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Supreme Court No. 93038-4  
COA No. 31227-5-III  
(consolidated with 31338-7-III)

WASHINGTON STATE  
SUPREME COURT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE RESTRAINT OF

ALEKSANDR PAVLIK,

Petitioner.

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MOTION FOR DISCRETIONARY REVIEW

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Judgment in Spokane County Superior Court No. 08-1-01641-3  
The Hon. Jerome Leveque, Presiding

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**A. IDENTITY OF PETITIONER**

Aleksandr Pavlik asks this Court to accept review of the decision designated in Part B, *infra*

**B. DECISION BELOW**

Mr. Pavlik seeks review of the unpublished opinion of the Court of Appeals in *In the Matter of the Personal Restraint of Aleksandr Pavlik*, 31227-5-III,<sup>1</sup> issued on March 24, 2016. App. A.

**C. ISSUES PRESENTED FOR REVIEW**

1. Did the self-defense instructions improperly weaken the State's burden of proof, violating Mr. Pavlik's rights to due process and to bear arms?
2. Was Mr. Pavlik's right to jury unanimity violated?
3. Did the State fail to disclose material impeachment information, violating Mr. Pavlik's right to confrontation and due process?
4. Were trial counsel and appellate counsel ineffective, and did trial counsel have a conflict of interest?
5. Did new evidence justify a new trial?
6. Was it unconstitutional for challenges to cause to be taken at

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<sup>1</sup> Consolidated with No. 31338-7-III.

sidebar?

7. Was the exclusion of Mr. Pavlik's excited utterance harmless?

**D. STATEMENT OF THE CASE**

**1. *Facts***

After midnight on May 19, 2008, Aleksandr Pavlik, an Ukrainian refugee, was driving home in Spokane. He encountered two highly intoxicated individuals on bicycles with long criminal histories, Gabriel Leenders and Bradley Smith. Leenders and Smith yelled at Mr. Pavlik, threatened him, began opening his car door and reaching inside and threw a bike at the car. When Leenders and Smith continued to harass Pavlik, he fired a warning shot in their direction with a handgun, and then drove to a nearby park. According to Pavlik, Leenders and Smith appeared "from nowhere" and Leenders ran up to the open window, reached inside and started punching Pavlik multiple times, trying to reach for the gun, telling him that he was going to shoot him. Smith circled the car, and Pavlik feared he was going to enter through the other door. Mr. Pavlik shot Leenders in the chest. *Amended Personal Restraint Petition ("PRP")* at 3-8.

**2. *Procedural History***

The State charged Mr. Pavlik with attempted first degree murder and

first degree assault. In March 2010, a jury found Mr. Pavlik “not guilty” of attempted murder but guilty of assault. Ex. 9. The trial court imposed an exceptionally low sentence of 125 months in prison.<sup>2</sup> Exs. 10,12. On appeal, the Court of Appeals issued a partially published decision affirming the conviction (with one judge dissenting).<sup>3</sup> This Court denied review.

In October 2012, Mr. Pavlik filed a PRP and a CrR 7.8 motion, which was transferred to the Court of Appeals and consolidated with the PRP. In July 2013, Pavlik filed an amended PRP raising a series of claims. The PRP was passed to the merits, and on March 24, 2016, the Court of Appeals issued an unpublished decision dismissing the PRP. App. A.

**E. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

**1. *Introduction***

The victim of violence at the hands of a career offender, Mr. Pavlik shot Mr. Leenders in self-defense. As a result, Mr. Pavlik is incarcerated for years and will be deported. Yet, his trial was marred by a series of prejudicial errors ranging from incorrect self-defense instructions to extensive *Brady*<sup>4</sup> violations. This Court should accept review pursuant to RAP 13.5A(b) and

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<sup>2</sup> The judge found that Mr. Leenders was “an idiotic willing participant.” RP 578.

<sup>3</sup> *State v. Pavlik*, 165 Wn. App. 645, 268 P.3d 986 (2011).

<sup>4</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

and/or another is in actual danger of great bodily harm.” Ex. 7; Inst. 22. Trial counsel also failed to propose an instruction modeled on WPIC 16.03, related to defense against a felony, and failed to propose an instruction based on WPIC 16.02 that would have allowed for self-defense based upon Mr. Smith’s acting in concert with Mr. Leenders.

Each of these errors, by themselves, would be grounds for relief. This case is notable by the sheer number of instructional errors that seriously diminished the State’s burden of proving intent and the absence of self-defense beyond a reasonable doubt, thereby violating due process.<sup>6</sup> “Jury instructions on self-defense must more than adequately convey the law.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). “[B]ecause the State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged, a jury instruction on self-defense that misstates the law is an error of constitutional magnitude.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Moreover, the failure to propose proper instructions violated

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<sup>6</sup> U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Acosta*, 101 Wn.2d 612, 615-25, 683 P.2d 1069 (1984).

Pavlik's right to effective assistance of counsel,<sup>7</sup> while the failure to raise these issues on direct appeal also was ineffective and violated due process and the right to appeal.<sup>8</sup>

The Court of Appeals incorrectly rejected these arguments. To begin with, the Court of Appeals held that Inst. 20 set out the proper standard of self-defense for both assault and attempted murder, and that Mr. Pavlik only had the right to use deadly force if he was threatened with *death or great personal injury*. Slip Op. at 10, 12 (citing *Kyllo*, 166 Wn.2d at 866-867 (citing *Walden*, 131 Wn.2d at 475 n.3)). This conclusion is wrong. It is not clear that this Court actually concluded in *Kyllo* and *Walden* that a defendant can only use deadly force if he was threatened with death or great personal injury. The discussion of this issue in the cited portions is tangential and dicta.

The Court of Appeals' conclusion ignores the plain language of the two statutes involved – RCW 9A.16.050's higher standard is strictly limited to “homicide,” while RCW 9A.16.020(3), the general self-defense statute,

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<sup>7</sup> U.S. Const. amends. VI & XIV; Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Kyllo*, 166 Wn.2d at 862-71; *State v. Harris*, 122 Wn. App. 547, 553-55, 90 P.3d 1133 (2004).

<sup>8</sup> U.S. Const. amends. VI & XIV; Const. art. I, §§ 3 & 22; *Evitts v. Lucey*, 469 U.S. 387, 100 S. Ct. 830, 83 L.Ed.2d 821 (1985); *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); *In re Dalluge*, 152 Wn.2d 772, 787-89, 100 P.3d 279 (2004).

specifically allows for the use of force by “a party *about to be injured*.” Emphasis added. Thus, the Legislature has determined that, in non-homicide cases, the person need not fear death or “great personal injury” to use self-defense, including deadly force. While WPIC 16.02, modeled on RCW 9A.16.050, might be appropriate in attempted murder cases because the key element is the defendant’s intent, not whether the other person died,<sup>9</sup> in a case like Mr. Pavlik’s, where there is no intent to kill, RCW 9A.16.020’s standards apply and courts have no authority to abrogate the scope of self-defense given to individuals by the Legislature.

The Court of Appeals’ analysis also ignores the Second Amendment and article I, section 24, which provide people with the right to bear arms and the right to use the threat of deadly force to protect themselves, even in situations where the person may not necessarily fear death or great personal injury.<sup>10</sup> The Legislature understood this right and has not required a threat of death or great personal injury to be a predicate before someone uses a gun for self-defense in a non-homicide case. Ultimately, the issue is a jury issue:

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<sup>9</sup> See *State v. Cowen*, 87 Wn.App. 45, 53, 939 P.2d 1249 (1997). See also *State v. McCrevin*, 170 Wn. App. 444, 461-67, 284 P.3d 793 (2012); *State v. Slaughter*, 143 Wn. App. 936, 944-46, 186 P.3d 1084 (2008).

<sup>10</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 629; 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (explaining handgun’s popularity for in-home protection because “it can be pointed at a burglar with one hand while the other hand dials the police.”).

whether the State has proven beyond a reasonable doubt that the use of deadly force was excessive under the circumstances;<sup>11</sup> not whether a person is categorically barred from using deadly force in any case where he or she does not fear death or great personal injury.<sup>12</sup>

The Court of Appeals also concluded that even though Inst. 20's second paragraph excluded assault as a crime to which self-defense applied this “unartful language” was not prejudicial. Slip Op. at 11.<sup>13</sup> Yet, the court ignored settled law that jurors are presumed to follow their instructions.<sup>14</sup> Ordinary jurors using Inst. 20 as their “road map” to determine whether the State has proven its case, would likely not apply self-defense to the assault charge because the second paragraph is limited to the charge of attempted homicide. This error cannot be harmless beyond a reasonable doubt. Where

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<sup>11</sup> RCW 9A.16.020(3) contains this limitation in its plain language: “in case the force is not more than is necessary.”

<sup>12</sup> To re-write RCW 9A.16.020 & .050 to exclude the use of deadly force in non-homicide cases the way the Court of Appeals has done would retroactively change the statutory elements of self-defense, violating due process under the U.S. Const. amend. XIV and Const. art. I, § 3. See *Bouie v. City of Columbia*, 378 U.S. 347, 351-52, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

<sup>13</sup> The Court of Appeals erroneously required *Mr. Pavlik* to show Inst. 20 worked to *his prejudice*. Slip Op. at 11. Because this issue should have been raised on direct appeal, appellate counsel’s ineffectiveness requires that a direct appeal standard of review be used. *In re Dalluge*, 152 Wn.2d at 788-89. Thus, it was the State’s burden to show harmlessness. *State v. Walden*, 131 Wn.2d at 478.

<sup>14</sup> See *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

instructions that address key elements of the crime are defective, even because of “scrivener’s errors,” reversal is the remedy.<sup>15</sup> Here, Mr. Pavlik was found “not guilty” of attempted murder, and “guilty” of assault. The difference is likely due to Inst. 20’s failure to make clear that Mr. Pavlik had the right to self-defense in a non-attempted homicide charge.

As for the “act on appearances” instruction, Inst. 22, the Court of Appeals correctly concluded that it was ineffective for trial counsel to propose this instruction,<sup>16</sup> but concluded Mr. Pavlik could not show prejudice. The court held that Pavlik’s theory was that he was frightened of being killed by Leenders and thus his fear of death satisfied the fear of great bodily harm, had the jury believed his testimony. Slip Op. at 15-16 (citing *State v. Freeburg*, 105 Wn. App. 492, 20 P.3d 984 (2001)).

