

81164-4

No. 81164-4

**FILED**  
FEB 28 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**Respondent.**

**v.**

**Kenneth Kylo**

**Appellant.**

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**PETITION FOR REVIEW**

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Kenneth L. Kylo, Pro Se

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**A. IDENTITY OF PETITIONER**

Kenneth Kylo asks this Court to accept review of the decision in Part B of this motion.

**B. DECISION**

Petitioner Kenneth Kylo seeks review of the Court of Appeals, Division II decision filed November 20, 2007, affirming his conviction for Assault in the Second Degree. A copy of the opinion of the Court of Appeals is attached,(Appendix A) as well as the order denying Mr. Kylo's Motion to Reconsider. (Appendix B)

**C. ISSUES PRESENTED FOR REVIEW**

Mr. Kylo cites to 11 assignments of error in the Court of Appeals decision, (listed below) that involve constitutional questions and warrant review by this Court.

**D. 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 12<sup>th</sup>, 2004. CP 47. The Information alleged that Mr. Kylo recklessly inflicted substantial bodily harm on Mr. Robert Mickens by "ripping away Robert Micken's' ear with the defendant's teeth." CP 47.

On June 12, 2004, Mr. Kylo and Mr. Mickens were inmates at the same unit of the Cowlitz County jail. Trial RP II, 178-79. On that date Mr. Mickens was upset with Mr. Kylo and set out, by his own testimony, to provoke a fight with Kylo. Trial RP II, 193-98 Mickens carried on for about 20 minutes, failing to bait Kylo into a fight. Trial RP II, 198. At that point, Mickens decided to confront Kylo physically, standing toe – to – toe with him. Trial RP II, 199.

Mr. Mickens gave the following account of the fight: Kylo threw some punches, none of which hit Mickens, and Mickens threw punches back. After that, Kylo backed up to where he came from and Mickens moved toward the call box. However, he instead went straight into Kylo “because he was there,” and Kylo went into him. When he realized Kylo wasn’t going to back up, Mickens began throwing punches. Mickens had Kylo with his back against the wall and was punching him with his head pinned into Kylo’s chest area. Kylo grabbed onto Mickens and screamed “Stop!” At that point, Kylo bit Mickens’ ear. Mickens testified the he believed Kylo was trying to prevent a fist fight by holding on to him. Trial RP II, 202-212. On cross examination, Mr. Mickens emphasized that he provoked the fight. Trial RP II, 231.

Kenny Stevens also testified for the State. He testified “Mickens kept pushing him, wanting to fight, pushing him, wanting to fight, and Kyлло told him at least a half 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 bite Mickens’ ear to get him off.” Trial RP II, 149. Stevens testified that at the time of the bite, Mickens had Kyлло against the wall and was punching him in the groin. Trial RP II, 152. Stevens testified that Mickens provoked the fight. Trial RP II, 168.

Mr. Kyлло testified that he had been drawing and Mr. Mickens started taunting him, trying to get him to fight. Trial RP III, 320. Kyлло testified that prior to the ear biting, 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. Kyлло 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 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

Mr. Kuhn proposed the following instruction, which the trial court gave to the jury as instruction number 13:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful. CP 98.

Mr. Kuhn did not propose a separate instruction defining "great bodily harm" as used in this instruction. Clerk's Papers, Report of Proceedings.

During closing arguments 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 16<sup>th</sup>, 2004. The State requested a sentence of life in prison without the possibility of early release under the Persistent Offender Accountability Act. At the conclusion of that hearing, the court ruled the State had not proven that Mr. Kylo had a prior conviction for Assault in the Second Degree. RP ( 11-16-04), 30-31. At the continued sentencing hearing on December 16<sup>th</sup>, 2004, the Honorable Stephen Warning, Mr. Kylo's former attorney, testified against him. RP (12-16-04). Judge Warning reviewed Exhibit 3, which

was purported to be a judgment and sentence showing Mr. Kylo had a prior conviction for Assault in the Second Degree, and testified that the Kenneth Kylo he represented in that case was the same Kenneth Kylo who was sitting in the courtroom. RP (12-16-04), 5. The court, relying solely on this testimony, found the State had proven the existence of this prior conviction 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. Judge Warning presided over the majority of the pre-trial hearing in this case.

**E. ARGUMENT**

- 1. Mr. Kylo received ineffective assistance of counsel when his attorney proposed an “Act on Appearances” instruction (Instruction #13) and failed to give the necessary accompanying instruction of “great bodily harm.” (WIPIC 2.04.01)**
- 2. Mr. Kylo was deprived of his Constitutional right to Due Process because the faulty instruction lowered the burden of proof.**

On direct appeal to the Court of Appeals Division II, Mr. Kylo asserted through his Statement of Additional Grounds that his attorney’s proposed jury instruction on self-defense improperly lowered the burden of proof. Mr. Kylo asserts that this instruction deprived him of his Constitutional right to due process and that counsel’s performance constituted ineffective assistance of counsel. (See

Appendix C Statement of Additional Grounds issues # 1 and 2 pages 2-13.) The Appellate Court ordered additional briefing on this issue and Appellate Counsel filed an additional brief on February 28<sup>th</sup> 2007. (See Appendix D) The Appellate Court ruled that the error was invited and Mr. Kylo cannot complain of it on Appeal. (Court of Appeals unpublished opinion page 7-8) The Appellate Court ignored Mr. Kylo's claim that the proposed instruction amounted to ineffective assistance of counsel.

Under the holding of *State v. Rodriguez* 121 Wn. App. 180, 87 P.3d 1201 (2004), the inquiry here is whether Mr. Kylo received ineffective assistance of counsel because his attorney proposed this instruction, thereby inviting this error. Under the holding of *Rodriguez*, it is clear that Mr. Kylo did receive ineffective assistance of counsel when his attorney proposed this instruction and he was prejudiced by this instruction because self-defense was the only defense presented at trial.

The Supreme Court held in *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997) that the use of this "act on appearances" instruction was error where the instruction required fear of "*great bodily injury*" in order to act on appearances, even when that belief

turns out to be mistaken. *Id* at 477. As such, use of this instruction was reversible error because it failed to make the relevant legal standard for self-defense manifestly apparent to the average juror. *Id* at 473. As the *Walden* court held that “Jury instructions on self-defense must more than adequately convey the law... Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Walden* at 473, citing *State v. LeFaber*, 128 Wn. 2d 896, 900, 913 P.2d 369 (1996). Although, as the *Rodriguez* Court noted, the rationale for this higher degree of certainty is unclear, it nevertheless demonstrates that Mr. Kylo suffered similar prejudice when the trial court gave this “act on appearances” instruction which required him to fear “great bodily harm” in order to rely on his subjective belief of danger. Because such fear was not required, and because “great bodily harm” was not defined for the jury, use of this instruction lowered the State’s burden of proof and caused obvious prejudice where self-defense was the only defense presented at trial. *Rodriguez* at 187.

While the *Walden* court dealt with an earlier version of this instruction, the *Rodriguez* court dealt with an instruction identical to the one given in this case. The holding in *Rodriguez* is simple and clear; use of the “act on appearances” instruction must be accompanied by a

separate instruction defining “great bodily harm.” In *Rodriguez*, the Court held that this definition is found at WIPIC 2.04.01 which defines “Great Personal Injury” as injury that would produce severe pain and suffering. *Rodriguez* at 478. It appears that the holding in *Rodriguez*, which instructs us to use a separate instruction defining “Great Personal Injury” when the “act on appearances” instruction is used, contradicts the holding in *Walden* which holds that such a high level of fear is not required (fear of simple battery is enough). Nevertheless, under either holding, use of this instruction in *Kyllo*’s case was error because the jury was left with the impression that *Kyllo* was required to have a higher level of fear than the law requires before acting in self-defense. Thus, the State’s burden of proof was lowered and instructions failed to make the relevant legal standard on self-defense manifestly apparent to the jury.

This issue is further confusing to a juror because the Court did give an instruction on “substantial bodily injury.” (Instruction # 19) When instructions 13 and 19 are read together the jury could clearly have believed that in order to find that *Kyllo* acted in self-defense he had to believe in good faith that he was in actual danger of substantial disfigurement, substantial loss or impairment of function or fracture of

any bodily part. The jury was not properly instructed on the law of self-defense because “great bodily harm” was not defined and the jury was left with only the definition of substantial bodily harm.

The Appellate Court reasoned that “Any possible confusion between the fear of ‘great bodily harm’ necessary to trigger the right to act in self-defense and the ‘substantial bodily harm’ necessary to prove second degree assault in the instructions could not have misled the jury or reduced the State’s burden..”<sup>1</sup> This ruling conflicts with this Court’s holdings in *Walden* and *Rodriguez* because the instruction read as a whole does not “more than adequately convey the law” or “make the relevant legal standard manifestly apparent to the average juror.” *Id.*

The Prejudice suffered by Mr. Kylo is self-evident: Self-defense was the only defense presented at trial, just like the defendants in *Walden* and *Rodriguez*, the Court noted the erroneous instruction “... struck at the heart of Mr. *Rodriguez’s* defense...” *Rodriguez* at 187. Such is the case for Mr. Kylo as well. Review of this issue is appropriate under RAP 13.4 (b) (3) because it involves a significant question of law under the Constitution of the State of Washington and the United States Constitution.

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<sup>1</sup> Unpublished Opinion page 8 footnote 6.

