kylo *still* would not fight, Mickens testified he decided "I'm not going to sleep with this issue. We're going to deal with it first." Trial RP II, 198. At that point, Mickens testified, he confronted Mr. Kylo, standing toe-to-toe with him, saying "Okay. If we're going to get it, let's get it. If you won't come into the day room where we can do this and not get in trouble, I'm going to come out here and we're going to do it." Trial RP II, 199. Mr. Mickens then "turned toward somebody at some point and I said: 'Okay, this ain't going nowhere.'" Mickens also said "See, he ain't going to do nothing. He's just a s-h-i-t talker...He's a bully. He's a nobody," and that is when the fight started. Trial RP II, 202.

Mr. Mickens gave the following account of the fight:

Mickens: He came at me and threw some punches and I threw some punches at him and--...

Shaffer: What was the first thing that happened after you said: "See guys, I told you he's not going to fight?"

Mickens: Next thing I remember, I was backing and going over the table, bending over off the table backwards, because he was throwing punches...

Shaffer: Those first punches, did he land any of them on you?

Mickens: I don't think any of them touched me...

Shaffer: Okay. You said you went over the table?

Mickens: I came over, went over, just leaned up over it with my butt hitting, crossed over back like this, and *he backed back up to the area he came from.*

Shaffer: What did you do once he backed into the area he came from?

Mickens: I went straight towards the door to the call box...

...

Shaffer: Um, once you started for the call box, though, what happened?

Mickens: We went straight towards into each other. I went straight into him because he was there.

Shaffer: Did he make any attempt to move out of your way?

Mickens: Well, no. He might have backed up a little bit, like he—like he did when I came in. When he came at me, I backed up, and when I come towards him, he might have backed up, too. We was both backing up so we can fight...

Shaffer: Did you make any attempt to get around him again to try to—

Mickens: Absolutely not.

Shaffer: Um, once the two of you butted into each other on the way to the call box, what happened?

Mickens: I stepped in and realized he wasn't going to back up, so I threw punches.

Shaffer: Do you recall where the punches landed?

Mickens: I don't think I hit him at all. I just threw punches, and he grabbed at me when—I stepped in throwing punches like this, and he grabbed like this to pull me in to him to hold...

Shaffer: His back is toward the wall?

Mickens: Yeah, he's backed up against the wall there. His back is against the wall, and my back isn't...And I'm facing him and he had me like this [indicating]...I went straight into him; didn't have a choice. I mean went

straight and we just collided...It was going to boil down to me throwing punches and him grabbing and holding me.

Shaffer: Did you have your head ducked at all when you were going towards him?

Mickens: Yeah, I went down and in...I stuck my head down. I threw two punches and stepped into him with my head down, like I said, leaning into him and...And I went into his chest area, and he grabbed me and pulled me into him...

Shaffer: Mr. Kyllo has got his back against the wall?

Mickens: Um-hum...

Shaffer: Mr. Mickens, how did you lose your ear?

Mickens: I got it bit off in the Cowlitz County Jail.

Shaffer: Who bit it off?

Mickens: Kenny Kyllo.

Shaffer: Leading up to that incident, after the verbal argument, once the two of you were toe-to-toe, what was the next thing that happened?

Mickens: *I threw punches.*

Shaffer: Stepping back, after the verbal argument when the two of you were toe-to-toe—

Mickens: He threw punches at me, I threw punches back at him. He pulled me in; tried to put my head in his chest area and hold me down...He grabbed me and pulled me and struck me and held me. I wanted a fist fight, and he wanted to hold me...And not fist fight I'm thinking. I'm not sure if that's what it was. *I think he wanted to prevent it:* "Oh-oh, we're going to fight.

...

Shaffer: What did you do once he had you in that hold?

Mickens: I tried to pull away. When I realized I couldn't pull away, I grabbed onto him, and I took my right hand and I tried to throw punches like this, and I couldn't get through to him, because he stepped inside me like this [indicating], and then he screamed: "Stop," and he bit my ear. Trial RP II, 202-212 (Emphasis added).

On cross examination, Mr. Mickens emphasized that he provoked the fight: "...[I] cussed him in and out. I started the fight. I created the fight myself and it was my fault. I called him every name in the book. I told everybody that. I came out in front of him." Trial RP II, 231.

Kenny Stevens also testified for the State. He was the only eyewitness, other than Mr. Mickens and Mr. Kyлло, to the fight. Mr. Stevens testified that Mr. Mickens and Mr. Kyлло were arguing and Mickens to Kyлло "...to come in the back portion and let's fight." Trial RP II, 148. Stevens said that the back portion, where all the bunks are, is out of the way of the camera. Trial RP II, 148. Mr. Kyлло did not comply with Mickens' request to go to the back portion and said he didn't want to fight. Trial RP II, 148. But "Mickens kept pushing him, wanting to fight, pushing him, wanting to fight, and Kyлло told him at least a half a dozen times he didn't want to fight." Trial RP II, 148.

With regard to the fight, Stevens testified that Mickens came out of the back part and hit Kyлло once, and then kicked him in the leg. Trial RP II, 149. Mr. Kyлло was up against the wall, and Mickens was "...giving him groin shots. Kyлло didn't do anything. He didn't punch him once. He

didn't want to fight. The only thing he did was bit Mickens' ear to get him off." Trial RP II, 149. Stevens testified that at the time of the bite, Mickens had Kylo against the wall and was punching him in the groin. Trial RP II, 152. Stevens testified that he was aware of Mr. Mickens' reputation amongst the prisoner population as to whether he was violent or peaceful. Trial RP II, 161. He testified that Mr. Mickens' reputation is for being "Quite violent." Stevens testified that Mickens provoked the fight. Trial RP II, 168.

Mr. Kylo testified that he had been drawing and Mr. Mickens started taunting him, trying to get him to fight. Trial RP III, 320. Mr. Kylo was aware that Mr. Mickens had a violent history that included having shot someone in the back of the head and a conviction for First Degree Assault. Trial RP III, 321. Mr. Kylo testified that when Mickens approached him, he thought Mickens might kick him in the face, so he stood up. Trial RP III, 323. Mickens acted like he was going to turn away, but then he kicked Mr. Kylo in the knee. Trial RP III, 323. Kylo buckled from the kick, but got up. Then Mickens charged him into the wall. Trial RP III, 323. While up against the wall, Mickens was hitting him in the crotch repeatedly. Trial RP III, 326. Mr. Kylo bit Mickens in the ear to stop the fight. Trial RP III, 327.

The court gave the jury an aggressor/provoker instruction, instructing the jury that if they found beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. CP 99. This instruction was not proposed by the defense. CP 67-83. The defense did not object to the court giving this instruction. Trial RP III, 351.