This conclusion is wrong. At the outset, as noted above at fn. 8 &13, because this issue should have been raised on direct appeal, the Court of Appeals improperly shifted the burden of proving prejudice to Mr. Pavlik and instead failed to determine whether the State could maintain its burden of

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<sup>15</sup> See *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

<sup>16</sup> “In many cases, an ‘act of appearances’ instruction that requires belief in ‘actual danger of great bodily harm’ impermissibly decreases the State’s burden to disprove self-defense.” Slip Op. at 15 (citing *State v. Kylo*, *supra* and *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004)).

proving the error was harmless beyond a reasonable doubt.<sup>17</sup> In any case, *Freeburg* is not comparable. There, the court found a similar instructional error was harmless where “there is no likelihood whatsoever that use of the great bodily harm language affected the outcome. . . . Freeburg’s theory at trial was that he was faced with a threat of gunshot at close range, which easily and obviously satisfies both definitions.” *Freeburg*, 105 Wn. App. at 505.

In contrast, the evidence here was that Mr. Leenders leaned into the car and began hitting Mr. Pavlik while his accomplice appeared to begin an attack from the passenger side of the car. The jurors may have concluded that Mr. Pavlik did not reasonably fear probable death, significant serious bodily disfigurement, or significant permanent loss of a body part or function (the definition of “great bodily harm” under Inst. 17), but only really feared being beat up or “carjacked.” If that is the case, Inst. 22’s error was significant, and the State cannot prove error was harmless beyond a reasonable doubt.

The Court of Appeals’ treatment of the lack of a “multiple assailant” instruction issue is also similarly deficient. The court concluded that because Mr. Smith “did not accompany Mr. Leenders in the direct confrontation of Mr. Pavlik and did not threaten Mr. Pavlik with an imminent assault,” there

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<sup>17</sup> See *State v. Coristine*, 177 Wn.2d 370, 380-81, 300 P.3d 400 (2013).

was not a basis for giving an instruction based on the bracketed language in WPIC 16.02.<sup>18</sup> Slip Op. at 18. Yet, any reasonable person would certainly conclude that Smith was acting in concert with Leenders in an attempt to harm or “carjack” Mr. Pavlik given Smith’s aggressive actions on the street. Mr. Smith’s behavior in walking around to the passenger side of the parked car would clearly support the conclusion he was part of the on-going threat to Pavlik’s safety. The Court of Appeals’ decision therefore conflicts with *State v. Harris, supra*, and *State v. Irons*, 101 Wn.App. 544, 4 P.3d 174 (2000).

Finally, the Court of Appeals rejected the argument that trial counsel was ineffective for not proposing an instruction modeled on WPIC 16.03 regarding resistance to a felony because it concluded that WPIC 16.02 and 16.03 were similar and that WPIC 16.02 matched Mr. Pavlik’s theory of the case more closely. Slip Op. at 20. This conclusion is simply wrong. Contrary to the court’s conclusion, while WPIC 16.02 may contain language about resistance to a felony, Inst. 20 – the instruction actually proposed and given in this case – did not contain that language. The failure to propose resistance to a felony language is grounds for relief because of evidence that Leenders

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<sup>18</sup> WPIC 16.02 provides in part: “[or others whom the defendant reasonably believed were acting in concert with the person slain].”

and Smith appeared not only to want to injure Mr. Pavlik, but also to “carjack” him – a violent felony. Thus, an instruction modeled on WPIC 16.03 (or even WPIC 16.02(1)’s bracketed language) would have been proper under *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005). Such an instruction would not have, in any way, conflicted with the defense theory of the case. Thus, it was ineffective for trial counsel not to request an instruction regarding resistance to a felony (and for appellate counsel not to raise this issue on direct appeal).

In all, the self-defense instructions in this case were defective on multiple grounds and they should have been challenged on appeal. The State’s burden of proof was seriously weakened. Mr. Pavlik’s rights to due process, to effective assistance of counsel at trial and on appeal, and to bear arms under U.S. Const. amends. II, VI & XIV and Const. art. I, §§ 3, 22 & 24 were violated. The Court of Appeals’ decision conflicts with decisions from this Court and the Court of Appeals, and there are issues of public importance. Review should be granted under RAP 13.4(b)(1), (2), (3) & (4).

**3. *Mr. Pavlik’s Right to Jury Unanimity Was Violated***

Mr. Pavlik’s fired two shots. One was the warning shot on the street; the other struck Mr. Leenders after he attacked Pavlik at the park. It is

possible that some jurors concluded that Pavlik acted in self-defense at the park, but rejected self-defense for the first shot. Other jurors may have concluded that the first shot was only a “warning shot” that did not constitute an assault, but voted to find Pavlik guilty due to the shooting at the park.

Mr. Pavlik argued below that the failure to instruct the jurors to be unanimous as to which act constituted the assault violated his right to a jury trial under both the state and federal constitutions. *PRP* at 36-37. The Court of Appeals rejected this argument, concluding that the State elected the second shot as the basis for the charge. *Slip Op.* at 22-23. This is not correct. The State clearly argued to the jury that both shots were not justified under the self-defense instructions.<sup>19</sup> There was no true election to the jury -- certainly, the jury was never told by the judge to base the verdict for the assault on the second shot. Review of this issue should be granted because of the conflict with *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), and because of the constitutional issues involved.<sup>20</sup>

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<sup>19</sup> See RP 481 (“Mr. Pavlik did not act in reasonable self-defense. Mr. Pavlik . . . was not justified in firing his gun two times that night.”). *See also* RP 486-87, 509-10.

<sup>20</sup> These include the violation of the right to a jury trial under the Sixth and Fourteenth Amendments and article I, sections 21 & 22, and the right to effective assistance of counsel and trial and on appeal (which would have led to a more favorable harmless error standard). U.S. Const. amends. VI & XIV; Const. art. I, §§ 3 & 22.

**4. *Newly Discovered Evidence Requires a New Trial***

Mr. Pavlik's appellate counsel took out a newspaper ad to locate witnesses, and a new witness, Shea McKeon, came forward and confirmed Pavlik's testimony that when he initially drove to the park, Leenders and Smith were not present. McKeon also confirmed that Smith appeared to be trying to enter Mr. Pavlik's car on the passenger side. Exs. 19, 20 & 21.

The Court of Appeals rejected the argument that this evidence should result in a new trial because there was no explanation for why it was not discovered earlier. Slip Op. at 24. But, the explanation was clear that Mr. McKeon did not initially stay in the area to be contacted by the police and only came forward when he heard of the ad in the paper. Exs. 20 & 21. Either the evidence could not have been discovered before or trial counsel was ineffective under the Sixth Amendment and article I, section 22, for not taking out an ad herself.

The Court of Appeals also used the wrong legal standard when evaluating this claim. Under *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981), the new evidence need only "probably" have changed the result of trial. This matches the *Strickland* standard that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different.” 466 U.S. at 694. Yet, the court here erroneously used a stronger standard: that the evidence was not “so compelling” that it “would have changed the result at trial.” Slip Op. at 24. In this case, the proper standards were easily met. McKeon’s testimony directly contradicted Leenders and Smith on key issues and it was reasonably probable his testimony would have changed the result. Review should be granted under RAP 13.4(b)(1) & (3) because of the conflict with *Williams* and *Strickland*.

#### **5. *Leenders’ and Smith’s Backgrounds***

Leenders and Smith had prior criminal histories that were far more extensive than normal people. The State failed to disclose, and trial counsel failed to uncover, dozens of police reports that document their violent pasts, unstable mental health, dishonest behavior, pending and unfiled criminal charges, pending probation violations, violent behavior while abusing substances, lack of respect for human life, and willingness to engage in “tit-for-tat” allegations to get back at others. *PRP* at 14-25. Mr. Pavlik raised claims that the suppression of this information, *and trial counsel’s failure to uncover it and her mistaken impression that such information was not admissible*, violated his rights to due process, to confront witnesses and to

effective assistance of counsel under the Sixth and Fourteenth Amendments and article I, sections 3 & 22.

The Court of Appeals rejected these arguments, concluding the evidence was not material. Slip Op. at 26-27.<sup>21</sup> But, the court misunderstood the impeachment value of Leenders' and Smith's backgrounds. It is not just that they were dishonest, but also that they were willing to manipulate the legal system for their own benefit, evidence of which would be admissible under ER 608(b) and the Confrontation Clauses.<sup>22</sup> And, while the Court of Appeals stated that pending or "unproven" charges were not admissible, Slip Op. at 26 n.4, in fact, a witness' exposure to prosecution and current probationary status is admissible to show bias.<sup>23</sup> Even a witness' mental

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<sup>21</sup> The court also cast doubt on the effective assistance of counsel argument, concluding that it was a "novel contention" that counsel should "check the bicyclists' prior contacts with police." Slip Op. at 25. This conclusion is itself novel as defense counsel most certainly has a duty to investigate. See *Strickland*, 466 U.S. at 691; *Duncan v. Ornoski*, 528 F.3d 1222, 1234-35 (9<sup>th</sup> Cir. 2008); *Lord v. Wood*, 184 F.3d 1083, 1095-96 (9<sup>th</sup> Cir. 1999). See also *Ex Parte Bowman*, \_\_ S.W.3d \_\_ (Tex. Ct. App. 1/12/16) (granting habeas relief where defense did not investigate background of police officer in DWI case); *Hannon v. State*, \_\_ S.W.3d \_\_ (Mo. Ct. App. 3/15/16) (counsel ineffective for not obtaining school records that would have contradicted witness in sex case).

<sup>22</sup> U.S. Const. amends. VI & XIV; Const. art. I, § 22. See *State v. Gregory*, 158 Wn.2d 759, 798-799, 147 P.3d 1201 (2006); *Carriger v. Stewart*, 132 F.3d 463, 479 (9<sup>th</sup> Cir. 1997) (informant had "a long history, known to state authorities, of violence, lying to police, and trying to pin his crimes on others").