An instruction that may relieve the state of proving every element necessary for conviction is constitutionally deficient and deprives the defendant of his 14<sup>th</sup> Amendment right to have the jury prove every element beyond a reasonable doubt. *Sandstrom v. Montana* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979).

The Due Process clause of the 14<sup>th</sup> Amendment protects against conviction unless every fact necessary to constitute a crime is proven beyond a reasonable doubt. *Francis v. Franklin* 105 S. Ct. 1965, 471 U.S. 307, 851 L. Ed 2d 344 (1985). Given the instructions as read it is possible that the jury could have convicted Mr. Kylo on a misapplication of the law. The instructions certainly did not meet the standard set by this Court in *State v. LeFaber*, 128 Wn. 2d 896, 900, 913 P.2d 369 (1996) that the jury instructions must make the relevant legal standard *manifestly* apparent to the average juror.

Misstating the law in a manner that makes it easier for the jury to convict amounts to ineffective assistance of counsel. *Lankford v. Arave* 468 F.3d 578, 585 (9<sup>th</sup> Cir. 2006).

- 3. This Court should reverse the Court of Appeal's holding that the trial court did not err 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:

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 act 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). 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 P2d 922 (1983).<sup>2</sup> The provoking act cannot be the assault itself. *State v. Kidd*, 57 Wn.App. 95, 100, 786 P.2d 847 (1990).<sup>3</sup>

Here, there were three witnesses to the actual assault. All three witnesses agreed that Mr. Mickens, planned for and provoked the assault. It was error for the court to give this instruction because the evidence supported that Mr. Mickens, not Mr. Kylo, was the aggressor. Contrary to the State's assertion, the question of who struck the first

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<sup>2</sup> See also *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).

<sup>3</sup> See also *State v. Brower*, 43 Wn.App. 893, 902, 721 P.2d 12; *State v. Wasson*, 54 Wn.App. at 159.

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 (1998), 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 *Brower* 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. 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.

It is not clear why defense counsel did not object to this instruction. 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 said to be harmless unless it is harmless beyond a reasonable doubt. *State v. McCullam*, 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 said to be harmless beyond a reasonable doubt. Using this instruction, the jury was told 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 misstating the level of fear which must be present in self-defense (argued below), leads to the conclusion but for those errors, the outcome of this case would have been different. Review of this issue is warranted under RAP 13.4 (b) (3) and (4) because it involves a significant question of law under the Constitution of the State of Washington and the United State Constitution and involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Kylo would also bring to this Court's attention that the improper jury instruction violated his 5<sup>th</sup> and 14<sup>th</sup> Amendment right to due process because it infected the entire trial. *Cupp v. Naughten* 94 S. Ct. 396,400 (1973). Failure to properly instruct the jury regarding an element of a charged crime is a constitutional error that deprives the defendant of due process. *Hennessy v. Goldsmith* 929 F.2d 511. (9<sup>th</sup> Cir. 1991). A challenged instruction violates due process if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Allen v. Woodford* 366 F.3d 823 (9<sup>th</sup> Cir. 2004.)

Additionally, Mr. Kylo would ask this court to consider the instruction in the context of the whole case and in conjunction with the fact that defense counsel told the jury that if Mr. Kylo threw the first punch then he did not have a self-defense argument. (Issue # 4 below.) The critical question is whether the instruction, taken as a whole and viewed in the context of the entire trial, were misleading or confusing, or inadequately guided the jury's deliberations, or improperly intruded on the fact finding process. *U.S. v. Beltran-Garcia* 179 F.3d 1200 (9<sup>th</sup> Cir. 1999.) Taken in the context of the whole trial, including the explanation given to the jury by the state as

well as defense counsel, the aggressor/provoker instruction struck a fatal blow to the heart of Mr. Kylo's defense.

**4. Mr. Kylo was denied effective assistance of counsel where his attorney repeatedly told the jury that Mr. Kylo 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 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 told the jury that Mr. Kylo had to be in fear of death or grievous bodily harm in

order to act in self-defense. This is an incorrect statement of the law. 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); WIPIC 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. 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 it *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. Review of this issue is warranted under RAP 13.4 (b) because it involves a

significant question of law under the Constitution of the State of Washington and the United States Constitution. Mr. Kylo was deprived of his 6<sup>th</sup> Amendment right to the effective assistance of counsel by several incidents where counsel misinformed the jury on the applicable law.

The right to effective assistance of counsel extends to closing arguments. *Yarborough v. Gentry* 124 S. Ct. 1 (2003). When an attorney has made a series of errors that prevent the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice. *Turner v. Duncan* 158 F.3d 449 (9<sup>th</sup> Cir. 1998). Misstating the law in a manner that makes it easier for the jury to convict undermines the “adversarial testing process” required by the 6<sup>th</sup> Amendment and outlined in *Strickland*. *Lankford v. Arave* 468 F.3d 578, 585 (9<sup>th</sup> Cir. 2006).

Counsel’s errors that are a result of a misunderstanding of the law cannot be said to be a strategic decision. *U.S. v. Span* 75 F.3d 1383, 1390 (9<sup>th</sup> Cir. 1996). (This case is directly on point with Mr. Kylo’s in as much as the conviction hinged on which party was the aggressor and the jury was improperly instructed on the applicable law.)

A fundamental misstatement of the law which infringes on a constitutional right is an error of constitutional magnitude. *Mahorney v. Wallman* 917 F.2d 469 (10<sup>th</sup> Cir. 1990).

**5. The Appellant was denied due process of law by the trial Court's refusal to allow a jury instruction on specific intent.**

Mr. Kylo has asserted that the trial court erred by refusing to allow an instruction on specific intent. (Proposed defense instruction #6 CP 74.) The Appellate Court ruling completely misses the issue as it erroneously reasoned that Mr. Kylo's argument was regarding instruction #7, a general intent instruction that was in fact given. This is simply not the case. The specific intent instruction that Mr. Kylo's counsel proposed and Mr. Kylo assigned error to in his Statement of Additional Grounds was in fact *not* given to the jury.

As the Court of Appeals has made an obvious error and has not ruled on the merits of Mr. Kylo's constitutional claim, this Court should grant review. RAP 13.5(b)(1).

Furthermore the 9<sup>th</sup> Circuit has stated that jury instructions which improperly remove the element of specific intent is reversible error. *Powell v. Galaza* 328 F.3d 558 (9<sup>th</sup> Cir. 2002). See also *Ho v. Carey* 332 F.3d 587 (9<sup>th</sup> Cir. 2003) (Trial court violated constitutional

right to have a jury decide every element of the offense by erroneously instructing on general intent instead of specific intent.)

This is precisely the situation in the present case. The trial court refused to give a specific intent instruction and instead gave one on general intent despite the fact that Washington State Supreme Court case law states that specific intent is needed in some 2<sup>nd</sup> degree assault cases. *State v. Byrd* 125 Wn. 2d 707, 887 P.2d 396 (1995), *State v. Eastmond* 129 Wn. 2d 497, 919 P. 2d 577 (1996). The Court of Appeals did not properly rule on this issue.

Mr. Kylo has addressed this issue in detail in his Statement of Additional Grounds attached as Appendix C.

- 6. The Appellant was deprived of his constitutional right to the effective assistance of counsel by his attorney's assertion during closing arguments that if the state showed that Kylo threw the first punch then his right to self-defense was negated.**

As discussed above, trial counsel made numerous statements to the jury which dramatically misstated the applicable law and raised the burden of proof to show that Mr. Kylo was acting in self-defense. In the Statement of Additional Grounds pages 18-20 Mr. Kylo assigns error to his counsel's statement to the jury that if they were to find that Mr. Kylo threw the first punch then his self-defense argument goes

away. As outlined in Statement of Additional Grounds this statement is completely contrary to Washington law. The Court has clearly stated that the simple question of who threw the first punch is not determinative of who provoked the fight.<sup>4</sup> The Court of Appeals decision does not address this issue.

Similar to the issues discussed above, counsel's statement to the jury was a misstatement of the law and was ineffective assistance of counsel and cannot be said to be strategic. *Lankford v. Arave* 468 F.3d 578, 585 (9<sup>th</sup> Cir. 2006). *U.S. v. Span* 75 F.3d 1383, 1390 (9<sup>th</sup> Cir. 1996).

Further this Court should grant relief because this assignment of error strikes at the heart of the defense and should be looked at for the cumulative impact. *Harris by and Through Ramseyer v. Wood* 64. F. 3d 1432 (9<sup>th</sup> Cir. 1995).

## **7. Prosecutorial Misconduct**

In the Statement of Additional Grounds (pages 20-29) Mr. Kylo asserts that he was deprived of his Constitutional right to Due Process by numerous incidents of prosecutorial misconduct. Mr. Kylo raised 5 different instances of prosecutorial misconduct.

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<sup>4</sup> *State v. Heath* 35 Wn. App. 269, 666 P.2d 922 (1983)

- A. The prosecutor misrepresented critical facts.
- B. The prosecutor misquoted key witness testimony.
- C. The prosecutor interjected her personal opinion on matters requiring expertise.
- D. The prosecutor made comments intended to inflame the passions of the jury
- E. The prosecutor misinformed the jury on the applicable law.