The State argued to the jury repeatedly, using the aggressor instruction, that if the jury found that Mr. Kylo took the first swing, he cannot avail himself of the defense of self-defense. Trial RP III, 366, 390

During closing argument Mr. Kuhn stated, with regard to the force used by Mr. Kylo: "That was exactly the amount of force that he needed to use at that minute to save his life, to save himself either from death or grievous bodily harm...He knew that Mickens was a violent man with a violent history, and he did what he needed to do to save himself from serious injury or death." Trial RP III, 385. Mr. Kuhn later stated: "I submit to you that when you've considered all the evidence fairly and fully and determined that my client acted based on appearances and did only that which he thought was necessary to protect himself from serious injury or death, you will return a verdict of not guilty based upon self-defense." Trial RP III, 386.

The jury returned a verdict of guilty. CP 106. A sentencing hearing began on November 16th, 2004. The State requested a sentence of life in prison without the possibility of early release under the Persistent Offender Accountability Act. The State called Edward Reeves, a fingerprint expert, to testify regarding fingerprints on two prior judgments and sentences. Exhibit 3 was a court certified judgment and sentence, bearing the name Kenneth Lee Kylo, with a cause number of 88-1-00024-4, purporting to be a conviction for Assault in the Second Degree on March 10th, 1988. Exhibit 3. It contains no visible fingerprints and does not, in any place, bear the signature of Kenneth Kylo. Exhibit 3. Mr. Reeves testified that he could not evaluate any fingerprints from that judgment and sentence. RP (11-16-04), 11. Exhibit 3 was admitted over the objection of the defense. RP (11-16-04), 11-12. The court also admitted Exhibit 5, a court certified judgment and sentence bearing the name of Kenneth Lee Kylo, under cause number 94-1-00561-5, purporting to be a conviction for Indecent Liberties. This court certified judgment and sentence bore the fingerprints of Appellant, Kenneth Kylo. Exhibit 5, RP (11-16-04), 16.

At the conclusion of this hearing, the court indicated it was not satisfied that the State had proven that Mr. Kylo had a prior conviction for Assault in the Second Degree. RP (11-16-04), 30-31. The court

continued the sentencing hearing so that the State could find proof that Mr. Kylo had a prior conviction for Assault in the Second Degree.

On December 16th, 2004, the sentencing hearing reconvened. At that time, the State called Stephen Warning to testify. Mr. Warning reviewed Exhibit 3 and identified it as a Judgment and Sentence for Kenneth Kylo for Assault in the Second Degree. RP (12-16-04), 5. Mr. Warning testified that he represented Mr. Kylo in the case that resulted in this judgment and sentence. RP (12-16-04), 5. Mr. Warning then testified that the Kenneth Kylo he represented in that case was the same Kenneth Kylo sitting in the courtroom. RP (12-16-04), 5. The court found the State had proven the existence of two prior most serious offenses by a preponderance of the evidence and sentenced Mr. Kylo to life in prison without the possibility of early release. RP (12-16-04), 17, 22, CP 116.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ALLOWING MR. FREY TO WITHDRAW AS COUNSEL WITHOUT A PROPER BASIS, THEREBY RE-SETTING THE SPEEDY TRIAL CLOCK AND CAUSING A DENIAL OF MR. KYLLO'S RIGHT TO A SPEEDY TRIAL.

The trial court bears the ultimate responsibility to ensure that trial is held within the speedy trial period. CrR 3.3 (a) (1); *State v. Raschka*, 124 Wn.App. 103, 110, 100 P.3d 339 (2004); *State v. Carson*, 128 Wn.2d

805, 815, 912 P.2d 1016 (1996); *State v. Jenkins*, 76 Wn.App. 378, 382-83, 884 P.2d 1356 (1994). Under CrR 3.3 (c) (2) (vii), the disqualification of the defense attorney or prosecuting attorney will reset the speedy trial commencement date to zero, with the date of the disqualification being the first date of the new period. Ms. Tabbut was disqualified due to a conflict of interest (a conflict which Mr. Kylo agrees was valid and does not dispute) on July 22nd, 2004. Mr. Frey was appointed on July 27th, 2004, but was permitted by the court to withdraw on August 3rd, 2004 because he didn't want to commence the representation until October 3rd, 2004. Mr. Frey wanted Mr. Kylo to waive his right to a speedy trial, with a *commencement* date of October 3rd, and thus an expiration date of December 3rd. Mr. Kylo refused to waive his right to a speedy trial, as defendants often do, and the trial court allowed Mr. Frey to withdraw because of that refusal.

The record is silent as to why Mr. Frey could not commence the representation until October 3rd, 2004. Mr. Frey simply told the court "...the only thing I could do to represent him in this case—to do a good job—would be to have his commencement period start on October 3rd." RP (8-3-04). Presumably Mr. Frey, an attorney with a felony defense contract with Cowlitz County, was too busy to handle this case. It is worth noting that Mr. Frey being busy does not distinguish him from any

other attorney in criminal practice in the State of Washington, and certainly not from any other attorney, prosecution or defense, in Cowlitz County. There is no question that the time periods outlined in the speedy trial rule are often burdensome and unrealistic. The speedy trial rule, curiously, makes no distinction between serious cases, such as murder, and de minimus cases, such as criminal trespass in the second degree. If a defendant is in custody, both charges require a trial within sixty days. On its face, this seems ridiculous. Invariably, a murder case would require substantially more preparation than a criminal trespass. But again, the speedy trial rule is unconcerned with this. It is the law under which we all must operate, and a defendant has a right to avail himself of this rule, just as he has the right to avail himself of his right to a trial, without penalty. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997).

The court, without requiring any showing on the part of Mr. Frey as to why he was unable to represent Mr. Kylo, simply said: "Well, apparently Mr. Kylo is not agreeable to a waiver that far out, so Mr. Frey is not going to be representing him, so we'll put it over two weeks and see what we can do about another attorney." RP (8-3-04), 4. When the deputy prosecutor advised the court that they couldn't put the matter over two weeks, the court said "I'll find good cause, based on his *conditions that Mr. Kylo is setting on counsel's representation.*" RP (8-3-04), 4.

What “conditions”? The exercise of his right to a speedy trial? Later, the court reiterated the good cause was “...based on Mr. Kylo’s set conditions such that Mr. Frey can’t represent him.” The court never articulated what those conditions were, beyond Mr. Kylo’s exercise of his right to a speedy trial. Perhaps Mr. Frey’s contract stipulates he only represents clients who agree not to exercise their right to a speedy trial? This case, factually, was not particularly complicated. It was a straight forward self defense case. The witness were all either associated with law enforcement or lodged in custody. There is no reason an attorney could not prepare this case in sixty days. The record below simply does not support the trial court’s order allowing Mr. Frey to withdraw from representation, thereby resetting the speedy trial commencement date from July 22nd, 2004, to August 3rd, 2004.