<sup>23</sup> See *Davis v. Alaska*, 415 U.S. 308, 315-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (pending probation proceeding); *United States v. Price*, 566 F.3d 900, 912-13 & n. 14 (9<sup>th</sup> Cir. 2009) (arrests that do not lead to convictions); *United States v. Kohring*, 637 F.3d 895, 904-06 (9<sup>th</sup> Cir. 2011) (allegations of sexual improprieties and attempts to

health and substance history need to be disclosed,<sup>24</sup> particularly where, as here, the trial judge excluded evidence about the effect of alcohol on someone's behavior because of the lack of evidence that Mr. Leenders was aggressive when drunk. RP 42-43.

The Supreme Court requires that a court reviewing *Brady* violations consider the "cumulative effect" of the suppressed evidence. *Wearry v. Cain*, 577 U.S. \_\_\_, 136 S. Ct. 1002, 1007, 194 L.Ed.2d 78 (2016). The issue is whether there is a reasonable probability that had the jurors heard the suppressed or undiscovered evidence, a single juror would have had a reasonable doubt.<sup>25</sup> Indeed, in *Wearry*, the Court held that the standard was such that a defendant can prevail if confidence in the verdict is undermined, "even if, as the dissent suggests, the undisclosed information may not have affected the jury's verdict." *Wearry v. Cain*, 136 S. Ct. at 1006 n. 6.

The Court of Appeals here did not properly apply these tests, did not address the cumulative effect of all of the undisclosed or undiscovered evidence and did not apply the required "one juror" test. Given the scope of

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solicit perjury); *Benn v. Lambert*, 283 F.3d 1040, 1057-58 (9th Cir. 2002) (witness' exposure to prosecution).

<sup>24</sup> See *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013).

<sup>25</sup> See *In re Stenson*, 174 Wn.2d 474, 493, 276 P.3d 286 (2012)

the information about Leenders' and Smith's true backgrounds, as set out at pages 16 to 25 of the PRP, and the differences between their testimony and Pavlik's, one cannot have confidence in the verdict. Mr. Pavlik's rights to due process, confrontation, and effective assistance of counsel under U.S. Const. amends. VI & XIV and Const. art. I, §§ 3 & 22 were violated. Review should be granted under RAP 13.4(b)(1) & (3).

**6. *Trial Counsel had a Conflict of Interest***

Mr. Leenders was represented in a pending felony VUCSA case by attorneys who worked in Mr. Pavlik's trial counsel's firm. In fact, one of Leenders' attorneys actually met with Pavlik in the early phases of the case. Exs. 22, 23, 36. The Court of Appeals rejected Mr. Pavlik's argument about a conflict of interest, concluding that "[t]he supervisor did not ever represent Pavlik on this case, but merely met with him before assigning the case to a trial attorney." Slip Op. at 31. Yet, meeting Mr. Pavlik was done for the purpose of representation and certainly would form an attorney-client relationship.<sup>26</sup>

As for prejudice, the court concluded, "[t]here must be evidence that divided loyalty actually impacted the case." Slip Op. at 31. But, trial counsel

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<sup>26</sup> See *Dietz v. Doe*, 131 Wn.2d 835, 843-44, 935 P.2d 611 (1997).

agreed not to impeach Mr. Leenders with prior convictions, which included the very case for which there was a conflict. RP 46. This VUCSA case could have been used for impeachment because Leenders lied about his own name upon arrest, Ex. 28 at 125, and because he was under the control of the prosecutors and subject to arrest and incarceration when he did not pay his legal financial obligations (as occurred when trial counsel's firm represented him in 2009). Ex. 29. Mr. Pavlik demonstrated that the conflict of interest had an actual impact, and that his right to counsel under U.S. Const. amend. VI & XIV and Const. art. I, § 22 was violated.<sup>27</sup> Review should be granted under RAP 13.4(b)(1) & (3).

#### **7. *Other Issues***

Trial counsel failed adequately to tie up her impeachment of Leenders with evidence that he told Det. Gilmore that he was worried about being accused of carjacking because he opened Mr. Pavlik's door and that he had threatened to kill Mr. Pavlik. PRP at 10-12; Ex. 17 at 8-9. Counsel's failure to tie up the impeachment violated Mr. Pavlik's right to effective counsel under U.S. Const. amends. VI & XIV.<sup>28</sup> The Court of Appeals'

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<sup>27</sup> See *State v. Dhaliwal*, 150 Wn.2d 559, 570-73, 79 P.3d 432 (2003).

<sup>28</sup> See, e.g., *Rutland v. State*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.3d \_\_\_ (3/30/16) (ineffective for not impeaching witness with prior inconsistent statement).

conclusion that the evidence came in through Mr. Pavlik, Slip Op. at 29, is incorrect because the key to impeachment would have been for counsel to bring in Leenders' prior inconsistent statements through Det. Gilmore, who the jurors would view as more neutral and detached than Mr. Pavlik. Review should be granted under RAP 13.4(b)(1) & (3).

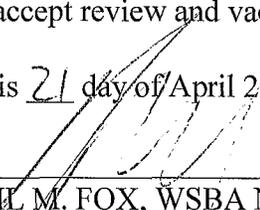
Next, taking "for cause" challenges at side-bar, without the presence of the defendant, violated U.S. Const. amends. I, VI, & XIV and Const. art. I, §§ 10 & 22. With all due respect, the Court should accept review and overrule *State v. Love*, 183 Wn.2d 598, 354 P.3d 841 (2015).

The Court should also accept review of the exclusion of Mr. Pavlik's hearsay at the scene. PRP at 8-10, 42-44. Considering the hearsay of the State's witnesses, and counsel's ineffectiveness on this issue under U.S. Const. amends. VI & XIV, review should be granted under RAP. 13.4(b)(1), (3) & (4).

**F. CONCLUSION**

The Court should accept review and vacate the conviction.

DATED this 21 day of April 2015.

  
\_\_\_\_\_  
NEIL M. FOX, WSBA NO. 15277  
Attorney for Petitioner

APPENDIX A

**FILED**  
**March 24, 2016**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

In the Matter of the Personal	)	
Restraint of	)	No. 31227-5-III
	)	(Consolidated with
ALEKSANDR PAVLIK,	)	No. 31338-7-III)
	)	
Petitioner.	)	UNPUBLISHED OPINION

KORSMO, J. — By way of this personal restraint petition (PRP), Aleksandr Pavlik renews his challenge to his Spokane County conviction for first degree assault. We conclude that he has not met his burden of proving prejudicial error occurred at trial. Accordingly, the petition is dismissed.

FACTS

The facts are drawn from our opinion in the direct appeal and related in slightly greater detail there. *State v. Pavlik*, 165 Wn. App. 645, 268 P.3d 986 (2011), *review denied*, 174 Wn.2d 1009 (2012). We initially note some of those background details, with additional discussion of relevant facts in conjunction with our analysis of the issues presented.

Around 1:00 a.m. on the morning of May 19, 2008, Mr. Pavlik was driving a car in northeast Spokane when he encountered two bicyclists riding abreast on the same street. He swerved to avoid them and angry words were shared between the bicyclists

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and the driver. Mr. Pavlik drove to a traffic light at the bottom of the hill, stopped his car, opened the trunk,<sup>1</sup> and then fired a “warning shot” when the bicyclists were about a block away. He then drove east several blocks and parked, while the bicyclists stopped in a park close to where Mr. Pavlik had fired the “warning shot.” *Id.* at 647.

After a short period of time, Mr. Pavlik drove to the park and stopped five feet from the bicyclists, both of whom were smoking cigarettes. One of them, Gabriel Leenders, saw the gun on the front seat of Pavlik’s car and reached for it through the open car window. The two men struggled for control of the gun. Meanwhile, a Spokane Police Department Officer drove to the location. While he was stopped at the traffic light outside the park entrance, he saw the two men struggle and then heard a gunshot. Pavlik shot Leenders, causing serious injuries. *Id.* at 647-648.

As soon as the officer reached the car, Mr. Pavlik told him “you saw it, it was self-defense.” *Id.* at 648. He made several additional claims of self-defense to other officers during the course of the morning and his interview with the detective. The prosecutor ultimately charged alternative counts of attempted first degree murder and first degree assault of Mr. Leenders. The case proceeded to jury trial. Mr. Pavlik received

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<sup>1</sup> Whether or not Mr. Pavlik retrieved the gun from the trunk was a disputed question at trial. Mr. Pavlik testified that he had the gun in his pocket the entire time, but understood why the bicyclists believed he took the gun from the trunk. 165 Wn. App. at 647 n.1.

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instructions on self-defense, while the prosecutor obtained a first aggressor instruction. *Id.* at 648-650.

The prosecutor successfully sought to exclude the “self-defense” statements at trial. *Id.* at 648-649. The jury acquitted Mr. Pavlik of attempted murder, but convicted him on the first degree assault charge. *Id.* at 650. A panel of this court affirmed the conviction on appeal. In the unpublished portion of the opinion, the court unanimously agreed that there was no error in giving the aggressor instruction. A divided panel upheld the exclusion of the “self-defense” statements at trial, concluding that although the trial court’s analysis was unclear, the exclusion did not harm the defense. *Id.* at 650-657. In dissent, Judge Sweeney believed the statements should have been admitted as excited utterances. *Id.* at 657-662. The Supreme Court declined to review the case. *Id.* at 662.

Shortly thereafter, Mr. Pavlik filed a CrR 7.8 motion in superior court seeking a new trial on the basis of newly discovered evidence—a witness to the incident who had not been previously identified. He also filed a PRP with this court that raised three issues. The superior court transferred the CrR 7.8 motion to this court for consideration as a PRP. It was consolidated with the pending PRP.

A new attorney substituted for the attorney who filed the original PRP and an amended PRP was filed. Thereafter, this court stayed the action pending decisions of the Washington Supreme Court on public trial issues. After the decisions were entered and

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supplemental briefing was received, the matter was heard by a panel of this court without oral argument.

#### ANALYSIS

The brief in support of the amended petition raises eight contentions, many with sub-arguments, that we will address by topic in the order presented. Initially, we note some of the principles that govern multiple claims presented by the petition.