It is well settled that a prosecutor in a criminal case has a special obligation to avoid improper suggestions, insinuations, and especially assertions of personal knowledge. *U.S. v. Edwards* 154 F.3d 915 (9<sup>th</sup> Cir. 1998). A prosecutor presenting false evidence violates due process. *Phillips v. Woodford* 267 F.3d. 966 (9<sup>th</sup> Cir. 2001.)

Mr. Kylo has cited to authoritative state and federal case law to support his assignments of error. The appellate court did not respond to any of the issues of prosecutorial misconduct. As prosecutorial misconduct represents a constitutional violation and as this issue has not been ruled on, this Court should grant review.

The full argument is contained in the Statement of Additional Grounds is attached as Appendix C.

**8. Mr. Kylo was deprived of his 6<sup>th</sup> Amendment right to have a jury decide all facts which increase punishment.**

Mr. Kylo has asserted, through counsel, that the process used by the trial court to find him a persistent offender violated his 6<sup>th</sup>

Amendment right to have a jury determine all facts that increase punishment. The basis for this assignment of error is the position that *Apprendi v. New Jersey*<sup>5</sup> and *Blakely v. Washington*<sup>6</sup> indicate a departure from the Court's holding in *Almendarez-Torres*<sup>7</sup>. This argument is contained in counsel's Brief of Appellant pages 43-49. The appellate court did not specifically rule on this issue.

As this issue represents a constitutional question and has not been ruled on this Court should grant review.

**9. Mr. Kylo was deprived of his right to due process when the state failed to prove by a preponderance of the evidence that Mr. Kylo had a prior conviction for Assault in the Second Degree.**

Mr. Kylo has further asserted, through counsel, that the trial court's use of a faulty judgment and sentence which was lacking a signature, visible fingerprints and has a missing page, violated his right to due process guaranteed under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. This argument is contained in counsel's Brief of Appellant pages 53-54. The Appellate Court did not address this issue.

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<sup>5</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

<sup>6</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004).

<sup>7</sup> *Almendarez-Torres v. United States*, 253 U.S. 224, 118 S.Ct. 1219 (1998)

Under current State and Federal law the existence of any prior conviction must be proven by a preponderance of the evidence. *State v. Ford*, 137 Wn. 2d 472, 480-81 (1999). See also, *Torres v. United States*, 140 F.3d 392, 404 (2<sup>nd</sup> Cir. 1998), *U.S. v. Safirstein*, 827 F.2d 1380, 1385-87 (9<sup>th</sup> Cir. 1987).

A certified copy of the judgment and sentence is the best evidence. *State v. Lopez* 147 Wn. 2d 515 (2002). In the present case the trial court used an invalid judgment and sentence. As this issue represents a significant question of law under the State and Federal Constitution and the Court of Appeals declines to address it, this Court should grant review.

**10. Mr. Kylo was deprived of his 6<sup>th</sup> Amendment right to Confrontation and his 14<sup>th</sup> Amendment right to Due Process when Governmental Misconduct and Trial Court Error denied him the right to be present at all proceedings and subsequently deprived him of his right to speedy trial.**

This assignment of error is argued on pages 24-34 of counsel's Brief of Appellant. The essence of the complaint is that the state and trial court allowed a critical witness for the defense (who was under state subpoena at the time) to be transferred out of the County jail into another jurisdiction. This transfer arose out of a hearing that neither Mr. Kylo nor his attorney, were able to attend as they were not given

notice that it was taking place. The state made no attempt to prevent the critical witness to be transferred and defense counsel had no opportunity as they were not allowed to attend the hearing. The state then made no attempt to return the witness until 6 days before trial which was insufficient time to get the witness back before Mr. Kylo's speedy trial rights expired.

The transfer and lack of effort to bring the witness back in time for trial affected placing Mr. Kylo in a classic *Hobson's choice* between giving up his speedy trial rights against the opportunity to have Mr. Stevens as a witness.

Mr. Kylo had a fundamental right to be present at any hearing that involved his case. *U.S. v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482. (1985), *Fisher v. Roe* F.3d 906. (9<sup>th</sup> Cir. 2001).

As the Appellate Court did not address the Constitutional problems involved with this issue and the fact that Mr. Kylo was deprived of his right to attend or be represented at a critical stage of the proceedings, this Court should grant review. This issue further involves a significant question of law under the United States Constitution and warrants review.

**11. This Court should reverse the Court of Appeal's ruling that Mr. Kylo's case will be remanded for a new sentencing**

**hearing, and instead order that, upon re-sentencing, Mr. Kylo should be re-sentenced within the standard range without the unproven prior assault conviction.**

Mr. Kylo agrees with the holding of the Court of Appeals that the appearance of fairness doctrine was violated when the Honorable Stephen Warning, who presided over a majority of Mr. Kylo's pre-trial hearings, testified against him at his sentencing hearing in his capacity as Mr. Kylo's former attorney and provided the sole proof that Mr. Kylo had a prior conviction for Assault in the Second Degree. Mr. Kylo does not ask this Court to review this ruling.

However, Mr. Kylo argues that this is not a case where the State should be given yet another opportunity to try and prove this prior conviction. First, the remedy contemplated by the Court of appeals' remand order will not cure the appearance of fairness violation. The Court ordered that a new sentencing hearing be conducted by a visiting judge. A new sentencing hearing in front of a visiting judge cannot undo the fact that Judge Warning presided over a majority of the pre-trial hearings in this case and that the State cannot prove this prior conviction without Judge Warning's testimony. As the Court of Appeals stated in its opinion at page seven, "here, a disinterested observer could question the neutrality of a proceeding in which a judge

who presided over preliminary matters later provided the sole evidence of the defendant's identity as the perpetrator of a previous strike offense to a term of life without possibility of parole." The appearance of fairness will be violated if Judge Warning again testifies against his former client, Mr. Kylo, having presided over the majority of Mr. Kylo's hearings, irrespective of which judge hears the matter.

Second, the State should not be given another opportunity to prove this prior conviction when it has already had two opportunities to prove this prior conviction. A sentencing hearing began on November 16<sup>th</sup>, 2004. The State was unable to prove that Mr. Kylo had a prior conviction for Assault in the Second Degree at this hearing. RP (11-16-04), 30-31. The court continued the sentencing hearing so the State could find proof that Mr. Kylo had a prior conviction for Assault in the Second Degree.

On December 16<sup>th</sup>, 2004, the sentencing hearing reconvened. At that hearing, based solely on the testimony of Judge Warning, the trial court found that Mr. Kylo had a prior conviction for Assault in the Second Degree. RP (12-16-04), 17,22, CP 116. The State knew, prior to the commencement of the first hearing on November 16, that there were no readable fingerprints on the Assault II judgment and sentence.

The State commenced the hearing while knowingly unprepared, and made no effort to correct the deficiencies in its proof until the December 9<sup>th</sup>, 2004 hearing (which was continued until December 16<sup>th</sup>). At the December 16<sup>th</sup> hearing the State called only one witness (Judge Warning) to testify about the Assault in the Second Degree, presumably because Judge Warning is the only one who can provide the proof the State needs. The State has had, therefore, *two* opportunities to prove this prior conviction with competent evidence and has failed to do so. Mr. Kylo's case, therefore, is analogous to *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002), where the Supreme Court held that where the State was completely unprepared to prove the defendant's prior convictions, it should not be given another chance to prove the prior conviction on remand. Review of this issue is warranted under RAP 13.4(b)(1) and (4) because the decision of the Court of Appeals to allow another sentencing hearing is in conflict with a decision of the Supreme Court and involves an issue of substantial public interest that should be determined by the Supreme Court.

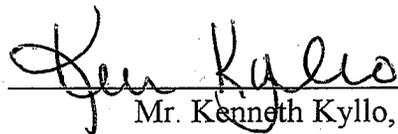
Mr. Kylo further asserts that to allow the Honorable Stephen Warning to testify before a visiting judge in order to establish identity, would violate Mr. Kylo's 6<sup>th</sup> Amendment right to have all facts which

increase punishment proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed. 2d 403, 124 S.Ct. 2531 (2004). (See also Judge Quinn-Brintall's dissent in *State v. Rudolph* 141 Wn. App 59. (2007)).

CONCLUSION

As Mr. Kylo has asserted numerous significant questions of law under the Constitution of the State of Washington and the United States and has also shown that the Court of Appeals decision conflicts with decisions of Washington State Supreme Court, this Court should grant review.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of Feb 2008.

  
Mr. Kenneth Kylo, pro se

# Appendix A

Court of Appeals Opinion

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

KENNETH LEE KYLLO,

Appellant.

No. 32729-5-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Kenneth Lee Kylo and Robert W. Mickens were both incarcerated in the Cowlitz County Jail when they had a fight during which Kylo bit and “ripp[ed] away” Mickens’s left ear. Clerk’s Papers (CP) at 47. The State charged Kylo with second degree assault. At trial, Kylo claimed that he had acted in self-defense, but the jury disagreed and convicted him. For this “third strike,” Kylo was sentenced as a persistent offender to life in prison without the possibility of release under the Persistent Offender Accountability Act (POAA).<sup>1</sup> He appeals his conviction and sentence raising numerous issues. We affirm the conviction, but vacate Kylo’s POAA finding and remand for a new POAA sentencing hearing before a visiting judge.

<sup>1</sup>RCW 9.94A.570.