A trial’s court’s decision to allow an attorney to withdraw from representation is reviewed for abuse of discretion. *State v. Berrysmith*, 87 Wn.App. 268, 944 P.2d 397 (1997). In *State v. Berrysmith*, the Court held that the trial court properly allowed counsel to withdraw where he reasonably believed that his client intended to perjure himself at trial. *State v. Berrysmith* at 279-80. Because withdrawal was proper, the court properly continued the case for three weeks, outside the speedy trial period, for new counsel to prepare for trial. *State v. Berrysmith* at 280.

Here, no such conflict of interest was found by the court, or even raised by Mr. Frey. Mr. Frey simply did not want to represent Mr. Kylo unless the timeline was of his own choosing, and not Mr. Kylo's. No record whatsoever was made as to why Mr. Frey could not represent Mr. Kylo until October 3rd. As such, the trial court abused its discretion in allowing Mr. Frey to withdraw. The correct speedy trial period, therefore, commenced on July 22nd, 2004, and expired on September 21st, 2004. Mr. Kylo was not brought to trial within this speedy trial period.

The State may claim that Mr. Kylo failed to object to the violation of his right to speedy trial and therefore waives any objection on appeal, however the record reflects that Mr. Kylo did object. Mr. Kylo filed a motion to dismiss the charge, which was never heard or considered by the court, due to the violation of his right to a speedy trial. CP 11-14. He filed this objection on August 31st, 2004. CP 11-14. To the extent Mr. Kuhn never argued this motion or asked it to be ruled upon by the court, that failure constituted deficient representation. Further, Mr. Kuhn should have investigated whether Mr. Frey's withdrawal was proper and discovered that speedy trial began running on July 22nd, 2004. There can be no tactical reason for an attorney to fail to object to a violation of his right to a speedy trial. In any event, Mr. Kylo did everything within his power to lodge an objection to the violation of his right to a speedy trial.

In addition to his written motion, Mr. Kylo attempted to address the court directly on August 3rd, 2004, but was prevented from speaking because he was “requesting counsel.” RP (8-3-04), 4.

The basis for the trial court allowing Mr. Frey to withdraw appears to be the trial court’s agreement with Mr. Frey that a defendant choosing to exercise his right to a speedy trial is acting unreasonably. The law in Washington simply does not support this unfair assumption. Our speedy trial rule must be strictly adhered to. When it is violated, dismissal with prejudice is required without any showing of prejudice. “Failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice.” *State v. Adamski*, 111 Wn.2d 574, 582, 761 P.2d 621 (1988); *State v. Swenson*, 150 Wn.2d 181, 186-87, 75 P.3d 513 (2003); *State v. Ralph G.*, 90 Wn.App. 16, 20-21, 950 P.2d 971 (1998); *State v. Raschka* at 112. Mr. Kylo did not place unreasonable conditions on Mr. Frey’s representation, he simply asserted his right to a speedy trial. A diligent review by appellate counsel has found no case which supports a trial court’s requirement that a defendant must choose between his right to a speedy trial and his right to counsel. Absent a conflict of interest, or some legitimate, identifiable reason why Mr. Frey could not represent Mr. Kylo, Mr. Kylo was entitled to representation by Mr. Frey with a speedy trial period commencing on July 22nd, 2004 and

expiring on September 21st, 2004. Mr. Kylo's right to a speedy trial was violated and this court should reverse his conviction and dismiss this prosecution.

2. GOVERNMENTAL MISCONDUCT AND TRIAL COURT ERROR DENIED MR. KYLLO HIS RIGHT TO A SPEEDY TRIAL WHEN THE COURT ALLOWED A MATERIAL WITNESS TO LEAVE THE COWLITZ COUNTY JAIL AND THE STATE FAILED TO EITHER OBJECT OR MAKE A TIMELY EFFORT TO HAVE HIM RETURNED.

a. Trial Court Error

The trial court denied Mr. Kylo his right to be present at a critical stage of the proceeding when it heard a motion, brought by counsel for material witness Kenny Stevens, to have him returned to prison in Shelton rather than remain in the Cowlitz County jail pending trial. On September 7th, 2004, counsel for Mr. Stevens, who was under subpoena, made a motion in front of Judge Jill Johanson that Mr. Stevens be allowed to return to Shelton. The motion was based on the fact that Mr. Stevens did not like being in the Cowlitz County jail. RP (9-7-04), 5. The record of this hearing reflects that the court was made aware, at the beginning of the hearing, that the hearing pertained to the case of Ken Kylo. RP (9-7-04), 3. In spite of this, the only parties present at this hearing were the State and the attorney for Mr. Stevens. The record does not reflect that Mr.

Kuhn was given any notice of this hearing (and a reasonable interpretation of the entire record reflects that had he been given notice, he likely would have been present and objecting at the top of his lungs to what happened at this hearing). In fact, the court revealed that she wasn't even aware of who Mr. Kylo's attorney was or whether he had had the opportunity to interview Mr. Stevens.

“A criminal defendant has a constitutional right under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to be present during all ‘critical stages’ of the criminal proceedings...The Due Process Clause is implicated in situations where the defendant is not actually confronting witnesses or evidence against him or her.” *State v. Berrysmith* at 273, citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484 (1985). “A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure.” *State v. Berrysmith* at 273, citing *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658 (1987); *State v. Bremer*, 98 Wn.App. 832, 834, 991 P.2d 118 (2000); *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835. “Due process does not require the defendant’s presence ‘when presence would be useless, or

the benefit but a shadow.” *State v. Berrysmith* at 273, citing *Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S.Ct. 330, 332 (1934).

When the right of confrontation is not at issue, two questions determine whether the hearing at issue was a critical stage of the proceeding: First, whether the subject of the hearing related purely to a legal matter; Second, if it did relate solely to a legal matter, whether the absence of the defendant nevertheless bore a reasonably substantial relation to the fullness of his or her opportunity to defend against the charge, or whether a fair and just hearing was thwarted by his absence. *State v. Berrysmith* at 273-74; *U.S. v. Gagnon* at 526.