The burdens imposed on a petitioner in a PRP are significant. Because of the significant societal costs of collateral litigation often brought years after a conviction and the need for finality, relief will only be granted in a PRP if there is constitutional error that caused substantial actual prejudice or if a nonconstitutional error resulted in a fundamental defect constituting a complete miscarriage of justice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). It is the petitioner's burden to establish this "threshold requirement." *Id.* To do so, a PRP must present competent evidence in support of its claims. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885-886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). If the facts alleged would potentially entitle the petitioner to relief, a reference hearing may be ordered to resolve the factual allegations. *Id.* at 886-887. A petitioner may not renew an issue that was addressed and rejected on direct appeal unless the interests of justice require reconsideration of that issue. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013).

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Running through several of the arguments are various complaints that counsel failed to perform effectively. These complaints are resolved under the familiar standards governing ineffective assistance claims. The Sixth Amendment to the United States Constitution guaranty of counsel requires that an attorney perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-prong test whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

With these principles in mind, we turn to Mr. Pavlik's contentions.

#### *Public Trial*

Mr. Pavlik argues that his right to a public trial under Washington Constitution art. I, § 22, and his due process right to be present were violated during jury selection when cause challenges were exercised at sidebar in the courtroom outside the hearing of the defendant and peremptory challenges were conducted on paper. The Washington

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Supreme Court now has decided both of these arguments contrary to Mr. Pavlik's position.

After general voir dire in this case, the court heard counsel's challenges for cause and hardship at sidebar (all challenges were by agreement) and then had the attorneys exercise their peremptory challenges on paper. The selection sheet subsequently was filed in the public court record. Mr. Pavlik remained at counsel table during the sidebar.

A criminal defendant has a constitutional right to a speedy public trial. Wash. Const. art. I, § 22. The public's right to open courts is guaranteed by Washington Constitution, article I, § 10. These related constitutional provisions assure the fairness of the judicial system and are collectively called the "'public trial right.'" *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). Three questions are considered in determining whether a courtroom proceeding violates the right to a public trial—does the public trial right attach to the proceeding, was the courtroom closed, and was the closure justified. *Id.* (citing *State v. Smith*, 181 Wn.2d 508, 513-514, 334 P.3d 1049 (2014)).

Both parties recognize that *Love* is the controlling case here. In *Love*, counsel and the court questioned the jury pool in open court. After questioning concluded, counsel approached the bench to discuss challenges for cause and the court reporter recorded the conversation. The discussion was visible to anyone in the courtroom, although the record does not indicate whether observers could hear what was said. Two jurors were dismissed for cause. Counsel then exchanged a list of jurors between them for silent

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peremptory challenges. This list of struck jurors was filed in the public record. The judge then read the names of the empaneled jurors without further explanation. *Love*, 183 Wn.2d at 601-604.

The appellant in *Love* argued, as Mr. Pavlik argues here, that the cause challenges at the bench and the paper peremptory challenges effectively closed the courtroom and violated his right to be present at a critical stage of the trial. *Love*, 183 Wn.2d at 604. Applying its three-factor test for public trial violations, the *Love* court first noted that the right to a public trial extends to jury selection, including for cause and peremptory challenges. *Id.* at 605-606 (quoting *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). When cause and peremptory challenges occur during a bench conference in open court, however, the appellant fails to carry his burden under the second prong of showing courtroom closure. *Id.* at 606. Although the public likely could not hear the discussion at the bench or see the struck juror sheet, the public had “ample opportunity to oversee the selection of *Love*’s jury because no portion of the process was concealed from the public.” *Id.* at 607. The voir dire procedures allowed the public to observe as counsel questioned the jurors, as jurors answered, and as counsel exercised challenges at the bench and on paper. *Id.* Consequently, the courtroom was not closed during any part of the voir dire process. *Id.*

Accordingly, *Love* compels rejection of Mr. Pavlik’s public trial arguments here.

*Jury Instructions*

Mr. Pavlik next raises a series of challenges to counsel's failure to offer, or correct, instructions concerning self-defense. To the extent that he demonstrates that counsel may have erred, his claims fail due to lack of prejudice.

This court reviews claims of instructional error de novo. *State v. O'Donnell*, 142 Wn. App. 314, 321, 174 P.3d 1205 (2007). Generally, jury instructions must be supported by substantial evidence, allow the parties to argue their theories of the case, and when read together, inform the jury of the applicable law. *State v. Rodriguez*, 121 Wn. App. 180, 184-185, 87 P.3d 1201 (2004). A jury instruction on self-defense, however, must more than adequately convey the law. *Id.* at 185 (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). A jury instruction on self-defense "that misstates the harm that the person must apprehend is erroneous." *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

*Self-defense Instruction Related to First Degree Assault*

The trial court's instruction 20, on the justifiable use of force, was meant to define self-defense against both the attempted murder and the first degree assault charges. Originally, instruction 20 described only a defense to the charge of attempted murder. But after a request by defense counsel, the trial court added "first degree assault" to the first and last paragraphs of the self-defense instruction:

It is a defense to a charge of attempted murder and/or first degree assault that the first degree assault and/or attempted homicide was justifiable as defined in this instruction.

Attempted homicide is justifiable when committed in the lawful defense of the actor and/or any person in the actor's presence or company when:

- (1) the actor reasonably believed that the person injured intended to inflict death or great personal injury;
- (2) the actor reasonably believed that there was imminent danger of such harm being accomplished; and
- (3) the actor employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the actor, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the first degree assault and/or attempted homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 126.<sup>2</sup> When the court made these corrections and read the first paragraph of the instruction to the parties, defense counsel said, "Your Honor, I believe the next paragraph should also have to be modified. It just says attempted homicide." Report of Proceedings (RP) at 454. The judge answered, "It's going to track. Every time we use that, that's got to track down through the instruction." *Id.* The finalized instruction given to the jury, however, did not include "first degree assault" in the second paragraph.

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<sup>2</sup> Unless otherwise stated, all cites refer to the record from the direct appeal for cause No. 29172-3-III.

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Mr. Pavlik contends this incomplete amendment of instruction 20 constituted a failure to instruct the jury when first degree assault is justifiable in self-defense.

Compounding the problem, he asserts, is the fact that the instructions on assault did not require the jury to consider whether the force used was unlawful.

The initial question is whether instruction 20 properly defined justifiable use of force for purposes of both attempted murder and first degree assault. Both charges here alleged Mr. Pavlik's use of a firearm; consequently, both involve the use of deadly force. *See* RCW 9A.16.010(2) ("Deadly force" is "the intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury.") Deadly force may be used in self-defense only if the defendant reasonably believes he is threatened with death or great personal injury. *See Walden*, 131 Wn.2d at 474. When deadly force is at issue, the proper instruction for justifiable use of force is 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 16.02, at 234 (3d ed. 2008) (WPIC). *See Kylo*, 166 Wn.2d at 866-867 (citing *Walden*, 131 Wn.2d at 475 n.3). This instruction states in relevant part:

It is a defense to a charge of [murder] [manslaughter] that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of [the slayer] . . . when:

- 1) the slayer reasonably believed that the person slain . . . intended [to commit a felony] [to inflict death or great personal injury];
- 2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

- 3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to [him] [her], at the time of [and prior to] the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 16.02. As amended to correspond to the charges here, both of which involve deadly force, instruction 20 accurately states the elements of WPIC 16.02.

Mr. Pavlik challenges the court's failure to include "first degree assault" in the second sentence of instruction 20, which should have read: "Attempted homicide [*and/or first degree assault*] is justifiable when committed in the lawful defense of the actor."

CP at 126. Due to this error, he claims, the jury was never instructed that it must evaluate when an assault is justifiable in self-defense. He fails to show, however, that the unartful language of instruction 20 misstates the law to his prejudice. The first sentence of the instruction clearly states that it is a defense to the charges of attempted murder *and/or first degree assault* that first degree assault and/or attempted murder was "justifiable as defined in this instruction." *Id.* Although the next sentence does not include first degree assault along with attempted murder, it defines when the action is "justifiable."

Consequently, the jury was advised that both charges could be "justifiable" only if they met the three elements listed.

Alternatively, Mr. Pavlik contends that trial counsel should have proposed a self-defense instruction based on WPIC 17.02, which states generally that it is a defense to some charges that the force used is lawful, and such force is lawful when used by a person who reasonably believes he or she is about to be injured.<sup>3</sup> The “Note on Use” for WPIC 17.02 (from WPIC Chapter 17 “Lawful Force—Charges Other Than Homicide”) state that WPIC 17.02 is used for “any charge other than homicide or attempted homicide.” WPIC 16.02’s “Note on Use” states that WPIC 160.02 is used when the offense charged is attempted murder, but does not address first degree assault with deadly force. Despite the language in the Note on Use for these two instructions, Washington courts hold that WPIC 17.02 is used for crimes involving nondeadly force, and WPIC 16.02 is reserved for crimes involving deadly force. *See Kyllo*, 166 Wn.2d at 866-867 (citing *Walden*, 131 Wn.2d at 475 n.3). Thus, a self-defense instruction based on WPIC 17.02 was not appropriate for Mr. Pavlik’s charge of first degree assault with a firearm.

In summary, Mr. Pavlik does not show that trial counsel’s failure to correct instruction 20—and that appellate counsel’s failure to assign error—constituted error or actually prejudiced him. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d

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<sup>3</sup> Mr. Pavlik also contends the instruction on assault should have included the bracketed language in WPIC 35.50 instructing that the assaultive act must be with “unlawful force.” Inclusion of this language would have been relevant if the proper self-defense instruction had been based on WPIC 17.02, describing lawful force. Because WPIC 17.02 is not the proper instruction for use of deadly force, however, the significance of the “unlawful force” language in the assault instruction is minimal.

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279 (2004). Additionally, trial counsel reasonably did not propose an instruction based on self-defense by nondeadly force.

*“Act on Appearances” Instruction*

Because self-defense is evaluated from the viewpoint of a reasonable person who knows and sees everything the defendant knows and sees, an “act on appearances” instruction must be given “to clarify that a defendant’s reasonable belief, not actual danger, is all that is required.” *State v. Freeburg*, 105 Wn. App. 492, 503-504, 20 P.3d 984 (2001). Here, the trial court informed the jury that a person asserting self-defense is entitled to act on appearances:

A person is entitled to act on appearances in defending himself and/or another, if that person believes in good faith and on reasonable grounds that he and/or another 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 an attempted homicide and/or first degree assault to be justifiable.

CP at 128.