## FACTS

On June 12, 2004, at about 2:00 AM, Kylo was housed in the Cowlitz County Jail on felony charges unrelated to this appeal when he and another inmate, Mickens, fought. The fight took place in a unit at the rear of the jail out of range of the security cameras and none of the jail staff witnessed the altercation. Inmate accounts of the fight were inconsistent, many, and varied. In one account, Kylo was bullying everyone in the unit and had attacked Mickens when he attempted to call staff on the call box. Others claimed that Mickens started the fight. At Kylo's request, jail staff took photographs of Kylo's injuries including a "swollen" knee and bite marks on his left shoulder. According to the treating nurse, Kylo's wounds appeared to have been inflicted hours after the fight and the bite mark could have been self-inflicted.

The State charged Kylo with one count of second degree assault, alleging that Kylo "recklessly inflicted substantial bodily harm" to Mickens when he tore off Mickens's ear with his teeth. CP at 47. Kylo stated that he did not know how Mickens's ear had been torn and claimed that he had acted in self-defense.

Following numerous pretrial motions and a three-day trial, a jury convicted Kylo as charged. The trial court sentenced Kylo to life without the possibility of parole under the POAA.

On appeal, Kylo challenges his conviction claiming that he was denied his right to a timely trial, and that the trial court erred by giving the jury an aggressor instruction. He raises additional issues in his statement of additional grounds (SAG),<sup>2</sup> including that he is entitled to a new trial under the doctrine of cumulative error, and because his counsel was ineffective.

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<sup>2</sup> RAP 10.10.

## ANALYSIS

### SPEEDY TRIAL AND DISQUALIFICATION OF COUNSEL

Kyllo contends that the trial court violated his right to a timely trial under CrR 3.3(b) which requires that a defendant not released from jail be brought to trial on the charges for which he is confined within 60 days of his arraignment and that a defendant who is not so detained be brought to trial within 90 days. But that rule also requires that any objection to the setting of a trial date must be filed within 10 days of notice of the trial date and provides that the motion “shall be promptly noted for hearing by the moving party. . . . A party who fails, *for any reason*, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.” CrR 3.3(d)(3). Kyllo did not comply with the preservation requirements of this rule and has therefore waived any challenge to the timeliness of his trial.<sup>3</sup>

### GOVERNMENT MISCONDUCT

Kyllo argues that the trial court erred when it permitted a witness, Kenny Stevens, to be released from jail and transported to the Department of Corrections facility in Shelton. As a result of the transport, the State was unable to produce Stevens in time for trial on September 27. Although Kyllo’s trial attorney initially objected to the State’s request for a continuance to

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<sup>3</sup> Kyllo was arraigned on June 17, 2004. On August 16, 2004, Kyllo, who was not represented by counsel, filed a pro se motion to dismiss on the grounds that he had not been tried within 60 days. Following a series of withdrawals of court-appointed attorneys for conflict of interest, Kyllo’s trial commenced on October 25, 2004. Even if we were to review the merits of Kyllo’s timely trial claim, because Kyllo was not detained in jail on the second degree assault charge and his October 25 trial date fell within 90 days following the disqualification of his last attorney to withdraw, his trial was timely. CrR 3.3(b)(2)(i); *State v. Bernhard*, 45 Wn. App. 590, 594, 726 P.2d 991 (1986), *review denied*, 107 Wn.2d 1023 (1987).

secure Stevens's presence, he later admitted that the defense could not proceed to trial without Stevens's testimony.

Even if we address Kylo's unpreserved timely trial objection, good cause supported the continuance to secure Stevens's presence at trial and insured that Kylo was not prejudiced in the presentation of his defense. CrR 3.3(b)(2)(i); *State v. Bernhard*, 45 Wn. App. 590, 594, 726 P.2d 991 (1986), *review denied*, 107 Wn.2d 1023 (1987). Kylo's timely trial rights were not violated.

#### JURY INSTRUCTIONS

Kylo challenges the trial court's jury instructions. "Jury instructions are sufficient when 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." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). We review a trial court's decision to give or not give a jury instruction for an abuse of discretion. *Tennant v. Roys*, 44 Wn. App. 305, 308, 722 P.2d 848 (1986). Each party is entitled to have the court instruct the jury on its theory of the case if evidence supports that theory. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). In evaluating whether the evidence supports a defendant's requested instruction, the trial court must interpret the evidence most strongly in the defendant's favor and may not weigh the proof, since that is an exclusive function of the jury. *State v. Williams*, 93 Wn. App. 340, 348, 969 P.2d 106 (1998), *review denied*, 138 Wn.2d 1002 (1999).

For the first time on appeal, Kylo challenges the trial court's Instruction No. 14, which limited the right of one who is the first aggressor in an altercation to claim self-defense. The instruction read:

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

CP at 100. Generally, the failure to object precludes appellate review of jury instructions. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

Moreover, jury Instruction No. 14 accurately states the law<sup>4</sup> and, although who started the fight was disputed, on this record there is evidence the jury could have found credible that Kylo provoked the use of force by blocking Mickens's access to the call box to call for help. An aggressor instruction is appropriate even if there is conflicting evidence as to whether the defendant's conduct provoked the attack and thereby necessitated the use of force in self-defense. *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999) (citing *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)), *cert. denied*, 543 U.S. 917 (2004). With conflicting evidence regarding the identity of the aggressor, an aggressor instruction is "particularly appropriate." *State v. Cyrus*, 66 Wn. App. 502, 508-09, 832 P.2d 142 (1992), *review denied*, 120 Wn.2d 1031 (1993). The trial court's aggressor instruction was proper.

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<sup>4</sup> RCW 9A.16.020 states in pertinent part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

POAA

Kyllo next contends that his Sixth Amendment right to a jury trial was violated when the trial court found that he was the same person previously convicted of two prior most serious offenses. At Kyllo's POAA sentencing hearing, the State presented the following evidence: (1) a jail booking sheet dated May 20, 2004 (Ex. 1); (2) testimony from Corrections Officer Paul Curtis related to the booking sheet; (3) a fingerprint card from the May 20, 2004 jail booking (Ex. 2), as well as the testimony from the State's fingerprint expert, Edward Reeves, a former Cowlitz County Sheriff's Deputy; (4) a certified copy of a judgment and sentence dated March 10, 1988 (Ex. 3), for second degree assault, the first strike offense; (5) a copy of a fingerprint card (Ex. 4) which Reeves compared to those prints from Exhibit 2 and determined that they were made by the same person; (6) a certified copy of a judgment and sentence dated August 7, 1997, for indecent liberties, the second strike offense which Reeves also compared to prints from Exhibits 2 and 4, determining that they were all made by the same person; and (7) a copy of an inked fingerprint card (Ex. 6) which Reeves also compared to the other prints in the exhibits and determined it was made by the same person. Kyllo objected to all the exhibits, especially Exhibit 3, arguing that the State did not meet its burden of proof because a majority of the exhibits could not be linked to him.

Notably, no fingerprint or other documentary evidence of perpetrator identity was presented for one of the strike offenses, second degree assault (Ex. 3). Reeves, the State's fingerprint expert, was unable to identify or evaluate prints from Exhibit 3 due to the poor quality of the prints. Additionally, the document was not signed by the defendant named in it. The sole supporting evidence of Kyllo's identity as the person previously convicted for this strike offense was provided by his former defense counsel, now a Cowlitz County Superior

Court judge.<sup>5</sup> And the sole determiner of the evidence was another Cowlitz County Superior Court judge. Although we do not doubt the integrity of either the witness or the sentencing trier of fact, we agree with Kylo that this procedure violates the appearance of fairness doctrine. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.”) (quoting *State v. Ladenburg*, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992)), review denied, 127 Wn.2d 1013 (1995). See also *Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966) (“It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties”).

Here, a disinterested observer could question the neutrality of a proceeding in which a judge who presided over preliminary matters later provided the sole evidence of the defendant’s identity as the perpetrator of a previous strike offense for purposes of sentencing the defendant as a persistent offender to a term of life without possibility of parole. Accordingly, we reverse Kylo’s sentence of life without possibility of parole and remand for resentencing before a visiting judge to determine whether Kylo is a persistent offender.

#### SAG ISSUES

A. “GREAT BODILY HARM” SELF-DEFENSE JURY INSTRUCTION NO. 13

For the first time on appeal, Kylo objects to the trial court’s Instruction No. 13 regarding “great bodily harm,” which is the same language as 11 *Washington Practice: Washington Pattern Jury Instructions* 17.04, at 203 (2d ed. 1994). Jury Instruction No. 13 provides:

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<sup>5</sup> This witness had also presided over the majority of the preliminary proceedings for this case.

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP at 99.

Kyllo did not take exception to this instruction and had requested that the trial court give an identical instruction, defendant's proposed Instruction No. 11. The failure to object precludes appellate review of jury instructions. RAP 2.5(a); *Scott*, 110 Wn.2d at 685-86. "A party may not request an instruction and later complain on appeal that the requested instruction was given." *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (quoting *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). Kyllo invited any error in the trial court's jury instructions which, on the facts of this case, did not relieve the State of its burden of proof or prejudice his defense in any event.<sup>6</sup>

#### B. INSTRUCTIONS DEFINING INTENT

Kyllo also argues that the trial court erred by not giving his proposed jury instruction on "specific intent." Kyllo's proposed Instruction No. 7 read: "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a

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<sup>6</sup> Citing *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997), Kyllo argues that our Supreme Court disfavors using the phrase "great bodily harm."