Here, the right of confrontation was not at issue. However, this hearing was clearly a critical stage of the proceeding. First, it did not relate solely to a legal matter. Factual matters were in question at this hearing, such as whether Mr. Stevens’ had fulfilled his obligations in the *Kyllo* case (he hadn’t), and whether Mr. Kuhn had interviewed Mr. Stevens. While the court initially appeared concerned that counsel for Mr. *Kyllo* (she, again, was not even aware who it was) had not had an opportunity to interview Mr. Stevens, counsel for Mr. Stevens interjected “I don’t know why they couldn’t walk up to the jail in the last three weeks. If they haven’t been up there in three weeks, they’re not gonna get up there at all.” RP (9-7-04), 5. In other words, the inquiry, according to

counsel, was not whether Mr. Kylo's attorney actually had interviewed Mr. Stevens but whether he *should have already done so*. No one at this hearing bothered to ask Mr. Stevens whether he had been interviewed, and Mr. Kuhn was not there to say whether he had conducted an interview or, if he hadn't, to explain why he hadn't.

The court, in affirming that factual matters were at issue, asked the prosecutor whether Mr. Stevens had fulfilled his obligations and the prosecutor replied that he didn't know. It was at this point, however, that the prosecutor emphasized that Mr. Stevens was a critical witness for both the State and the defense. This, in the very least, should have compelled the court to recess the hearing until Mr. Kylo's attorney had an opportunity to be heard. However, the court, having no answer to either question she posed, namely whether Mr. Stevens' obligations had been fulfilled and whether he had been interviewed by the defense, simply proceeded to grant Mr. Stevens' motion, presumably because she agreed with counsel that Mr. Kylo's attorney should have already interviewed Mr. Stevens, irrespective of whether he actually had done so or not. The first inquiry, whether the hearing involves solely legal matters, must be answered in the negative.

The second inquiry, whether a fair and just hearing was thwarted by Mr. Kylo's absence, is obvious: Mr. Stevens was shipped back to

Shelton and could not be brought back by the trial date, thus requiring Mr. Kylo to submit to a trial date outside of speedy trial. Had Mr. Kuhn been at the hearing, he could have advised the court that Mr. Kylo was not willing to waive speedy trial, that Mr. Stevens was the most crucial witness in the case, and that shipping him back to Shelton created the very real, yet unnecessary risk, that Mr. Stevens would not make it back by the trial date. Although this monumental error on the part of the court didn't technically impair Mr. Kylo's opportunity to defend against the charge, it did cause him prejudice in that it caused the trial to commence outside of speedy trial. Again, in the face of a speedy trial violation, prejudice is presumed because of the importance of the right. The importance of the right dictates that a defendant need not prove that a trial delay caused him prejudice in his substantive ability to defend himself (indeed, the practical effect of trial delay is usually the opposite. *Barker v. Wingo*, 407 U.S. 514 (1972)).

The State's likely response will be as follows: Mr. Kylo waived any objection to the denial of his right to a speedy trial, which would not have occurred had he been granted his due process right to be present at the hearing in which Mr. Stevens was permitted to leave the jurisdiction, when he agreed that his attorney would not be able to commence the trial on October 4th and agreed that trial could commence on October 25th, 2004

instead. (RP 9-24-04). However, at that point Mr. Kylo had no choice but to agree to the continuance because his counsel was unavailable on the 4th. The unavailability of defense counsel constitutes grounds to continue a case outside speedy trial, even over the objection of the defendant. *State v. Jones*, 117 Wn.App. 721, 72 P.3d 1110 (2003). Objecting would have been futile because the real problem could not be remedied: Mr. Stevens could not be present for the September 27th trial date. The unavailability of defense counsel was caused by the continuance of the trial date, which would not have been necessary but for the court's shipping of Mr. Stevens back to Shelton.

Further, to the extent that Mr. Kuhn and Mr. Kylo agreed to any date beyond September 27th, it was because the defense could not, under any circumstances, proceed to trial without Mr. Stevens as a witness. The record reflects that Mr. Kuhn objected to the continuance to the extent he could, while recognizing that he had no choice but to consent to a new trial date. RP (9-23-04). Furthermore, the purpose of requiring a defendant to object to a trial date which he believes to be outside the speedy trial period is so that the trial court can cure the defect. *State v. Malone*, 72 Wn.App. 429, 864 P.2d 990 (1994). Again, this defect could not be cured because it was physically impossible for Mr. Kylo to proceed to trial within the speedy trial period with his key witness, Mr.

Stevens, in attendance. This impossibility was created by the actions of the court and the prosecution.

b. Governmental Misconduct

At the hearing on September 7th, 2004 the State did not, contrary to the assertion of Ms. Shaffer at the September 23rd hearing, object to the court shipping Mr. Stevens back to Shelton. The deputy prosecutor made no attempt, beyond remarking that he was standing in for another deputy prosecutor, to deter the court from this wrong-headed course of action. More importantly, the deputy prosecutor made no attempt to recess the hearing so that Mr. Kuhn could be notified, nor did he even advise the court who Mr. Kylo's attorney was. The State's conduct, in allowing this hearing to proceed without any attempt to notify Mr. Kuhn was tantamount to ex-parte contact. Further, the State made no attempt, until September 21st, 2004 (six days before trial) to have Mr. Stevens returned to Cowlitz County. CP 31. It hardly needs arguing that six days was not enough time for DOC to return Mr. Stevens to the Cowlitz County jail.

In *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), the Supreme Court considered the question of when a criminal prosecution may be dismissed pursuant to CrR 8.3 (b). In *Michielli*, the defendant was originally charged with one count of Theft in the Second Degree. The State, five days prior to trial, amended the information to add four

additional counts, despite the fact that the information supporting these new charges had been in possession of the State since the time of the original information. *State v. Michielli*, 132 Wn.2d at 233. Because the defense attorney was unprepared to proceed to trial on the amended information, the defendant was forced to waive his right to a speedy trial and request a continuance. *State v. Michielli*, 132 Wn.2d at 233. The defense, at a later hearing, moved to dismiss the charges because the State had added the charges with the intent to punish Mr. Michielli for exercising his right to trial and refusing to plead guilty to the original Amendment. *State v. Michielli*, 132 Wn.2d at 233. The trial court, without referencing any specific rule, dismissed the case “in the furtherance of justice.” *State v. Michielli*, 132 Wn.2d at 234.

The Supreme Court upheld the dismissal, which it held was effectuated through CrR 8.3 (b), because it found that the facts of the case supported governmental misconduct through governmental mismanagement. *State v. Michielli*, 132 Wn.2d at 243. “Governmental misconduct, however, ‘need not be of an evil or dishonest nature; simple mismanagement is sufficient.’” *State v. Michielli*, 132 Wn.2d at 239, citing *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). The court found that when a defendant can establish government misconduct and prejudice, dismissal under CrR 8.3 (b) is warranted. Such prejudice

includes the loss of the right to a speedy trial. *State v. Michielli*, 132 Wn.2d at 240. Here, no motion to dismiss under CrR 8.3 (b) was brought. The reasoning and holding of *Michielli*, however, are persuasive because in this case, governmental misconduct via governmental mismanagement deprived Mr. Kylo of his ability to proceed to trial within the speedy trial period.