Instruction 22 misstated the harm that the person must apprehend. Although instruction 20 correctly states that the actor must reasonably believe that the person injured intended to inflict “death or great personal injury,” instruction 22 required reasonable belief that the actor “is in actual danger of great bodily harm.” CP at 128. Elsewhere, the instructions defined “great bodily harm,” a term also used in the “to convict” instruction on first degree assault: “Great bodily harm means bodily injury that

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creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.” CP at 121, 123. Another instruction defines “great personal injury.” “In determining whether a use of deadly force in self-defense was justifiable, the phrase ‘great personal injury’ means an injury that the actor reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the actor or another person.” CP at 127.

Because “great bodily harm” is an element of first degree assault with a specific definition that relates to that crime, the term “great bodily harm” should not be used in an “act on appearances” self-defense instruction. *Kyllo*, 166 Wn.2d at 867 (quoting *Walden*, 131 Wn.2d at 475 n.3). In line with the case law, the “act on appearances” section of WPIC 16.07 (“Justifiable Homicide—Actual Danger Not Necessary”) was amended in July 2008 to replace “great bodily harm” with “great personal injury.” Defense counsel was on notice in 2010 that the “act on appearances” language in instruction 22 was an inaccurate statement of the law. *See State v. Woods*, 138 Wn. App. 191, 197, 156 P.3d 309 (2007) (“reasonable attorney conduct includes a duty to investigate the relevant law”). Accordingly, defense counsel’s performance was deficient in failing to object to the inaccurate instruction.

The question then is whether counsel’s error prejudiced Mr. Pavlik’s defense. Once a defendant produces evidence supporting self-defense, the burden shifts to the

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State to prove the absence of self-defense beyond a reasonable doubt. *Walden*, 131 Wn.2d at 473. In many cases, an “act of appearances” instruction that requires belief in “actual danger of great bodily harm” impermissibly decreases the State’s burden to disprove self-defense. *See, e.g., Rodriguez*, 121 Wn. App. at 186, *cited with approval in Kylo*, 166 Wn.2d at 867. In other cases, however, the erroneous use of “great bodily harm” has no prejudicial effect.

For example, in *Freeburg*, the defendant claimed he shot the victim in self-defense after the victim pointed a gun at the defendant’s head. *Freeburg*, 105 Wn. App. at 496, 505, *cited with approval in Kylo*, 166 Wn.2d at 867-868. The *Freeburg* “act on appearances” instruction, like the instruction here, improperly stated that the person defending himself must reasonably believe that he or another is in actual danger of great bodily harm. *Id.* at 503 n.29. The *Freeburg* instruction on justifiable homicide correctly stated that the actor must reasonably believe that the person slain intended to inflict death or great personal injury. *Id.* at n.28. Both “great bodily harm” and “great personal injury” were defined by language similar to the definitions in this case. *Id.* at n.30, n.31. Although *Freeburg* agreed that the act on appearance instruction should have used “great personal injury” rather than “great bodily harm,” it held that there was no likelihood that the incorrect language affected the outcome of the trial. *Id.* at 505. The court noted that the defendant’s trial theory was that he was faced with a threat of a gunshot at close range, “which easily and obviously satisfies both definitions.” *Id.*

Mr. Pavlik testified that after he fired the “warning shot,” one of the cyclists said that they were going to kill him. RP at 360. Later, when he confronted the cyclists in the park, he testified that one of the men began punching him, reached into the car to get the gun, and said he was going to shoot Mr. Pavlik. RP at 363. Mr. Pavlik’s defense theory was that he shot the man who was reaching for the gun because he was afraid the man would kill him. RP at 365. This fear of imminent death satisfies both the “act on appearances” instruction (belief in actual danger of “great bodily harm”, defined in part as “probability of death”) and the self-defense instruction (reasonable belief “that the person injured intended to inflict death or great personal injury”).

Here, as in *Freeburg*, if the jury had believed Mr. Pavlik’s testimony, “it would doubtless have believed he faced a threat of great bodily harm.” 105 Wn. App. at 505. Consequently, there is no reasonable probability that the erroneous “act on appearances” instruction affected the outcome of the trial. Mr. Pavlik thus fails to show that trial counsel’s failure to object to the erroneous instruction prejudiced his defense.

*Failure to Propose an Instruction on Defense Against Multiple Assailants*

Mr. Pavlik next contends the trial court erred by giving a self-defense instruction that required the jury to find he reasonably believed that solely “the person injured” intended to inflict death or great personal injury. CP at 126. He contends defense counsel should have requested that the instruction state that the person injured “or others whom the defendant reasonably believed were acting in concert with the person”

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intended to inflict death or great personal injury. See bracketed language in WPIC 16.02. With this added language, he asserts, the jury would have been allowed to consider his right to act on reasonable appearances in a multiple-assailant attack.

The petition relies upon *State v. Irons*, 101 Wn. App. 544, 4 P.3d 174 (2000) and *State v. Harris*, 122 Wn. App. 547, 90 P.3d 1133 (2004). In *Irons*, the man shot by Mr. Irons was accompanied by three other men, who surrounded Mr. Irons and assisted in confronting Mr. Irons. One of the other men threatened Mr. Irons with a beer bottle. The trial court refused defense counsel's request for a justifiable homicide instruction that allowed the jury to consider that he faced multiple assailants, only one of whom was the victim. *Irons*, 101 Wn. App. at 552. On appeal, Division One held that the instructions allowing the jury to consider only a reasonable threat from the victim inadequately conveyed the law of self-defense because those instructions did not make it manifestly clear that the jury could consider that Mr. Irons faced multiple assailants acting in concert. *Id.* at 552-553.

In *Harris*, 122 Wn. App. at 550-551, Mr. Harris testified that he shot the victim because he was afraid the victim and another man were about to attack him. At trial on a charge of second degree felony murder, defense counsel proposed a self-defense instruction based on WPIC 16.02 that instructed the jury that Mr. Harris had to believe that the victim intended to inflict death or great personal injury. Citing *Irons*, Division Two held that the self-defense instruction was inconsistent with the "act on appearances"

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instruction, which instructed the jury that it could consider all the facts and circumstances as they appeared to Mr. Harris at the time of the incident. *Id.* at 555. Because this inconsistency was at odds with Mr. Harris's theory that he had been in imminent danger from two assailants, the court held that defense counsel was ineffective in proposing the improper instruction and that the error was prejudicial. *Id.*

Mr. Pavlik testified at trial that after he pulled into the parking lot, the cyclists appeared and told him they had called the police. He stated he told them that was good, because he wanted to talk to the police. Then, he testified, Mr. Leenders suddenly ran up, punched Mr. Pavlik several times, and lunged through the driver's window to grab the handgun sitting on the passenger seat. At the same time, he stated that the other cyclist was moving around to the back of the car and Mr. Pavlik was concerned that he would try to enter the passenger door. But he also stated that he grabbed his gun and shot Mr. Leenders before Mr. Leenders could use the gun to kill him. Although Mr. Pavlik claimed he felt threatened by both men, his testimony established that it was the imminent and direct threat of Mr. Leenders killing him with the gun that caused him to shoot Mr. Leenders. Unlike in *Irons* and *Harris*, the other bicyclist did not accompany Mr. Leenders in the direct confrontation of Mr. Pavlik and did not threaten Mr. Pavlik with an imminent assault.

Consequently, the evidence was insufficient to support a multiple assailant instruction. *See Irons*, 101 Wn. App. at 549 (jury instructions must be supported by

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substantial evidence). Trial counsel was not ineffective for failing to propose one, and appellate counsel was not ineffective for failing to raise the issue on appeal.

*Failure to Propose an Instruction Related to Defense Against a Felony*

Mr. Pavlik also contends trial counsel was ineffective because she did not propose an instruction based on WPIC 16.03. This instruction is appropriate when a defendant contends deadly force was reasonably necessary to protect against a felony: “Homicide [or attempted homicide] is justifiable when committed in the actual resistance of an attempt to commit a felony.” WPIC 16.03. Under RCW 9A.16.050(2), homicide is justifiable when committed in “the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.” As stated in the “Comment” to WPIC 16.03, “Although the statute does not limit the kind of attempted felony that will justify a homicide, the deadly force appears to be limited to resisting felonies committed by violence such as those when great personal injury is involved or in which human life is threatened.”

The class of felonies supporting the use of deadly force in self-defense include felonies committed by violence and surprise, such as murder, robbery, and rape. *See Brightman*, 155 Wn.2d at 522 (quoting *State v. Nyland*, 47 Wn.2d 240, 242, 287 P.2d 345 (1955)) (justifiable homicide). Because deadly force must be reasonably necessary under the circumstances, the attack on the defendant usually must threaten life or great bodily harm. *Id.* at 522-523 (quoting *State v. Brenner*, 53 Wn. App. 367, 377, 768 P.2d 509

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(1989), *overruled on other grounds by State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003)). The only significant difference between WPIC 16.02, which was given in Mr. Pavlik's case, and WPIC 16.03 is that the deadly force in WPIC 16.03 is used during the actor's actual resistance to the felony, while the deadly force in WPIC 16.02 is used when the actor reasonably believes in the imminent danger that the victim intends to commit a violent felony.

At the time Mr. Pavlik shot him, Mr. Leenders was unarmed. As Mr. Pavlik testified, he was afraid that Mr. Leenders would get the gun and use it to kill him. Thus, the instruction that more closely matched the defense theory was WPIC 16.02, because Mr. Pavlik claimed he reasonably feared that Mr. Leenders intended to get the gun and then kill him. Defense counsel's decision to instruct the jury on self-defense against an intended threat rather than during actual resistance was a legitimate tactical choice that should not be second-guessed by this court. *Kyllo*, 166 Wn.2d at 862-863.

Mr. Pavlik has failed to establish that his counsel rendered ineffective assistance with regard to the jury instructions.

*Jury Unanimity*

The petition next contends that the instructions erroneously failed to ensure unanimity because there were two potential first degree assaults—the “warning shot” and the injurious shot fired from the car, but only one charge. As the State elected which assault was at issue, there was no error.

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A jury must unanimously agree to a criminal verdict. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citing Wash. Const. art. I, § 21). “When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), *abrogation on other grounds recognized in In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600-601, 316 P.3d 1007 (2014).