In this case, none of the parties offered a definition for "great bodily harm"; rather, the instructions defined "substantial bodily harm." These phrases are not technical. In the context of the level of harm the defendant feared sufficient to trigger the right to act in self-defense, the phrases are similar. It is significant to note that second degree assault requires an intentional assault that thereby recklessly inflicts "substantial bodily harm." RCW 9A.04.110(4)(b). In contrast, "great bodily harm" is an element of the more serious felony of first degree assault. RCW 9A.04.110(4)(c). Here, the elements instruction provided the jury with the correct definition for second degree assault. Any possible confusion between the fear of "great bodily harm" necessary to trigger the right to act in self-defense and the "substantial bodily harm" necessary to prove second degree assault in the instructions could not have misled the jury or reduced the State's burden to prove the elements of second degree assault and disprove Kyllo's self-defense claim beyond a reasonable doubt.

No. 32729-5-II

crime.” CP at 75. Contrary to Kylo’s assertion, the trial court did provide this proposed instruction. The trial court’s Instruction No. 16 was identical to Kylo’s proposed Instruction No. 7.

C. CUMULATIVE ERROR

Kylo contends that he is entitled to a new trial under the cumulative error doctrine.

The cumulative error doctrine applies when several trial errors occurred but none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial.. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). Here, however, there are no errors to accumulate regarding the second degree assault conviction appealed. Accordingly, the doctrine does not apply.

We affirm the conviction, but vacate Kylo’s POAA finding and remand for a new POAA sentencing hearing before a visiting judge.

  
QUINN-BRINTNALL, J.

We concur:

  
HOUGHFON, C.J.

  
VAN DEREN, J.

# Appendix B

Order Denying Motion to Reconsider

# Appendix C

Statement of Additional Grounds

**IN THE COURT OF APPEALS OF THE STATE OF**  
**WASHINGTON**  
**DIVISION II**

**STATE OF WASHINGTON,**

**Respondent,**

**Vs.**

**Kenneth Kylo,**

**Appellant.**

**CASE NO: 32729-5-II**

**STATEMENT OF  
ADDITIONAL GROUNDS  
PURSUANT TO  
RAP 10.10**

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In addition to the issues raised by appellate counsel the appellant would like to bring to the court's attention the following grounds for review. It is the contention of this defendant that the accumulation of numerous errors by the trial court deprived him of a

fair trial.<sup>1</sup> This Court has the authority under RAP 2.5(a)(3) to review error claims whether they be properly preserved or not, if the cumulative effect of all errors denies the defendant the constitutional right to a fair trial.<sup>2</sup> Although it is my contention that many of the errors listed warrant reversal on their own merit, this appellant would ask this court to also view all of the errors in light of, “the total effect of a series of incidents creating a trial atmosphere which threatens to deprive the accused of the fundamentals of due process.”<sup>3</sup> “The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affects the outcome of a trial.”<sup>4</sup>

Following is a list of the issues this defendant wishes to raise before this Court:

**Additional Ground # 1**

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY A FAULTY SELF-DEFENSE INSTRUCTION THAT LOWERED THE STATE’S BURDEN OF PROOF.

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<sup>1</sup> US Constitution 5<sup>th</sup> and 14<sup>th</sup> Amendments

<sup>2</sup> St. v. Alexander 64 Wn. App 147 150-151, 822 P.2d 1019 (1992)

<sup>3</sup> St. v. Swenson 62 Wn. 2d 259, 382 P.2d 614 (1963)

<sup>4</sup> St. v. Newbern 95 Wn. App. 277, 297, 975 P.2d 721 (1999)

A conviction cannot rest on an ambiguous and equivocal jury instruction.<sup>5</sup> An erroneous to-convict instruction that relieves the State of its burden of proving every essential element of the charged crime beyond a reasonable doubt constitutes prejudicial error requiring reversal of the conviction. *State v. Cronin* 142 Wn. 2d 568, 14 P.3d 752 (2000).

The Due Process clause of the 14<sup>th</sup> Amendment protects against conviction unless every fact necessary to constitute a crime is proven beyond a reasonable doubt. *Francis v. Franklin* 105 S. Ct. 1965, 471 U.S. 307, 851 L. Ed 2d 344 (1985).

In the present case the jury was given the following instruction (#13) proposed by defense counsel: “A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.” WPIC 17.04

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<sup>5</sup> *U.S. v. Washington*, 819 F.2d 221 (9<sup>th</sup> Cir. 1987).

The Washington Supreme Court has criticized the use of the term “great bodily harm” in *State v. Walden*.<sup>6</sup> In that case the Court held that the term “great bodily harm” as well as the definition given injected an impermissible objective standard into the instructions.

Although in the present case, “great bodily harm” was not defined, “substantial bodily harm” was defined in instruction 19. (Attached as Appendix A) That definition requires substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part. It is completely plausible that in considering the act on appearances instruction, the jury would equate “great bodily harm” with “substantial bodily harm” thus creating an impermissible standard.

In *Walden* the Supreme Court reiterated that when self-defense is alleged, “great personal injury” should be defined using WPIC 2.04.01 which defines it as “an injury that the (defendant) reasonably believed, in light of all the facts and circumstances known at the time,

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<sup>6</sup> *State v. Walden*, 131 Wn. 2d 469, 932 P.2d 1237

would produce severe pain and suffering if it were inflicted upon either the defendant or another person.”

In the present case no definition was requested or given. This left the jury with the only possible definition of great bodily harm to be the one given for “substantial bodily harm.” By this definition the jury would have to believe that the defendant was in fear of substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part. The proper standard would be for the jury to have been instructed that the defendant was in fear of receiving an injury that would produce severe pain and suffering if it were inflicted.

In the present case, as in *Walden*, the instructions as read create an impermissible standard and change the burden of proof. Instead of having to show that the defendant was in fear of severe pain and suffering, the instructions created a requirement that the jury find the defendant was in fear of substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part.

Read as a whole, the jury instructions must make the relevant legal standard *manifestly* apparent to the average juror.<sup>7</sup> A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.<sup>8</sup>

The Court of Appeals Division III recently ruled on a case with essentially the same issue in *State v. Rodríguez*.<sup>9</sup> In *Rodríguez* as in the present case the jury was given the act on appearances instruction with the term “great bodily harm” in the language. The jury was then given the definition of great bodily harm in regards to the first degree assault charge. The Court of Appeals noted that “this is precisely the problem the Supreme Court warned against in *State v. Walden*.”<sup>10</sup> The Court further concluded that the net effect was to decrease the State’s burden to disprove self-defense.<sup>11</sup>

The proposed and accepted jury instruction regarding act on appearances (#13) should have either had the phrase “great bodily harm” removed or had the term defined as fear of severe pain and

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<sup>7</sup> *State v. LeFaber*, 128 Wn. 2d 896, 900, 913 P.2d 369 (1996)

<sup>8</sup> *Id.* at 900

<sup>9</sup> *State v. Rodríguez*, 121 Wn. App. 180, 87 P.3d 1201, (2004).

<sup>10</sup> *Id.* at 186.

<sup>11</sup> *Id.* at 187.

suffering. The instructions as read clearly lowered the States burden of proof and substantially prejudiced the defense.

An error in giving or failing to give an instruction will be considered for the first time on appeal if it evades a fundamental constitutional right of accused and would probably change the result of the case.<sup>12</sup> Clearly the faulty instruction addressed here lowered the burden of proof and fundamentally deprived the defendant of his right to a fair trial and due process of law.

**Additional Ground # 2**

THE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S PROPOSAL OF A FAULTY INSTRUCTION.

Defendants are constitutionally guaranteed reasonably effective representation by counsel. U.S. Constitution, Amend.6. *Strickland v. Washington*.<sup>13</sup> Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient

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<sup>12</sup> *State v. Pam*, 98 Wn. 2e 748, 659 P.2d 454, (1983).

<sup>13</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

performance prejudiced the defense.<sup>14</sup> The first prong of the *Strickland* test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas*.<sup>15</sup> The second prong of *Strickland* requires the defendant to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case.<sup>16</sup> The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." A reasonable probability is one sufficient to undermine the confidence in the outcome of the case.<sup>17</sup>

In the present case, counsel proposed a jury instruction that relieved the state of its burden of proof. There is no tactical advantage to having the jury receive the instruction without the proper definition for "great bodily harm."

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<sup>14</sup> *Strickland*, 466 U.S. at 687

<sup>15</sup> *State v. Thomas*, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987)

<sup>16</sup> *Strickland*, 466 U.S. at 693

<sup>17</sup> *Id* at 694.

The present case is virtually identical to the case of *State v. Rodriguez*.<sup>18</sup> As outlined above the circumstances are in effect the same. In *Rodriguez* the Court of Appeals Div. III stated:

“If we can conceive of some reason why Mr. Rodriguez’s lawyer would propose these instructions as a tactic or strategy to advance Mr. Rodriguez’s position at trial, then we would conclude that the lawyer’s performance was not deficient...But we can conceive of none here. The net effect was to decrease the State’s burden to disprove self-defense.”<sup>19</sup>

It is clear from the record as well as recent case law that the instructions given were deficient and did not make the appropriate legal standard manifestly apparent to the jury. As both *State v. Walden* and *State v. Rodriguez* had been decided prior to defendant’s trial<sup>20</sup> in October of 2004, counsel should have been aware of the relevant case law and requested the proper instruction and definition.