Governmental mismanagement occurred in three ways here: First, the State should not have proceeded with the September 7th hearing without first notifying counsel for Mr. Kylo, when it knew that substantial interests of Mr. Kylo were at stake in that hearing. Second, the State should have objected to the trial court's order returning Mr. Stevens to Shelton. At no time, despite the State's later assertion to the contrary, did the State object to Mr. Stevens' request. The State knew that Mr. Stevens was a crucial witness who was under subpoena. More importantly, the State *didn't know* whether counsel for Mr. Kylo had had the opportunity to interview Mr. Stevens or whether Mr. Stevens had fulfilled his obligations. Rather than request a recess of the hearing to obtain this critical information, the State simply acquiesced in the court's determination to allow Mr. Stevens' to return to Shelton as a form of punishment for the fact that the defense may not have interviewed Mr. Stevens.

Third, the State made no attempt to have Mr. Stevens returned to Cowlitz County until September 21st, 2004. CP 31. Perhaps recognizing the unfairness of having conducted this hearing without the presence of Mr. Kylo's attorney, the trial court instructed deputy prosecutor Heiko Coppola to "Notify the people that they need to do it by Friday, and he's leaving on Friday." RP (9-7-04), 7. As such, one of two things happened: Either Mr. Coppola failed to "notify the people," or he notified Ms. Shaffer and she did not act to correct this serious problem until September 21st, 2004, a mere six days before trial. Perhaps recognizing that due diligence on her part would be an issue in this case, Ms. Shaffer implied at the hearing on September 23rd, 2004, when she moved to continue the case, that she was very upset about what had occurred:

Ms. Shaffer: The State's material witness, Kenny Stevens, the only witness besides the victim in this case, was TRO'd from Shelton to Cowlitz County jail. This court, Judge Warne, ruled that Mr. Stevens would be staying in the Cowlitz County jail until this case was tried, which is scheduled for Monday. At a subsequent hearing, Judge Johanson overruled this court's decision, and ordered that Ken Stevens be shipped back to Shelton. The State then attempted to TRO Mr. Stevens back to Cowlitz County Jail, so that he could testify in Monday's trial.

Court: When was the TRO done?

Ms. Shaffer: It was done early this week, Monday. He was just shipped back last week, on Judge Johanson's order, *over the State's objection*.

RP (9-23-04).

However, if the State was as incensed as it appeared to be at this September 23rd hearing, why was nothing done until September 21st? Why was a motion to reconsider, with proper notice to Mr. Kylo's attorney (who had not been invited to participate in this critical game of tug of war) not filed immediately? Why did a full *fourteen* days pass before any attempt was made to get Mr. Stevens back? It is simply axiomatic that DOC would need more than six day's notice, two of which were non-business days, to transfer a prisoner back to a county jail. It is simply inexcusable that nothing was done until September 21st, and compelling evidence of government mismanagement. Further, when the court ruled, at the September 23rd hearing, that the unavailability of Mr. Stevens was not attributable to the fault of either party, this was incorrect. The fault lied not only with the Cowlitz County Superior Court, but also with the State, which mismanaged this issue from start to finish. The only party who bore no fault was Mr. Kylo. This mismanagement deprived Mr. Kylo of a speedy trial, which is specifically condemned by our Supreme Court in *State v. Michielli*.

3. THE TRIAL COURT ERRED IN GIVING AN AGGRESSOR/PROVOKER INSTRUCTION WHERE THE EVIDENCE DID NOT SUPPORT GIVING SUCH AN INSTRUCTION.

The court gave instruction number 14, which instructed the jury that:

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

CP 99.

Aggressor/provoker instructions are disfavored. *State v. Wasson*, 54 Wn.App. 156, 161, 772 P.2d 1039 (1989); *State v. Arthur*, 42 Wn.App. 120, 125, 708 P.2d 1230 (1985). "Few situations come to mind 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." *State v. Wasson*, 54 Wn.App. at 161, citing *State v. Arthur*, 42 Wn.App. at 125 n.1. It is error to give the aggressor instruction where it is not supported by substantial evidence. *State v. Heath*, 95 Wn.App. 269, 271, 666 P.2d 922 (1983); *Wasson*, 54 Wn.App. at 158-59; *State v. Brower*, 43 Wn.App. 893, 901, 721 P.2d 12 (1986); *State v. Upton*, 16 Wn.App. 195, 204, 556 P.2d 239 (1976), *review denied* 88 Wn.2d 1007 (1997). The provoking act cannot be the assault itself. *State v. Kidd*, 57 Wn.App. 95, 100, 786 P.2d 847 (1990); *State v. Brower*, 43 Wn.App. 893, 902, 721 P.2d 12; *State v. Wasson*, 54 Wn.App. at 159.

Here, there were three witnesses to the actual assault. All three witnesses agreed that Mr. Mickens planned for and provoked the assault. Mr. Mickens testified he wanted the fight and it was his fault. More importantly, Mickens testified that after repeatedly failing to bait Kyлло into a fight, he at one point decided he was going to go to sleep but decided that he wouldn't go to sleep until the fight happened. "I'm not going to sleep with this issue. *We're going to deal with it first.*" Trial RP II, 198. At this point he went "out there" to "confront him," and stood toe-to-toe with him, continuing his barrage. *Id.* The State relied heavily on Mickens equivocal contention that Kyлло threw the first punch (which didn't make contact). The State, using the aggressor instruction, argued that this unsuccessful punch was the provoking act which triggered the aggressor/provoker theory and precluded Mr. Kyлло from claiming self-defense.

It was error for the court to give this instruction because the evidence supported that Mr. Mickens, not Mr. Kyлло, was the aggressor. Contrary to the State's assertion, the question of who struck the first blow is not determinative of who provoked the fight. *State v. Heath*, 35 Wn.App. at 271. An aggressor is one whose words or actions precipitated the fight. *Id.* In *State v. Hawkins*, 89 Wn.App. 449, 455, 154 P.2d 827 (1916), the court upheld the giving of the aggressor instruction where the

defendant did not strike the first blow, but was “manifestly the aggressor in the sense that his actions brought on the affray.” Likewise, in reversing the court for giving an aggressor instruction, the *Bower* court noted that the defendant in that case could only be perceived as the aggressor in terms of the assault itself. *State v. Brower* at 902.