The jury was instructed that to convict Mr. Pavlik of first degree assault, it needed to find beyond a reasonable doubt:

- (1) That on or about the 19th day of May, 2008, the defendant assaulted Gabriel A. Leenders.
- (2) That the assault was committed with a firearm;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

CP at 121. Instruction 16 sets out the common law definitions of assault:

An assault is an intentional touching or striking or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive, if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another

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a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 122. *See Smith*, 159 Wn.2d at 781-782. Neither party proposed an instruction requiring the jury to be unanimous as to what act constituted the assault.

Here, the State told the jury during closing argument that the assaultive act was Mr. Pavlik actually shooting Mr. Leenders. In reviewing the elements of first degree assault, the prosecutor noted that the primary element was that Mr. Pavlik assaulted Mr. Leenders with a firearm, and then stated, "This is undisputed. The defense is claiming self-defense, that Mr. Pavlik admitted that he shot him. That is not in dispute." RP at 482. The prosecutor then explained that the difference between the charge of attempted murder and the charge of assault was whether Mr. Pavlik acted with premeditation and tried to kill Mr. Leenders with that injuring shot. RP at 483. Defense counsel in closing remarked, "there is a gunshot wound and that is the type of harm that's required for first degree assault[,] but you also have to have an absence of self-defense beyond a reasonable doubt." RP at 507. The "warning shot" was discussed solely in regard to its evidence that Mr. Pavlik acted in anger rather than fear that night, and to contradict Mr. Pavlik's testimony that he acted reasonably. RP at 509, 512-514.

Although the "warning shot" incident could have constituted an assault done with the intent to create fear of bodily injury under instruction 16, the State clearly told the jury that the act underlying the first degree assault charge was the shooting of Mr.

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Leenders in the car. Consequently, a unanimity instruction was not necessary under these circumstances. *Kitchen*, 110 Wn.2d at 411. Defense counsel's failure to propose such an instruction was reasonable, as was appellate counsel's failure to raise the issue of unanimity on appeal.

*Newly Discovered Evidence*

Mr. Pavlik next argues that he should be entitled to a new trial based on the newly discovered evidence of an additional witness to the shooting who would have bolstered the defense theory that Mr. Leenders was the aggressive person who brought about the need for Mr. Pavlik to act in self-defense. This claim fails to satisfy our newly discovered evidence standard.

To grant a new trial for "newly discovered evidence," Washington courts must apply a five factor test:

A new trial will not be granted on that ground unless the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

*State v. Williams*, 96 Wn.2d 215, 222-223, 634 P.2d 868 (1981). "The absence of any one of the five factors is grounds for the denial of a new trial." *Id.* at 223.

Here, the bicyclists testified at trial that they were in the park smoking cigarettes when Mr. Pavlik drove his car up to them. RP at 86, 116-117. Mr. Pavlik told the jurors that he had just stopped in the park and "didn't even have a second" before the bicyclists

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came up to him; he had not seen them before pulling in. RP at 363. In contrast, the new witness would have testified that the bicyclists left the area before Mr. Pavlik stopped at the park and did not return until a few minutes later. He said one of the bicyclists attacked the driver through the window and the other went around to open the passenger door. Declaration at 2. In contrast, the officer saw only Leenders at the car, while the second bicyclist was sitting on his bike behind the car when the shot was fired. RP at 132-134.

This declaration is not so compelling that we believe it would have changed the result of the trial. Instead, all it shows is yet another view of the incident—and one that was dramatically at odds with the defendant's own testimony concerning the timing of the shooting, as well as inconsistent with testimony from the bicyclists and the officer. Mr. Pavlik also does not demonstrate why this new evidence was not discovered before trial. He does not set forth any evidence of efforts made by the defense, if any, to discover additional witnesses to the shooting or otherwise explain how the witness could only have been found post-trial.

This evidence fails the first and third prongs of the newly discovered evidence test. Accordingly, the new declaration provides no basis for relief.

*Police Reports Concerning the Bicyclists*

Mr. Pavlik next argues that the prosecution failed to turn over evidence of police reports involving the two bicyclists and that his counsel was ineffective in failing to

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discover them through a Public Records Act, ch. 42.56 RCW, request. While he presents no relevant authority in support of his novel contention that both counsel needed to check the bicyclists' prior contacts with police, we need not resolve that contention in light of the fact that he can show no prejudice from the alleged errors.

The decisions in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and its progeny established that the government has a duty to disclose favorable evidence that is material to the guilt or punishment of the accused. *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 486, 276 P.3d 286 (2012). This duty encompasses both impeachment and exculpatory evidence. *Id.* A prosecutor has a duty to learn of and disclose any favorable information known by law enforcement. *Id.* A petitioner claiming a *Brady* violation must show that the evidence was favorable to him, that it was suppressed by the State, and that this suppression prejudiced him. *Id.* at 486-487. The evidence is "material" if there is a reasonable probability that, if it had been disclosed to the defense, the result of the proceeding would have been different. *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). The evidence is considered collectively, not item by item. *Id.* at 897.

One important aspect of materiality under *Brady* is the admissibility of the evidence. *Id.* If the evidence is not admissible, it is unlikely that its nondisclosure could affect the outcome of the proceeding. *Id.* (quoting *State v. Gregory*, 158 Wn.2d 759, 797, 147 P.3d 1201 (2006)). Under ER 608(b), specific instances of a witness's conduct used

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to attack his credibility may not be proved by extrinsic evidence. “They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . concerning the witness’[s] character for truthfulness or untruthfulness.”

Through current counsel, Mr. Pavlik obtained multiple police reports and court records detailing the bicyclists’ activities involving the police over the years. These records show that the police investigated many reports of substance abuse, harassment (sometimes by, sometimes targeting the men), domestic violence, and suicide attempts (by Mr. Leenders). *See ex. 28-32*. Some of the police reports state that the men lied to police about their involvement in the incidents. Mr. Leenders, in particular, allegedly lied to police on more than one occasion in attempts to get other people in trouble. *See PRP brief at 35 n.16; Appendix D*.

Only the evidence related to the untruthfulness of Mr. Leenders and Mr. Smith potentially was admissible under ER 608(b).<sup>4</sup> For impeachment purposes, evidence that the witnesses had lied to the police on prior occasions was favorable to the defense. But even if the prosecution had a duty to find and disclose this evidence, a question we need not answer, Mr. Pavlik does not show that it was material.

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<sup>4</sup> Pending or unproven conduct is not a basis for impeachment. *State v. Cardenas*, 146 Wn.2d 400, 413, 47 P.3d 127, 57 P.3d 1156 (2002).

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To show that suppressed evidence was material to the defense, the defendant need only show that the suppression undermines confidence in the outcome of the trial. *State v. Davila*, 184 Wn.2d 55, 73, 357 P.3d 636 (2015). Here, even if trial counsel had obtained the evidence of untruthfulness before trial, there is no reasonable probability that its use during cross-examination would have resulted in a different verdict. Both witnesses admitted that they had been drinking high-alcohol beer on the night of the incident, were riding bicycles in violation of the rules of the road, and gave inconsistent versions of the events on different occasions to the police. Other eyewitnesses testified and corroborated relevant parts of the cyclists' stories, including the initial confrontation, the warning shot, and the return of Mr. Pavlik to the scene for the final confrontation. Additional information that in the past the witnesses had lied to police would not have appreciably undermined the State's evidence that, however provocative the cyclists had been, Mr. Pavlik sought the final encounter. Because Mr. Pavlik cannot establish prejudice, he also does not show that trial counsel's failure to investigate further into the cyclists' history of police engagement prejudiced the defense.

Accordingly, even if there was error here, it was not prejudicial to the defense.

*Ineffective Cross-examination*

Mr. Pavlik next argues that his counsel was ineffective in her cross-examination of Mr. Leenders and failed to correct the error when examining the lead investigating

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detective, Chet Gilmore. This argument also fails to establish that counsel erred in such a prejudicial manner that she rendered ineffective assistance.

Whether or not counsel properly conducted examination of witnesses has been a topic of earlier ineffective assistance of counsel arguments. Cross-examination is a matter of trial strategy that typically is immune from challenge as long as it falls within the range of reasonable representation. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Even lame or ineffectual cross-examination does not establish ineffective assistance of counsel. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

Leenders testified on direct examination that he told Pavlik “something along the lines of ‘you better kill me’” while riding toward the car after the “warning shot.” RP at 85. Defense counsel did not address the statement during her cross-examination. She did ask Leenders if he remembered telling the detective he was unsure if he would talk out of fear of being charged with attempted carjacking; Leenders answered “No.” RP at 105. The defense later called the detective to the stand to testify concerning his interviews of the participants, including his interview of Mr. Leenders at the hospital. When she attempted to ask Detective Gilmore about the carjacking comment, the court twice sustained objections to the use of leading questions. RP at 329. Counsel then turned to questioning the detective concerning Mr. Leenders’ attitude.

Mr. Pavlik now contends that counsel should have cross-examined Leenders about the “you better kill me” comment, arguing that the police reports more fully reported the statement as “If that’s a gun, you’re going to have to shoot me and kill me ‘cause I’m going to kill you if that’s a gun.” Ex. 17 at 9. While there unlikely would have been little harm in asking Mr. Leenders if he remembered his statement as contained in the police report, there was no need to do so. His answer to the prosecutor’s question suggests his memory of the statement was unclear. More critically, the information was only important to the defense if Mr. Pavlik was aware of the statement because that would relate to the reasonableness of his action in shooting Leenders. Mr. Pavlik did in fact testify to the contents of the statement and even told the jurors: “That’s their exact words and it’s in the report.” RP at 360.

Thus, the substance of this evidence was before the jury in the form where it was most useful—from the defendant to establish the reasonableness of his fear of Leenders. The failure to ask Leenders if he had a better memory of the statement did little or nothing for the defense case. The lack of cross-examination was not error and also did not prejudice the defense.

Similarly, the failed examination of the detective did not harm the defense. Whether or not Leenders was fearful of facing charges was an entirely different question from whether Pavlik acted reasonably. Leenders had testified on cross-examination that he did not remember talking to the detective about carjacking; whether he did so could

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only be used to impeach his memory. Mr. Pavlik never contended that he feared having his car stolen. Rather, he was afraid Leenders was going for the gun to shoot him. Accordingly, the evidence was not relevant to the defense. There was no harm in the failure to develop the evidence more fully.