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<sup>18</sup> *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201, (2004). (Citing *State v. Studd*, 137 Wn. 2d 533, 538, 973 P.2d 1049 (1999).

<sup>19</sup> *Id* at 187.

<sup>20</sup> *State v. Walden* was decided in 1997 and *State v. Rodriguez* was decided in April of 2004.

In the present case as in *Rodriguez*, the error cannot be said to be harmless, as the Court of Appeals stated “here these particular defense instructions struck at the heart of Mr. Rodriguez’s defense.”<sup>21</sup>

The same is true of the present case.

The overwhelming evidence showed that the fight was instigated and pursued by the “victim” Mr. Mickens. Mr. Mickens himself stated:

“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’m the one that went out there and started a fist fight with Ken Kylo. I admit that.” VRP 231

Mr. Mickens stated that prior to the fight he had been calling the defendant an informant for the task force, a rat and a sex offender. VRP 194. He also repeatedly stated that the defendant wasn’t looking for a fight, VRP 194. Mickens stated that at some point prior to the fight “ I came to the conclusion that I figured that, you know what, he doesn’t want to fight.” VRP 195.

Mr. Mickens described the actual fight in his own words and stated:

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<sup>21</sup> *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201, (2004).

“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.” VRP 211

Mr. Mickens also testified that the defendant “screamed stop” prior to biting his ear. VRP 212.

Perhaps the most telling evidence of Mr. Mickens intent to harm the defendant comes from his final statement: “The best thing that ever happened to Kenny Kylo in his life is he bit my ear off.” VRP 261. It is pretty clear from that statement that Mr. Mickens was indeed trying to inflict severe pain and suffering on the defendant and that the only thing that stopped him from doing so was getting his ear bit.

An especially telling point on this issue of Mickens intent to harm Kylo is the fact that Mr. Kylo was in jail following a car wreck and was injured. Mr. Mickens knew that and testified to it. “He was injured. He was hurt from a car wreck,” VRP 181. Obviously a person who had been injured in a car wreck would expect that to get into a fight would cause further pain and damage to the body.

Mickens testified that this was the reason Mr. Kylo gave for not wanting to fight. VRP 181

The entire defense was based upon self defense. The improper instructions to the jury struck right at the heart of that defense. Instead of being able to argue that the defendant was in fear of severe pain and suffering, the defense was forced to prove that the defendant was in fear of substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part. There is no tactical or strategic rationale for the requesting instructions that created a greater burden on the defense. Counsel's deficient performance in submitting an incomplete instruction without proper definition of the critical term was highly prejudicial.

Defense counsel further compounded the error by the fact that he misinformed the jury that Mr. Kylo needed to be in fear of serious injury or death. During closing arguments, defense counsel in recounting the defendant's actions, stated "he did what he needed to do to save himself from serious injury or death." VRP 385

This statement could do nothing but re-affirm to the jury that this was the standard that had to be arrived at in order to justify self-defense. Had the proper definition been given, counsel could have properly argued that all Mr. Kyllo had to be in fear of was severe pain and suffering.

**Additional Ground # 3**

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSAL TO ALLOW A JURY INSTRUCTION ON SPECIFIC INTENT.

At the close of trial, counsel requested a jury instruction to define specific intent. (Attached as appendix B, Defendant's Proposed Jury Instructions #6) Counsel cited *State v. Louther*<sup>22</sup> as the basis for this instruction. The trial Court refused to give an instruction on specific intent and instead gave jury instruction # 16, a general intent instruction which read:

**A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime. WPIC 10.10**

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<sup>22</sup> *State v. Louther* 22 Wn. 2d 497, 156 P.2d 672 (1945)

Defense counsel formally objected to the Court's failure to allow the proposed specific intent instruction. VRP 351-352.

The proposed instruction was needed in order to clarify the required essential element of intent. The court's refusal to allow the instruction prevented the defense from properly presenting their defense theory.

In order to convict the defendant of 2<sup>nd</sup> degree assault, the state had to prove beyond a reasonable doubt that the defendant "intentionally assaulted another and thereby recklessly inflicts substantial bodily harm," RCW 9A.36.021(1)(a). The other possible definitions of 2<sup>nd</sup> degree assault do not apply here. Given the fact that the State's burden of proof was to show that the defendant *intentionally assaulted* Mr. Mickens, the specific intent instruction was needed.

Under the general intent instruction that was given instead, the jury could have reasoned that the State satisfied its burden by showing that the defendant engaged in the fight, a point that the prosecutor made numerous references to. The specific intent

instruction proposed by the defense would have clarified the State's burden to show "that the defendant knowingly did an act which the law forbids, purposefully intending to violate the law." (proposed instruction #6)

Two Washington Supreme Court cases stand for the proposition that the State must prove specific intent in some 2<sup>nd</sup> degree assault cases.<sup>23</sup> RCW 9A.08.010 gives a statutory definition of culpability and defines 4 levels of culpability or mental states. The Supreme Court has held that when one of these mental states is an essential element of the charged crime, a defendant is entitled to an instruction incorporating the appropriate statutory definition.<sup>24</sup>

In the present case by giving a broader general intent instruction instead of the specific intent instruction that was requested, the trial court reduced the State's burden of proof. Under the broader definition the State merely had to prove that the defendant intentionally entered into a fight which resulted in a crime. In the

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<sup>23</sup> *State v. Byrd* 125 Wn. 2d 707, 887 P.2d 396 (1995), *State v. Eastmond* 129 Wn. 2d 497, 919 P. 2d 577 (1996)

<sup>24</sup> *State v. Allen*, 101 Wn. 2d 355, 678 P.2d 798 (1984).

proposed specific intent instruction the State would have properly been required to prove that the defendant intended to assault Mr. Mickens. Furthermore, the jury would have been instructed that the fact that the fight resulted in Mr. Mickens receiving an injury does not prove intent.

Testimony from the only independent eye witness, Kenny Stevens, provides clear evidence that the defendant stated numerous times that he did not want to fight, (VRP 148) that Mickens was the aggressor and was inflicting severe pain to the defendant with kicks and blows to the groin. (VRP 149).

Under the general intent instruction the State was able to argue that the defendant intentionally bit Mr. Mickens' ear and therefore his intentional action resulted in assault. This is not a proper instruction because the whole defense was based upon the theory that the defendant bit Mr. Mickens in order to get him to stop beating on him. Under the proposed instruction the State would have had to prove that Mr. Kylo intentionally assaulted Mr. Mickens with the intent to recklessly inflict substantial bodily harm.

As is discussed above, the cumulative effect of the jury instructions read as a whole created a fundamentally unfair standard of proof. The essential element of intent to commit 2<sup>nd</sup> degree assault was not properly defined for the jury.

Instructions that relieve the State of its burden to prove one of the elements of the charged crime are a violation of due process and the Sixth Amendment.<sup>25</sup> It is reversible error to refuse to give a requested instruction when its absence prevents the defendant from presenting his or her theory of the case.<sup>26</sup> The instructions as given do not provide the jury with sufficient understanding of the issues involved and applicable standards pertaining to this case. An instruction is appropriate if it informs the jury of the applicable law, is not misleading, and allows the defendant to argue his theory of the case.<sup>27</sup>

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<sup>25</sup> *U.S. v. Gaudin* 115 S. Ct. 2310 (1995).

<sup>26</sup> *State v. Kidd*, 57 Wn. App. 95, 99, 786 P.2d 847 (1990).

<sup>27</sup> *State v. Tili*, 139 Wn. 2d 107, 126, 985 P.2d 365 (1999), *State v. Brightman*, 112 Wn. App. 260, 264, 48 P.3d 363. (2002)

A trial court's decision on what instructions to give are reviewed de novo.<sup>28</sup> A conviction cannot rest on an ambiguous and equivocal jury instruction.<sup>29</sup>

In the present case the lack of a specific intent instruction reduced the State's burden of proof and allowed the jury to convict with proving an essential element of the charged crime. The error cannot be said to be harmless.

#### **Additional Ground #4**

THE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S ASSERTION DURING CLOSING ARGUMENTS THAT IF THE STATE SHOWED THAT KYLLO THREW THE FIRST PUNCH THEN HIS RIGHT TO SELF-DEFENSE WAS NEGATED.

During closing arguments defense counsel stated: "The State has hung it's hat and must convince you that my client threw the first punch; that he was the aggressor, and if they can convince you of that, then his right to self-defense goes away." VRP 380

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<sup>28</sup> *State v. Walker*, 136 Wn. 2d 767, 772, 966 P.2d 883 (1998)

<sup>29</sup> *U.S. v. Washington*, 819 F.2d 221 (9<sup>th</sup> Cir. 1987)

As discussed above an attorney's performance is deficient when it falls below an objective level of reasonableness and prejudices the defendant.<sup>30</sup>

In the present case, the offending statement was not only a material misstatement of the law, but it struck at the core of the defense case. Washington case law does not support a position that the person who throws the first blow is automatically the aggressor. The Court of Appeals has determined in *State v. Heath*, that the simple question of who struck the first blow is not determinative of who provoked the fight.<sup>31</sup>

The statement by defense counsel dramatically changed the burden of proof for the State and made it possible for the State to make the whole case a question of whether or not Mr. Kylo threw an "air punch" when Mickens was attacking him verbally and getting "toe-to-toe" with him and threatening him. This is clearly not the standard as Washington law supports the principle that words and actions that precipitate a fight can be the provoking factor. In the case

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<sup>30</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

<sup>31</sup> *State v. Heath* 35 Wn. App. 269, 666 P.2d 922 (1983)

at hand, there is volumes of evidence to support the fact that Mickens was the aggressor and that he provoked and instigated the fight. If fact, the question of whether or not Mickens was calling Kylo horrible names, swearing at him, challenging him to a fight and threatening him are uncontested by the State. The misstatement of the law by defense counsel allowed the State to set all of that aside and “hang it’s hat” on the single question of whether or not the defendant swung first. The State made great use of this misstatement and elaborated on it during the final phases of closing argument. (Discussed below in Additional Ground #5point (E))

There can be no tactical or strategic reason for counsel to make a statement that misinforms the jury on the applicable law and destroys his client’s claim of self-defense. The appellant was greatly prejudiced by counsel’s statement and counsel’s performance fell below an objective standard of reasonableness.