Here, the evidence was overwhelming that Mickens was the aggressor. Mickens himself was adamant in his testimony that he provoked the fight. Kylo withstood a twenty minute barrage of verbal attacks, until finally, Mickens came up to him toe-to-toe as a deliberate escalation. Mickens testified he would not go to sleep until he had accomplished his goal of drawing Kylo into a fight. Perhaps the court, in giving this instruction, was persuaded by the State’s novel theory that one who throws the first punch is automatically and forever precluded from defending oneself in a fight, irrespective of whether and how it escalates (here, of course, the escalation occurred when Mickens pinned Kylo against a wall and punched him repeatedly in the groin). However, as demonstrated by the cited cases, throwing the first punch does not render one the aggressor automatically. Rather, it is the actions as a whole that occurred prior to the fight which determine who the aggressor was.

Further, and more importantly, the fight itself cannot be considered the provoking act. *Brower* at 902; *Kidd* at 100; *Wasson* at 159. By

arguing that Kylo lost his right to rely on self-defense when he allegedly threw the first punch (an air punch), the State relied on the assault itself as the provoking act. The State may split hairs and argue that the assault itself is limited solely to the ear biting, and not the physical confrontation in general. This, however, ignores everything Mickens was doing prior to this confrontation becoming physical. Also, it overlooks the fact that Kylo retreated.

Mickens testified that there were two parts to the fight. Trial RP II, 203. Mickens testified that Kylo initially threw punches at him, none of which made contact with him. Trial RP, II 203. Kylo then “backed back up to the area he came from.” Trial RP, II 203-04. In other words, Kylo retreated. At that point, in an effort to get out from “underneath” this conflict (meaning, get Kylo in trouble and keep himself out of trouble because he was set to be released soon), Mickens went toward the call box. Trial RP II, 204. Mickens testified that he expected Kylo to move out of his way rather than stand where he was (which Kylo had no duty to do), but Kylo didn’t. Trial RP, II 205. At that point, “We went straight into each other. *I went straight into him because he was there.*” Trial RP II, 206. Ms. Shaffer asked: “[O]nce the two of you butted into each other on the way to the call box, what happened?” To which Mickens replied “I stepped in and realized he wasn’t going to back up, *so I threw punches.*”

So if the State is correct, that throwing the first punch is the provoking act that can preclude one from defending oneself at all, then the first punch allegedly thrown by Kylo relates only to the first fight, not the second. In the second fight, Kylo had retreated and Mickens, according to his own testimony, threw the first punch. The fact that Kylo was standing in a place where Mickens did not want him to be standing does not negate the fact that Kylo retreated and Mickens started the fight again by throwing punches. Mickens was clearly the aggressor in both confrontations. As noted in *Hawkins*:

Any wrongful or unlawful act of the accused which is reasonably calculated to lead to an affray or deadly conflict, and which provokes the difficulty, is an act of aggression or provocation which deprives him of the right of self-defense, although he does not strike the first blow. So one is the aggressor when he provokes another into a quarrel causing a fatal affray, or commences an assault upon the other.

State v. Hawkins, 89 Wn.App. at 455, quoting the text of 21 Cyc. 807.

Under this definition Mickens, not Kylo, is the aggressor. The evidence did not support the giving of this instruction.

Since neither Mr. Kuhn nor Ms. Shaffer proposed this instruction in their packets of proposed instructions, it is unclear why it was given. As is often the case, the entire discussion of jury instructions took place off the record, with the parties merely coming back on the record to note objections and exceptions. Trial RP III, 351-353. It is also not clear why

Mr. Kuhn would not have objected to this instruction. This is an instruction which can *never* help a defendant and can only hurt him. As noted in *Wasson* and *Brower*, the giving of an aggressor instruction can effectively deprive a defendant of his ability to claim self defense. *Wasson* at 160, *Brower* at 902. This, of course, is exactly what the State argued in this case: That if the jury believed Kylo threw the first air punch during the first of two distinct fights, he was precluded under the law from defending himself in any way. He was obligated, under the State's theory, to stand pinned against a wall while taking punches to his groin and do nothing, all because he may have thrown an air punch in a fight that had concluded and then started up again when Mickens attacked him.

Mr. Kuhn's failure to object, however, does not preclude appellate review. Error which affects a defendant's self-defense claim is constitutional in nature and thus cannot be deemed harmless unless it is harmless beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983). So long as Mr. Kuhn did not *propose* the instruction, the error was not invited. Here, the giving of this instruction cannot be considered harmless beyond a reasonable doubt. It is difficult to imagine a more compelling case of self defense than one in which the supposed victim testifies that he provoked the assault, and then reignited it

after the defendant retreated. However, using this instruction, the jury was told that they could not consider self-defense if they believed that Kylo threw the first punch in the first fight. This deprived Mr. Kylo of his entire defense. This, coupled with Mr. Kuhn having repeatedly misstated the level of fear which must be present in self-defense (argued below), leads to the conclusion that but for these errors, the outcome of this case would have been different.

4. MR. KYLLO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY REPEATEDLY TOLD THE JURY THAT MR. KYLLO NEEDED TO BE IN FEAR OF LOSING HIS LIFE, RATHER THAN MERE INJURY, IN ORDER TO ACT IN SELF DEFENSE.

In order to establish a claim for ineffective assistance of counsel, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's errors, such that "but for counsel's errors the outcome of the proceedings would have been different." *State v. Varga*, 151 Wn.2d 179, 198 (2004), citing *State v. Brett*, 126 Wn.2d 136, 199, 829 P.2d 29 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). A reviewing court will presume the defendant received effective assistance of counsel unless that presumption is overcome by a clear showing of incompetence. *Varga*, 151 Wn.2d at 199; *State v. Piche*, 71 Wn.2d 583, 590-1, 430 P.2d 522 (1967). Ineffective assistance will not be found

where counsel's actions go to the theory of the case or trial tactics. *Varga*, 151 Wn.2d at 199; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Defense counsel, during closing argument, repeatedly misstated the standard to be applied for determining whether a person can act in self defense. Defense counsel said: "That was exactly the amount of force that he needed to use at that minute to save his life, to save himself either from death or grievous bodily harm...He knew that Mickens was a violent man with a violent history, and he did what he needed to do to save himself from serious injury or death." Trial RP III 385. Later, counsel said: "...[M]y client acted based on appearances and did only that which he thought was necessary to protect himself from serious injury or death..." Trial RP III 386.

A person is entitled to act in self defense when he reasonably believes he is about to be injured and the force used is not more than is necessary. RCW 9A.16.020 (2); WPIC 17.02. One is not required to believe he is about to be killed or grievously injured. To suggest that one must fear death or grievous bodily injury significantly lowers the State's burden to disprove self defense because it narrows the type of conduct that can trigger the right to act in self defense in the first place. While the law only required Mr. Kylo to believe he was about to be injured by Mr.

Mickens, his attorney inexplicably instructed the jury that Mr. Kylo was required to believe he was about to be killed or grievously injured by Mr. Kylo.