Petitioner has not established that his counsel performed ineffectively in the two noted examples.

*Conflict of Interest*

Mr. Pavlik next argues that his public defender labored under a conflict of interest because a public defender supervisor who met with him before assigning the case to his trial counsel later represented Mr. Leenders while the Pavlik case was pending. He fails to demonstrate that an actual conflict of interest existed.

The Sixth Amendment guarantee of effective counsel includes representation by a counsel free of a conflict of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). A conflict of interest arises if defense counsel owes duties to a party whose interests are adverse to the defendant's. *State v. White*, 80 Wn. App. 406, 411-412, 907 P.2d 310 (1995). Under the Washington Rules of Professional Conduct (RPC), an attorney is prohibited from representing a client if the attorney's duties will be directly adverse to another client or will materially limit the attorney's representation. RPC

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1.7(a). All members of a law firm are treated as a single attorney for the purposes of RPC 1.7. RPC 1.10(a).

It is petitioner's obligation to establish that an actual conflict of interest existed from the representation of multiple parties. *Dhaliwal*, 150 Wn.2d at 566-573; *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291(2002). "We agree that under *Mickens* reversal is not mandated when a trial court knows of a potential conflict but fails to inquire." *Dhaliwal*, 150 Wn.2d at 571. Thus, petitioner must show that an actual conflict of interest existed that adversely affected counsel's performance. *Pirtle*, 136 Wn.2d at 474. Mr. Pavlik fails to establish either.

First, there appears to be no actual conflict of interest. The public defender's office did not represent both Pavlik and Leenders in the same case. The supervisor did not ever represent Pavlik on this case, but merely met with him before assigning the case to a trial attorney. That fact alone does not establish a conflict of interest.

Second, the alleged conflict had no adverse effect on counsel's performance. Trial counsel rigorously and effectively cross-examined Mr. Leenders at Pavlik's trial. Speculation that she might have done more is simply insufficient to establish that she acted with divided loyalty. There must be evidence that divided loyalty actually impacted the case. There is none of that here.

The PRP fails to establish that the public defender's office had a conflict of interest in this action.

*Reconsideration of Hearsay Issue Decided on Direct Appeal*

Lastly, Mr. Pavlik asks us to revisit the exclusion of his “self-defense” statements that were the topic of the published portion of his direct appeal. Because he has presented no basis for us to do so, we decline his invitation.

Mr. Pavlik argues that the newly discovered witness makes it important to revisit the trial court’s exclusion of the “self-defense” statements he made to police on the morning of the incident. There is no connection between that evidence, which does not even warrant a new trial, and our decision in the direct appeal.

As noted previously, the published portion of the direct appeal addressed whether the trial court erred in excluding the defendant’s statements. One issue, and the reason the case was published, rejected the prosecutor’s argument that there was a “self-serving hearsay” rule that precluded a party from admitting his own statements at trial. *Pavlik*, 165 Wn. App. at 650-654. The remaining question was whether or not the statements were admissible as excited utterances. *Id.* at 654. The majority agreed that they could have been excited utterances, but it was unclear if the trial court actually found that the statements satisfied the rule. *Id.* at 654-656. Instead, the majority concluded that even if the statements should have been admitted, any error was harmless. *Id.* at 656-657.

There is no basis for revisiting that decision. If the evidentiary exclusion was harmless on direct appeal, it is even more harmless in this collateral attack. More importantly, nothing about the new evidence, even if it were admissible, impacts that

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analysis of the direct appeal. It was cumulative to the defendant's (and Mr. Leender's) testimony that the bicyclist reached into the car to get the gun, and it was contrary to the defendant's testimony that he had just arrived at the park when the bicyclists confronted him. None of the evidence bears on whether the trial court correctly or incorrectly analyzed the statements as excited utterances, and the inconsistent evidence does not make the exclusion of that evidence any less harmless than it was.<sup>5</sup> Accordingly, we will not revisit the decision in the direct appeal.

As has been noted on many occasions, there are many ways to try a criminal case and seldom, if ever, would two attorneys try the same case in the same manner. Mr. Pavlik has pointed to some things his counsel could have done differently, but he has not shown any that she had to do differently. The minor errors identified in this opinion did not impact the fairness of the trial. Accordingly, the petition has failed to demonstrate prejudicial error in the trial proceedings.

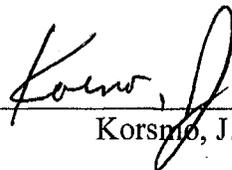
The petition is dismissed.

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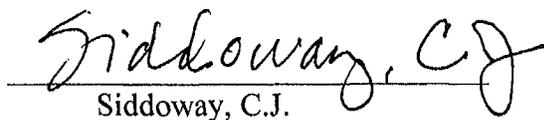
<sup>5</sup> Although Mr. Pavlik insists the initial statement could only be spontaneous, the trial court could easily have concluded otherwise. Mr. Pavlik admittedly drove back to the scene after several minutes of reflection on what was happening and had the opportunity to prepare a self-defense story in the event one was needed. This is not a clear case for admitting his statements as excited utterances.

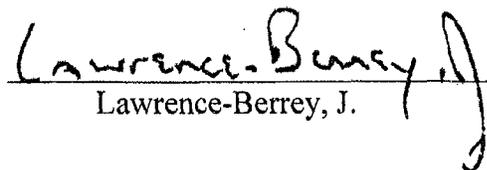
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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Korsmo, J.

WE CONCUR:

  
Siddoway, C.J.

  
Lawrence-Berrey, J.

APPENDIX B

FILED

MAR 26 2010

THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

STATE OF WASHINGTON  
Plaintiff,

v.

ALEKSANDR V. PAVLIK,  
Defendant.

)  
) No. 08-1-01641-3  
)  
)  
)  
)

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COURT'S INSTRUCTIONS TO THE JURY

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Date: March 24, 2010



Jerome J. Leveque  
Superior Court Judge

**ORIGINAL**

INSTRUCTION NO. 15

To convict the defendant of the crime of assault in the first degree, under Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 19th day of May, 2008, the defendant assaulted Gabriel A. Leenders.
- (2) That the assault was committed with a firearm;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

An assault is an intentional touching or striking or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive, if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 17

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 20

It is a defense to a charge of attempted murder and/or first degree assault that the first degree assault and/or attempted homicide was justifiable as defined in this instruction.

Attempted homicide is justifiable when committed in the lawful defense of the actor and/or any person in the actor's presence or company when:

(1) the actor reasonably believed that the person injured intended to inflict death or great personal injury;

(2) the actor reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the actor employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the actor, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the first degree assault and/or attempted homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

In determining whether a use of deadly force in self defense was justifiable, the phrase "great personal injury" means an injury that the actor reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the actor or another person.

INSTRUCTION NO. 22

A person is entitled to act on appearances in defending himself and/or another, if that person believes in good faith and on reasonable grounds that he and/or another 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 an attempted homicide and/or first degree assault to be justifiable.

INSTRUCTION NO. 23

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

INSTRUCTION NO. 24

Necessary means that, no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.

INSTRUCTION NO. 25

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

STATUTORY APPENDIX

ER 608(b) provides:

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

RAP 13.4(b) provides:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.5A provides:

(a) Scope of Rule. This rule governs motions for discretionary review by the Supreme Court of the following decisions of the Court of Appeals: (1) Decisions dismissing or deciding personal restraint petitions, as provided in rule 16.14(c); (2) Decisions dismissing or deciding post-sentence petitions, as provided in rule 16.18(g); (3) Decisions on accelerated review that relate only to a juvenile offense disposition, juvenile dependency, or termination of parental rights, as provided in rule 18.13(e) or 18.13A(j); (4) Decisions on accelerated review that

relate only to an adult sentence, as provided in rule 18.15(g).

(b) Considerations Governing Acceptance of Review. In ruling on motions for discretionary review pursuant to this rule, the Supreme Court will apply the considerations set out in rule 13.4(b).

(c) Procedure. The procedure for motions pursuant to this rule shall be the same as specified in rule 13.5(a) and (c).

RCW 9A.16.020 provides in part:

Use of force — When lawful.

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 . . .

RCW 9A.16.050 provides:

Homicide is also justifiable when committed either:

(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and

there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. II provides:

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 10 provides:

Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said

car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. art. I, § 24 provides:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

## WestlawNext Washington Criminal Jury Instructions

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 Part IV. Defenses  
 WPIC CHAPTER 16. Justifiable Homicide

**WPIC 16.02 Justifiable Homicide—Defense of Self and Others**

It is a defense to a charge of *[murder]* *[manslaughter]* that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of *[the slayer]* *[the slayer's [husband] [wife] [registered domestic partner] [parent] [child] [brother] [sister]]* *[any person in the slayer's presence or company]* when:

- 1) the slayer reasonably believed that the person slain *[or others whom the defendant reasonably believed were acting in concert with the person slain]* intended *[to commit a felony]* *[to inflict death or great personal injury]*;
- 2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
- 3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to *[him] [her]*, at the time of *[and prior to]* the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

**NOTE ON USE**

Use this instruction in any homicide case in which this defense is an issue supported by the evidence. Use bracketed material as applicable.

Use WPIC 25.01, Homicide—Definition, with this instruction. Use WPIC 2.04.01, Great Personal Injury—Definition, and WPIC 2.09, Felony—Designation of, as applicable with this instruction. If there is an issue whether the defendant was the aggressor, use WPIC 16.04, Aggressor—Defense of Self and Others.

If resistance to a felony is involved, see WPIC 16.03, Justifiable Homicide—Resistance to Felony.

Do not use this instruction if the deadly force was used to defend against a non-violent felony, such as forgery, bribery, perjury, or the like.

When the offense charged is attempted murder, use this instruction, rather than WPIC 17.02, Lawful Force—Defense of Self, Others, Property.

If a case involves a registered domestic partnership, and if it becomes necessary to define the term for jurors, an instruction can be drafted using language from RCW Chapter 26.60.

**COMMENT**

**Generally.** The instruction is based upon RCW 9A.16.050(1).

**All facts and circumstances.** The instruction's third numbered paragraph, referring to all facts and circumstances, is based upon *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984). In *Allery*, the Supreme Court held that if there is evidence of self-defense, the jury must be instructed "to consider the conditions as they appeared to the slayer, taking into consideration all the facts and circumstances known to the slayer at the time and prior to the incident." *State v. Allery*, 101 Wn.2d at 595. Also see *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991); *State v. Bell*, 60 Wn.App. 561, 805 P.2d 815 (Div. 2 1991).