**Additional Ground # 5**

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY NUMEROUS INCIDENTS OF PROSECUTORIAL MISCONDUCT.

During closing arguments, the prosecutor misrepresented critical facts, misquoted key testimony, interjected her personal opinion on medical matters, misstated the law in a highly prejudicial manner and participated in a card trick to inflame the passions of the jury. Although the defense objected on numerous occasions, the only instruction given by the trial court was “the jury is responsible in determining the evidence.” VRP 359

The Washington Courts will review remarks that are deemed flagrant and ill intentioned that result in prejudice that could not have been neutralized by an admonition to the jury, even if no objection is made at trial.<sup>32</sup> Closing arguments are the defendant’s “last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant’s guilt.”<sup>33</sup>

#### **A. The prosecutor misrepresented critical facts.**

The State focused a great deal of attention in closing to try and establish that it was the defendant who threw the first punch. During

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<sup>32</sup> *State v. Smith* 144 Wn. 2d 665, 30 P.3d 1245 (2001)

<sup>33</sup> *State v. Perez-Cervantes* 141 Wn. 2d 468, 6 P.3d 1160 (2000) citing *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)

her recitation of Mickens' testimony in closing argument she stated that Mickens turned away and "when he turns back around Kylo was swinging, doesn't land a punch, gets nothing but air. But he's swinging." VRP 358. This is not an accurate portrayal of what Mickens testified to. He originally stated that he turned and made a comment into the day room and "that's when the fight started." VRP 196. Then he stated that he got up toe- to- toe with Mr. Kylo and confronted him. VRP 198. Mickens was then asked when he turned back around where the defendant was in comparison to him and he stated he was "about a distance from me to the corner right there." He then stated, "He came at me and threw some punches and I threw some punches at him." VRP 202 Mickens then stated that none of the punches touched him. VRP 203.

The prejudice can be seen clearly later in closing when the prosecutor stated: "Mr. Mickens said: 'I was egging him on verbally, but Mr. Kylo threw the first punch', and that is consistent through all Mr. Mickens statements. It's been consistent the entire time that Mr. Kylo did actually get in some punches here and there." This editorial

license with the sequence of events is critical because the State placed it's whole case on the fact that if Kylo threw the first punch, his self-defense instruction was null and void as discussed in point (E) below.

**B. The prosecutor misquoted key witness testimony.**

The prosecutor stated during closing arguments that the defendant never mentioned self-defense in his statements to Pat Connors. "Didn't say he acted in self-defense." VRP 362. This statement is untrue. On direct examination by the same prosecutor Mr. Connors was asked if Mr. Kylo made any comments about defending himself and Mr. Connors responded that the report shows that Mr. Kylo told him that if he interviewed the people in the jail he would see that Kylo didn't start the fight and was defending himself. VRP 280.

Later in closing the prosecutor summarized the conversation prior to the fight from Mickens' testimony and stated that Mr. Kylo that was instigating the fight. "Mr. Kylo said: 'No you come here and let's fight.'" VRP 357. She then repeated the statement at VRP 358. Not only is this not what Mr. Mickens testified to but it is completely

contrary to all the evidence that shows Mr. Kylo stated several times that he did not want to fight. Mr. Mickens testified to the events proceeding the fight and clearly stated that Mr. Kylo “didn’t look for a fight,” VRP 194. Mr. Mickens did say that the two of them went back and forth saying “you come in here” “you go out there” VRP 195 but nowhere in the record is any mention of Kylo stating “let’s fight.”

Mr. Stevens stated that Mr. Kylo stated numerous times that he did not want to fight. VRP 148

The prosecutor’s misrepresentation of the statements preceding the fight went right to the heart of the defense that Mickens was the aggressor and the defendant was trying to avoid a fight.

In discussing Mr. Stevens’ testimony the prosecutor stated that Mr. Stevens testified that he never saw the ear being bitten. “And what’s interesting is Mr. Stevens, who supposedly was in this great viewpoint, never ever saw the defendant bite Mr. Mickens’ ear, claims to have not seen that: ‘Oh, I saw the whole thing. I saw Mr. Kylo was completely innocent and he didn’t want to fight, and he didn’t

throw a single punch, but I couldn't see this man biting off another man's ear. I don't know what happened. The fight just ended and his ear was hanging off." VRP 361. This whole line of quotes is complete fantasy. On direct examination the prosecutor asked Steven's "Your claiming now that you did see the defendant bite Mr. Mickens' ear?" "Yes." VRP 151

**C. The prosecutor interjected her personal opinion on matters requiring expertise.**

During closing the prosecutor gave her personal opinion on the injuries sustained by Mr. Kyлло. The State suggested that the bite marks were self-inflicted despite the fact that they did not call any qualified medical expert to give their opinion. Instead the prosecutor interjected her own opinion into the case. "If you're going to bite yourself, that's a hard thing to do if you're really trying to cause injury. It makes sense that the skin isn't going to be broken. It's very difficult, I think, psychologically to cause injury to yourself. It was not a vicious bite that would put the defendant in fear of his life. It was not from Mr. Mickens. *It's very obviously from Mr. Kyлло.*" VRP

370 (emphasis added). She then goes on to give her medical opinion regarding the defendant's bruises. VRP 371.

It is improper for a prosecutor to express opinions that require expert knowledge.<sup>34</sup> By going beyond the record, the prosecutor becomes an unsworn witness, engages in extraneous and irrelevant argument, diverts the jury from its proper function, and seriously threatens the defendant's right to a fair trial.<sup>35</sup>

In the present case it was improper for the prosecutor to give the jury her opinion of the evidence. She did not call an expert witness to give an opinion as to whether the injuries were self-inflicted and it was inappropriate for her to give her own opinion.

**D. The prosecutor made comments intended to inflame the passions of the jury**

Just prior beginning her rebuttal portion of the closing argument the prosecutor walked up to the jury box and shuffled a deck of cards and told the jury "that is the sound of your ear being ripped off your

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<sup>34</sup> <sup>34</sup> *The Georgetown Law Journal Annual Review of Criminal Procedure*. 2003, PG 558

<sup>35</sup> *Prosecutorial Misconduct*, 2<sup>nd</sup> Edition, Bennett L. Gersham, (2005), citing U.S. v. Hoskins, 446 F.2d. 564, (9<sup>th</sup> Cir. 1971).

head.” VRP 386. She then went on to tell the jury several times that she wanted them to remember that sound when they go back in deliberations.

A prosecutor is forbidden to use arguments calculated to inflame the fears, passions, and prejudices of the jury.<sup>36</sup> The theatrics employed by the prosecutor go beyond the pale. Courts have frowned upon argument that “offends the dignity and decorum of the proceedings,”<sup>37</sup> or possesses a “unique capacity to remain in the minds of the jurors and influence their deliberations.”<sup>38</sup> Clearly the prosecutor’s card trick was intended to do just that.

**E. The prosecutor misinformed the jury on the applicable law.**

Central to the State’s case was the assertion that if the State could prove that the Kylo threw the first punch then self-defense. During closing the prosecutor made a material misstatement of the law to the jury: “It’s true that if I prove to you beyond a reasonable doubt that Ken Kylo took that first swing, threw that first punch, self-

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<sup>36</sup> *Prosecutorial Misconduct*, 2<sup>nd</sup> Edition, Bennett L. Gersham, (2005) citing ABA Standards for Criminal Justice §3-5.8(c) (3d. Ed. 1993).

<sup>37</sup> *Viereck v. U.S.*, 318 U.S. 236, 63 S. Ct. 561, 87 L.Ed. 734 (1943)

<sup>38</sup> *Prosecutorial Misconduct*, 2<sup>nd</sup> Edition, Bennett L. Gersham, (2005) at page 260.

defense is out.” VRP 390. Not only is this statement contrary to Washington state case law, it is fatally prejudicial to the defense. The simple question of who struck the first blow is not determinative of who provoked the fight.<sup>39</sup> Even under the State’s theory of the events, at worst Mr. Kylo threw a punch that did not hit Mickens. To tell the jury that if that event happened, Mr. Kylo’s claim of self defense “is out” is a material misstatement of the law.