To misstate the law of self-defense, when self-defense is the *only* defense being asserted, is certainly deficient performance. Counsel could not have had any tactical reason for making to *more difficult* for his client to obtain an acquittal based on self-defense. The evidence amply supported Mr. Kylo's contention that he was in fear of injury, but less persuasively supported a belief that he was about to be killed or grievously injured. Because Mr. Mickens, and indeed every witness in the case, agreed that Mr. Mickens provoked the fight, it is reasonable to conclude that but for counsel's unprofessional error in misstating the correct standard to be employed in the determination of self defense, the outcome of the proceeding would have been different.

5. MR. KYLLO WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND HIS RIGHT TO DUE PROCESS WHEN THE COURT DETERMINED THE EXISTENCE OF HIS PRIOR CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE, AND SENTENCED HIM TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, WHERE A JURY WAS REQUIRED TO MAKE THIS FINDING UPON PROOF BEYOND A REASONABLE DOUBT.

The trial court sentenced Mr. Kylo to life in prison without the possibility of release under the Persistent Offender Accountability Act

(POAA) after it determined, by a preponderance of the evidence, that Mr. Kylo had two prior convictions for most serious offenses. Those convictions were for Assault in the Second Degree under cause number 88-1-00024-4, and Indecent Liberties under cause number 94-1-00561-5. Had Mr. Kylo not been sentenced as a persistent offender, his standard range was 63-84 months. CP 114. Mr. Kylo's sentence of life without the possibility of release exceeded the maximum term authorized by the jury's verdict and violated Mr. Kylo's federal constitutional right to due process and to a jury trial.

A criminal defendant has the right to a jury trial and may only be convicted if the prosecution proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2536-37 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). The constitutional rights to due process and a jury trial "indisputably entitled a criminal defendant to a 'jury determination that he is guilty of every element of the crime beyond a reasonable doubt.'" *Apprendi v. New Jersey* at 476-77, citing *United States v. Gaudin* at 510.

The United States Supreme Court applied this principle to facts the legislature had labeled "sentencing factors" but that nonetheless increased

the maximum penalty faced by the defendant. In *Blakely*, the Court held that a sentence in Washington which exceeded the standard sentencing range was unconstitutional because it permitted the judge to impose a sentence which exceeded the relevant statutory maximum sentence based upon facts that were not found by the jury beyond a reasonable doubt. *Blakely v. Washington*, 124 S.Ct. at 2537. Similarly, in *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428 (2002), the Court invalidated Arizona's death penalty scheme as unconstitutional because it allowed a defendant to receive the death penalty based upon aggravating factors found by a judge by a mere preponderance of the evidence. In *Apprendi*, the Court found New Jersey's procedure for enhancing a sentence based upon it being a "hate crime" unconstitutional because it allowed the court to impose a sentence above the statutory maximum after making factual findings by a preponderance of the evidence. *Apprendi v. New Jersey* at 491-92, 497.

In these cases, the Court emphasized that a Congressional or legislative designation of what constitutes a sentencing factor and what constitutes an element of a crime will not necessarily control the analysis of what must be proven beyond a reasonable doubt to a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." *Ring v. Arizona* at 602, citing

Apprendi v. New Jersey at 482-83. A judge, therefore, may only impose punishment within the maximum term justified by the jury verdict or guilty plea. *Blakely v. Washington*, 124 S.Ct. at 2537.

The Washington Supreme Court has previously held that the POAA does not violate an offender's federal constitutional right to due process even though it mandates sentences in excess of the statutory maximum based upon a judge's determination of prior convictions by a preponderance of the evidence. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 124 S.Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001), *cert. denied* 535 U.S. 996 (2002); *State v. Thorne*, 129 Wn.2d 736, 783, 921 P.2d 514 (1996); *State v. Manussier*, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), *cert. denied* 520 U.S. 1201 (1997). In each of these cases, the court believed it was following federal precedent. The precedent relied upon, however, is either no longer viable or never supported the court's conclusion.

Smith and *Wheeler* rely upon the United States Supreme Court opinion in *Almendarez-Torres v. United States*, 253 U.S. 224, 118 S.Ct. 1219 (1998). The *Wheeler* Court recognized that the continuing validity of *Almendarez-Torres* is questionable in light of *Apprendi*, but refused to reconsider the issue unless *Almendarez-Torres* was overruled. *State v.*

Wheeler at 123-24. In *Smith*, the court stated it was obligated to follow *Almendarez-Torres*. *State v. Smith* at 143.

In *Almendarez-Torres*, the Supreme Court held that prior convictions are sentence enhancements, as opposed to specific elements of a particular crime. *Almendarez-Torres* at 247. The enhancements, therefore, do not need to be proved beyond a reasonable doubt to a jury. This holding, however, was affected by *Apprendi*, which held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi* at 490.

Following *Apprendi*, the Washington Supreme Court determined in *Wheeler* that the holding of *Apprendi* should not be expanded to sentence enhancements based on the fact of prior convictions. *State v. Wheeler*, 145 Wn.2d 116. The *Wheeler* Court, rather than preclude such expansion, acknowledged that the issue was uncertain under the United States Supreme Court’s recent decisions and declined to address the issue. *State v. Smith*, 150 Wn.2d at 142.

The issue of how underlying offenses must be determined has been clarified by the Court in *Blakely*, in favor of recognizing the right to a jury determination of sentencing enhancements and exceptional sentences under the sixth and fourteenth amendments. In *Wheeler*, the court

followed *Almendarez-Torres*, in which the United States Supreme Court held that prior convictions need not be plead in an indictment. Prosecutors and reviewing courts have repeatedly stated that *Almendarez-Torres* stands for the proposition that prior convictions need never, under any circumstances, be proved to a jury beyond a reasonable doubt. There is reason to doubt this conventional wisdom, however.

First, *Almendarez-Torres* did not directly address this question. *Almendarez-Torres* solely considered the question of whether prior convictions need to be pled in an indictment. In reaching its conclusion, the Court repeatedly emphasized that Mr. Almendarez-Torres had *admitted* to his prior convictions. *Almendarez-Torres* at 227, 248. Second, the *Almendarez-Torres* court specifically stated “[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence.” *Almendarez-Torres* at 248.

A necessary, unavoidable conclusion of *Blakely* is that *Almendarez-Torres* was wrongly decided. *Blakely* and *Almendarez-Torres* are not logically compatible in that there is no appreciable distinction between determination of an aggravating factor and determination of a non-mechanical decision involving a finding that a defendant is a persistent offender. That *Almendarez-Torres* is incompatible with other

cases has been alluded to in several decisions. In deciding *Smith*, for instance, the Supreme Court couched its ruling on the basis that “[b]ecause the Court has not specifically held otherwise since then, we hold that the federal Constitution does not require that prior convictions be proved to a jury beyond a reasonable doubt.” *State v. Smith* at 156.