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[Home Table of Contents](#)**WPIC16.03 Justifiable Homicide—Resistance To Felony**

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**WPIC 16.03 Justifiable Homicide—Resistance To Felony**

It is a defense to a charge of *[murder][manslaughter]* that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony *[upon the slayer][in the presence of the slayer][or] upon or in a dwelling or other place of abode in which the slayer is present*.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to *[him][her]* at the time *[and prior to]* the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

**NOTE ON USE**

This instruction should be given in homicide cases in which there is evidence to support a claim that the defendant was acting in resistance to the commission of a felony upon the defendant or in the defendant's presence or upon or in a dwelling or other place of abode in which the defendant was present. If self-defense against a felony is involved, see WPIC 16.02, Justifiable Homicide—Defense of Self and Others.

Use bracketed material as applicable.

Use WPIC 2.09, Felony—Designation of, and WPIC 25.01, Homicide—Definition, with this instruction. Use WPIC 2.08, Dwelling—Definition, as applicable with this instruction.

**COMMENT**

RCW 9A.16.050(2).

The common law requires that the use of force in the prevention of a felony must be limited to that which would be used by a reasonably prudent person under circumstances as they might appear to him. *State v. Castro*, 30 Wn.App. 586, 636 P.2d 1099 (1981).

Although the statute does not limit the kind of attempted felony that will justify a homicide, the deadly force appears to be limited to resisting felonies committed by violence such as those when great personal injury is involved or in which human life is threatened. In *State v. Nyland*, 47 Wn.2d 240, 287 P.2d 345 (1955), the court held that adultery is not a crime that imperils the life of the unoffending spouse or threatens personal injury and in no event may the life of a human being be taken to prevent the commission of an act of adultery. See also *State v. Griffith*, 91 Wn.2d 572, 589 P.2d 799 (1979) (unlawful trespass does not come within felonious activity envisioned by the statute).

In the context of a case in which instructions regarding self-defense and resistance to felony were combined, and in which the issue was the use of instructions that appeared to require the appearance of an "attempt" by the victim to kill or inflict great bodily harm upon the slayer, rather than "intent" plus imminent danger, the court held that the wording of WPIC 16.03 as it appeared in the second edition was a correct statement of the law. *State v. Negrin*, 37 Wn.App. 516, 681 P.2d 1287 (1984).

For a general discussion of whether the burden of proving a defense can be shifted to the defendant, see Introduction to Part IV, Defenses.

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 WPIC CHAPTER 16. Justifiable Homicide

**WPIC 16.07 Justifiable Homicide—Actual Danger Not Necessary**

A person is entitled to act on appearances in defending *[himself][herself][another]*, if that person believes in good faith and on reasonable grounds that *[he][she][another]* is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

**NOTE ON USE**

Use this instruction with WPIC 16.02, Justifiable Homicide—Defense of Self and Others, and WPIC 16.03, Resistance to Felony, when appropriate.

**COMMENT**

The prior version of this instruction used the language "great bodily harm," which appeared in earlier cases defining this defense. E.g., *State v. Miller*, 141 Wash. 104, 250 Pac. 645 (1926). The term "great personal injury" is now used, because it is the term utilized by RCW 9A.16.050(1). See *State v. Walden*, 131 Wn.2d 469, 475 n.3, 932 P.2d 1237 (1997) (noting confusion); *State v. Freeburg*, 105 Wn.App. 492, 505, 20 P.3d 984 (2001) (holding that term "great personal injury" should be used rather than "great bodily harm").

RCW 9A.16.050(1) provides in part that a homicide is justifiable when committed in the lawful defense of the slayer, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer and there is imminent danger of such design being accomplished. The committee is unaware of any cases that address the relationship between this defense and the element of imminent danger under RCW 9A.16.050(1).

This defense applies not only to self-defense but also to the use of force to protect third persons from apparent injury. See *State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977) (a person may defend another when the defender reasonably believes that the other person is in danger even though such belief may be later shown to have been erroneous).

It is not clear whether this defense applies when a person erroneously uses force to defend against an apparent property offense. The committee could find no cases addressing this issue.

*[Current as of July 2008.]*

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## WestlawNext Washington Criminal Jury Instructions

[Home Table of Contents](#)**WPIC17.02 Lawful Force—Defense of Self, Others, Property**

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Part IV. Defenses

WPIC CHAPTER 17. Lawful Force—Charges Other Than Homicide

**WPIC 17.02 Lawful Force—Defense of Self, Others, Property**

It is a defense to a charge of (fill in crime) that the force *[used][attempted][offered to be used]* was lawful as defined in this instruction.

[The *[use of][attempt to use][offer to use]* force upon or toward the person of another is lawful when *[used][attempted][offered]* [by a person who reasonably believes that *[he][she]* is about to be injured] [by someone lawfully aiding a person who *[he][she]* reasonably believes is about to be injured] in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.]

[The *[use of][attempt to use][offer to use]* force upon or toward the person of another is lawful when *[used][attempted][offered]* in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.]

The person *[using][or][offering to use]* the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of *[and prior to]* the incident.

The *[State][City][County]* has the burden of proving beyond a reasonable doubt that the force *[used][attempted][offered to be used]* by the defendant was not lawful. If you find that the *[State][City][County]* has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty *[as to this charge]*.

**NOTE ON USE**

Use this instruction in any case in which this defense is an issue supported by the evidence.

Use bracketed material as applicable. Use this instruction for any charge other than homicide or attempted homicide. If homicide is involved, use WPIC 16.02, Justifiable Homicide—Defense of Self and Others.

With this instruction, use WPIC 16.05, Necessary—Definition. Also use, as applicable, WPIC 2.13, Malice—Maliciously—Definition. If there is an issue whether the defendant was the aggressor, use WPIC 16.04, Aggressor—Defense of Self, or WPIC 16.04.01, Aggressor—Defense of Others.

**COMMENT**

RCW 9A.16.020(3).

**Generally.** The wording of this instruction in the second edition "correctly instructed the jury on the subjective standard of self-defense." *State v. Goodrich*, 72 Wn.App. 71, 77, 863 P.2d 599 (1993), partially abrogated on other grounds as noted in *State v. Ramos*, 124 Wn.App. 334, 101 P.3d 872 (2004).

The instruction has been amended for the 2008 edition to clarify for the jury that the defendant need not believe that the defendant or another is about to be injured in order to lawfully use force against a malicious interference with property. See *State v. Bland*, 128 Wn.App. 511, 116 P.3d 428, 430 (2005).

**All facts and circumstances.** The third paragraph, referring to all facts and circumstances, is based upon *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984). See Comment to WPIC 16.02.

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 WPIC CHAPTER 17. Lawful Force—Charges Other Than Homicide

**WPIC 17.04 Lawful Force—Actual Danger Not Necessary**

A person is entitled to act on appearances in defending [himself][herself][another], if [he][she] believes in good faith and on reasonable grounds that [he][she][another] is in actual danger of injury, 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.

**NOTE ON USE**

Use this instruction with WPIC 17.02, Lawful Force—Defense of Self and Others, when appropriate.

Do not use this instruction when self-defense is asserted in the context of resisting an unlawful or excessive force arrest. See the Comment to WPIC 17.02.01, Lawful Force—Resisting Detention.

Use bracketed material as applicable.

**COMMENT**

This instruction has its origin in case law. See *State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977); *State v. Miller*, 141 Wash. 104, 250 P. 645 (1926); *State v. Dunning*, 8 Wn.App. 340, 506 P.2d 321 (1973). In *Miller*, the court stated:

If the appellants, at the time of the alleged assault upon them, as reasonably and ordinarily cautious and prudent men, honestly believed that they were in danger of great bodily harm, they would have the right to resort to self-defense, and their conduct is to be judged by the condition appearing to them at the time, not by the condition as it might appear to the jury in light of the testimony before it.

The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, although it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have acted under the circumstances as they appeared to them, they were justified in defending themselves.

*State v. Miller*, 141 Wash. at 105–06.

This instruction applies not only to self-defense but also to the use of force to protect third persons from apparent injury. See *State v. Penn*, *supra* (a person may defend another when the defender reasonably believes that the other person is in danger even though such belief may be later shown to have been erroneous).

It is not clear whether this instruction applies when a person erroneously uses force to defend against an apparent property offense. The committee is unaware of any cases that address this issue.

It is not reversible error to refuse a mistaken belief instruction, when under the self-defense instruction given, counsel is free to argue that "the defendant's reasonable belief that he was in danger could properly be a mistaken belief." *State v. Kidd*, 57 Wn.App. 95, 99–100, 786 P.2d 847 (1990). In *Kidd*, however, the self-defense instruction specifically stated that "the use of force toward the person of another is lawful when used by a person who believes that he is about to be injured by someone and when the force is not more than necessary." *State v. Kidd*, 57 Wn.App. at 100. Also see WPIC 17.02, Lawful Force—Defense of Self and Others.

The Note on Use states that this instruction should be used with WPIC 17.02 when appropriate. This instruction applies to the use of non-deadly force, as opposed to deadly force. See WPIC 16.07.

The requirement of "great bodily harm" contained in prior versions has been changed to "injury." Under RCW 9A.16.020, one can use self-defense to prevent any assault, regardless of whether the assault threatened great bodily harm. See *State v. L.B.*, 132 Wn.App. 948, 135 P.3d 508 (2006).

*[Current as of July 2008.]*

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE RESTRAINT OF:

ALEKSANDR PAVLIK,  
Petitioner.

) NO \_\_\_\_\_  
) COA NO. 31227-5-III  
) (consol with 31338-7-III)

) CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare that on the 21st day of April 2016, I caused a copy of the attached MOTION FOR DISCRETIONARY REVIEW to be deposited into the United States mail, with proper first class postage attached, in an envelope addressed to:

Lawrence H. Haskell  
Spokane County Prosecuting Attorney  
Gretchen E. Verhoef, Deputy  
1100 W. Mallon  
Spokane, WA, 99260-0270

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

4.21.2016 - SEATTLE, WA  
DATE AND PLACE

  
ALEX FAST