It is the rule in this state, that statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions to the court.<sup>40</sup> The 10<sup>th</sup> Circuit Court of Appeals has said, “A misstatement of law that affirmatively negates a constitutional right or principle is often, in our view, a more serious infringement than mere omission of a requested instruction.”<sup>41</sup>

Prosecutorial misconduct which denies a defendant a fair trial violates the defendant’s Constitutional due process rights.<sup>42</sup> “It is well

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<sup>39</sup> *State v. Heath* 35 Wn. App. 269, 666 P.2d 922 (1983)

<sup>40</sup> *State v. Estill* 80 Wn. 2d 196, 492 P.2d 1037 (1972)

<sup>41</sup> *Mahorney v. Wallman* 917 F.2d 469, 473 (10<sup>th</sup> Cir. 1990) Citing *Donnelly v. DeChristoforo* 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

<sup>42</sup> Washington Practice Criminal Procedure Volume 13 §4406 page 257

settled that presentation of false evidence violates due process.’<sup>43</sup> In the present case the prosecutor’s misrepresentation of the evidence coupled with her material misstatement of the law deprived the defendant of his Constitutionally guaranteed right to a fair trial.

### **Conclusion**

As previously stated this appellant would ask this Court to consider the cumulative effect of all the errors that deprived this appellant of due process as guaranteed under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution.

The cumulative effect of all the errors in the present case deprived this appellant of a fair trial. This appellant would respectfully ask this court to reverse the conviction against him.

Dated this 13<sup>th</sup> day of February, 2006.

Respectfully submitted,

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Kenneth L. Kylo, Pro se

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<sup>43</sup> Phillips v. Woodford 267 F.3d. 966 (9<sup>th</sup> Cir. 2001) at page 984.

# Appendix D

Additional Briefing On Faulty Self-Defense Instruction

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**KENNETH LEE KYLLO**

**Appellant.**

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**BRIEF OF APPELLANT**

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ANNE CRUSER/WSBA #27944  
Attorney for Appellant

P. O. Box 1670  
Kalama, WA 98625  
360 - 673-4941

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**A. ASSIGNMENT OF ERROR**

**I. MR. KYLLO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

**I. MR. KYLLO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY PROPOSED THE "ACT ON APPEARANCES" INSTRUCTION.**

**C. STATEMENT OF THE CASE**

Appellant's original brief outlines the facts of this case and that statement of the facts is incorporated by reference herein. For purposes of this supplemental brief, the following facts are pertinent: The jury instruction in question, found at CP 98, was proposed by defense counsel. Further, defense counsel did not propose, nor did the court give, an additional instruction defining "great bodily harm" as that term is used in this so-called "act on appearances" instruction. Clerk's Papers.

**D. ARGUMENT**

**I. DID MR. KYLLO RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED THE "ACT ON APPEARANCES" INSTRUCTION?**

Under the holding of *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004), the inquiry here is whether Mr. Kylo received ineffective assistance of counsel because his attorney proposed this instruction, thereby inviting this error. Under the holding of *Rodriguez*, it

is clear that Mr. Kylo did receive ineffective assistance of counsel when his attorney proposed this instruction and that he was prejudiced by this instruction because self-defense was the only defense presented at trial.

The Supreme Court held in *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997) that the use of this “act on appearances” instruction was error where the instruction required the actor to fear “great bodily injury” in order to act on appearances because such a fear is not required. *Walden* at 475-77. Rather, one can fear a simple battery when acting on appearances, even when that belief turns out to be mistaken. *Id.* at 477. As such, use of this instruction was reversible error because it failed to make the relevant legal standard for self-defense manifestly apparent to the average juror. *Id.* at 473. As the *Walden* court held, self-defense instructions must be given higher scrutiny than other jury instructions. Specifically, the *Walden* Court held that “Jury instructions on self-defense must more than adequately convey the law...Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Walden* at 473, citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Although, as the *Rodriguez* Court noted, the rationale for this higher degree of certainty is unclear, it nevertheless demonstrates that Mr. Kylo suffered similar prejudice when the trial court gave this “act on appearances” instruction which required him to fear

“great bodily harm” in order to rely on his subjective belief of danger. Because such a fear was not required, and because “great bodily harm” was not defined for the jury, use of this instruction lowered the State’s burden of proof and caused obvious prejudice where self-defense was the only defense presented at trial. *Rodriguez* at 187.

While the *Walden* Court dealt with an earlier version of this instruction, the *Rodriguez* Court dealt with an instruction identical to the one given in this case. The holding in *Rodriguez* is simple and clear: Use of the “act on appearances” instruction must be accompanied by a separate instruction defining “great bodily harm.” In *Rodriguez*, the Court held that this definition is found at WPIC 2.04.01 which defines “Great Personal Injury” as injury that would produce severe pain and suffering. *Rodriguez* at 478. It appears that the holding in *Rodriguez*, which instructs us to use a separate instruction defining “Great Personal Injury” when the “act on appearances” instruction is used, contradicts the holding in *Walden* which holds that such a high level of fear is not required (fear of simple battery is enough). Nevertheless, under either holding, use of this instruction in Mr. Kylo’s case was error because the jury was left with the impression that Mr. Kylo was required to have a higher level of fear than the law requires before acting in self-defense. Thus, the State’s burden of

proof was lowered and the instructions failed to make the relevant legal standard on self-defense manifestly apparent to the jury.

The prejudice suffered by Mr. Kylo is self-evident: Self-defense was the only defense presented at trial, just like the defendants in *Walden* and *Rodriguez*. In *Rodriguez*, the Court noted that the erroneous instruction "...struck at the heart of Mr. Rodriguez's defense..." *Rodriguez* at 187. Such is the case for Mr. Kylo as well.

It is worth noting that this instruction is totally unnecessary and may be an incorrect statement of the law. The fact that one can act on appearances in deciding whether he is justified in defending himself is axiomatic and a concept that is adequately conveyed in other self-defense jury instructions. "Evidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, *knowing all the defendant knows and seeing all the defendant sees.*'" *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). In other words, the inquiry is both objective and subjective. *Id.* The standard instruction on the lawful use of force, found at CP 96 and WPIC 17.02, states that "The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is

not more than necessary.” This instruction therefore adequately conveys that a person is entitled to act on appearances.

This instruction also erroneously suggests that acting on a “mistaken belief” will only be excused when the harm feared was “great bodily harm,” (as defined in the context of this instruction), as opposed to any physical harm. This is incorrect. As the standard “Lawful Use of Force” instruction correctly states, one must only reasonably believe he is about to be injured in order to use self-defense, based on the conditions as they appeared to him at the time. WPIC 17.02.

To the extent the “act on appearances” instruction might be deemed necessary, perhaps some attorneys and jurists believe that it is necessary because it allows a defendant to rely on self-defense even when he used force that was “more than necessary.” In other words, perhaps it is felt that the “act on appearances” instruction will save a claim of self-defense when the actor used more force than, in hindsight, was actually needed, but that he felt he needed to use at the time based on the conditions as they appeared to him. If this is the rationale, then the “act on appearances” instruction appears to directly contradict the standard “lawful use of force instruction” because that instruction requires that the force used be not more than was necessary. If these instructions are

contradictory, then the “act on appearances” instruction should be abandoned.

If these instructions are not contradictory, and the “act on appearances” instruction simply restates the subjective component of our law of self-defense, then the instruction is superfluous and unnecessary and should, again, be abandoned. The most compelling reason to abandon the “act on appearances” instruction, however, is that it seems it is very difficult to use it without running afoul of a large body of self-defense case law.

In fairness to defense counsel, the “act on appearances” instruction is a WPIC instruction. (WPIC 17.04). As such it was drafted and, presumably, given the stamp of approval by the Washington Supreme Court Committee on Jury Instructions (Chair, Hon. Patricia H. Aitken). Why the committee would give its stamp of approval to an instruction which has been harshly criticized by both the Washington Supreme Court in *State v. Walden*, supra, and Division I of the Court of Appeals in *State v. Rodriguez*, supra, is not clear. What is even more troubling is that the comments to this WPIC, on which busy trial attorneys understandably rely to apprise them of potential pitfalls that may accompany the use of a particular instruction, make *no reference* to either of these cases and say nothing about the requirement, adopted by these two cases, that this

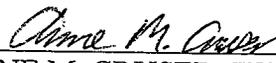
instruction *must* be accompanied by a separate instruction which defines “great bodily harm” in a manner specific to this instruction. Indeed, failure to separately define “great bodily harm” in a manner specific to this instruction is, under the holdings of *Walden* and *Rodriguez*, reversible error. As such, it is difficult to criticize the attorneys and the court in this case for using this instruction in light of its inexplicable endorsement by the WPIC committee and the committee’s failure to warn WPIC users that use of this instruction is fraught with peril.

That said, under the holdings of *Walden* and *Rodriguez*, Mr. Kylo was denied effective assistance of counsel where his attorney proposed an instruction that failed to make the relevant legal standard on self-defense manifestly apparent to the average juror and which lowered the State’s burden of disproving self-defense. Mr. Kylo was prejudiced by his attorney’s error because self-defense was the sole defense presented at trial. Further, when combined with defense counsel’s deficient performance in closing argument, where he suggested to the jury that Mr. Kylo must be in fear for his life before acting in self-defense (see Appellant’s Opening Brief), the prejudice could not be more apparent. Mr. Kylo is entitled to a new trial.

#### **E. CONCLUSION**

Mr. Kyllo is entitled to a new trial based upon ineffective assistance of counsel.

RESPECTFULLY SUBMITTED THIS 28<sup>th</sup> day of February, 2007.

  
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ANNE M. CRUSER, WSB# 27944  
Attorney for Mr. Kyllo