Blakely has further refined *Apprendi* to require that factors used to support the imposition of an exceptional sentence under RCW 9.94A.535 must be pled and proved to a jury beyond a reasonable doubt. Mr. Kylo argues that the Court’s reasoning in *Blakely* should be applied to the specific enhancements of the persistent offender statute. Furthermore, in cases in which there is an inadequate or contradictory record from one of the underlying offenses on which the State bases its request for a life sentence, or where a fact-finder must consider fact-based matters “in which reasonable minds could differ,” the prior convictions should be submitted to a jury and found beyond a reasonable doubt. These types of cases are not the mechanical, easily discernible cases contemplated by *Thorne* and *Smith*. In cases where there is a colorable issue of whether a prior conviction may be considered a first or second strike under the POAA, the adherence to *Almendarez-Torres* and its Washington progeny is not compatible with *Blakely*.

6. MR. KYLLO WAS DENIED DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL WHEN THE COURT MADE FACTUAL DETERMINATIONS PERTAINING TO THE EXISTENCE OF HIS PRIOR CONVICTIONS WHICH ARE REQUIRED TO BE MADE BY A JURY.

Even if the POAA is not unconstitutional after *Blakely*, Mr. Kylo's sentence is unconstitutional because the court, in determining the existence of Mr. Kylo's relevant prior convictions, made factual determinations that were required to be made by a jury beyond a reasonable doubt.

At the first sentencing hearing held on November 16th, 2004, the court found that at that point, the State had not established the existence of two prior strike offenses for Mr. Kylo. Because the fingerprints on the Judgment and Sentence for Assault in the Second degree from 1988 (Exhibit 3) could not be analyzed, the court found the State had not connected Mr. Kylo to that Judgment and Sentence. Further, although not mentioned in the record below, the Judgment and Sentence for Assault in the Second Degree does not contain Mr. Kylo's signature. Exhibit 3. When the parties returned for sentencing on December 16th, 2004, the State called Stephen Warning to testify. He testified that he had represented Mr. Kylo in the case that resulted in the Assault in the Second Degree Judgment and Sentence some fourteen years ago. RP (12-16-04),

5. He testified that the Kenneth Kylo “referenced in that Judgment and Sentence” was the same Kenneth Kylo who was sitting in the courtroom. RP (12-16-04). Mr. Warning was never asked to identify his signature on that document, nor to give any additional details about the case beyond what was contained in the document. Based on this, however, the court held this was sufficient to establish that Mr. Kylo had a prior conviction for Assault in the Second Degree.

In so finding, the court necessarily had to make a credibility determination pertaining both to Mr. Warning’s truthfulness and to the reliability of his memory. This is a factual determination. The court had to look beyond the face of the judgment and sentence and weigh testimony in order to find that Mr. Kylo had this prior conviction. Such reaching beyond the face of the judgment and sentence was condemned in Division I’s recent holding *State v. Jones*, 126 Wn.App. 136, 109 P.3d 755 (2005). *Jones* held that the determination of whether an offender was on community custody at the time he committed his current offense was a factual determination to be made by a jury. In that case, the State relied on the argument that the community custody finding fell within what it believed to be the “prior conviction exception” in *Blakely* because it fell within the broader issue of recidivism. *Jones* at 144. Although Division I correctly disagreed, it is worth noting that since the *Jones* decision was

announced, the Supreme Court has ruled that recidivism findings are for a jury rather than a judge. *State v. Hughes* 154 Wn.2d 118, 141, 110 P.3d 192 (2005). The *Jones* court stated:

More importantly, whether one convicted of an offense is on community placement or community custody at the time of the current offense cannot be determined from the fact of a prior conviction. Too many variables are involved...Mr. Jones' case illustrates the point we make here. At sentencing, both the State and the sentencing judge relied on DOC records, not the judgment and sentence for the prior offense, to determine whether he was on community placement at the time of his current offense.

Jones at 144-45. As in *Jones*, the trial court here should not have been permitted to weigh testimony and make a credibility determination, which was factual rather than legal, in order to impose a sentence beyond that which was authorized by the verdict of the jury.

Further, the procedure employed here is not the sort of rote, mechanical procedure contemplated by the Supreme Court in *State v. Thorne*. In *Thorne*, the court was persuaded that a jury need not determine the existence of prior convictions beyond a reasonable doubt because:

Prior convictions are proved by certified copies of the judgment and sentence, and identity (if contested) can be proved by fingerprints. The sentencing judge can make those determinations. While technically questions of fact, they are not the kinds of facts for which a jury trial would add to the safeguards available to a defendant...A certified copy of a judgment and sentence is highly reliable evidence." *State v. Thorne*, 129 Wn.2d at 783.

With all due respect to the *Thorne* majority, they appeared to believe that in cases such as these, the process of proving prior convictions always proceeds quite smoothly with properly certified judgments and sentences, bearing fingerprints, signatures, and other indicia of reliability. They simply don't address the need for enhanced safeguards when additional, fact finding procedures must be employed because the State is unable to meet its burden of proof on court documents alone. In Mr. Kylo's case, his right to a jury trial was violated because the judge engaged in fact finding beyond what is authorized by *Blakely*, and even beyond what appears to be authorized by *Thorne*.

7. THE STATE FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT MR. KYLLO HAD A PRIOR CONVICTION FOR ASSAULT IN THE SECOND DEGREE.

The judgment and sentence for Assault in the Second Degree, under cause number 88-1-00024-4 (Exhibit 3) lacks reliable proof that the subject of that sentence is the same Kenneth Kylo who appeared for sentencing in the case at bar. This judgment and sentence is court-certified and bears the name Kenneth Kylo. The judgment and sentence, however, contains no visible fingerprints, and does not bear the signature of Mr. Kylo. It appears, in looking at the judgment and sentence (Exhibit 3), that a page is missing. The last page before the certification says page

"5 of 6," but the last page attached (the one bearing the certification) has no page number. Exhibit 3. Appellate counsel has never encountered a felony judgment and sentence without the signature of the convicted party. This omission, Mr. Kylo argues, coupled with the lack of visible fingerprints, is fatal to the State in its attempt to establish that Mr. Kylo has a prior conviction for Assault in the Second Degree.

E. CONCLUSION

Mr. Kylo's conviction for Assault in the Second Degree should be reversed and dismissed because he was denied his right to a speedy trial. Alternatively, his conviction should be reversed and remanded for a new trial. Alternatively, Mr. Kylo's sentence should be reversed and he should be resentenced within the standard range.

RESPECTFULLY SUBMITTED THIS 8th day of December, 2005.



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