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Court of Appeals
Division III
State of Washington

No. 95635-9

34360-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

MICHAEL L. GEHRKE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in permitting the State to amend the information immediately before closing pursuant to CrR 2.1 because it prejudiced Mr. Gehrke's rights under the Washington State Constitution, Article I, section 22.

2. The trial court erred in providing a first aggressor instruction.

3. The trial court erred in failing to instruct the jury regarding withdrawal considering the first aggressor instruction given to the jury.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion in allowing an amendment of the information before the State rested its case in chief?

2. Did the evidence presented support the trial court's decision to give the first aggressor instruction?

3. Was the trial court's decision to refuse to instruct the jury on withdrawal as reviving self-defense proper where there was no evidence suggesting the defendant withdrew from the affray at any time?

III. STATEMENT OF THE CASE

On September 4, 2015, Mr. Olmstead was driving home from downtown after dropping his brother and his brother's wife at the "Pig Out in the Park." RP 167. He was travelling down Maxwell and turned right

onto Adams. RP 169-70. Upon turning, he was prevented from proceeding further, as an SUV was parked on Adams blocking the roadway. RP 170. Two individuals were standing in the road. RP 168-69. Mr. Olmstead did not know either of these individuals. RP 170. The sun was out and he had no trouble seeing. RP 180. One of the individuals, Christopher Pineyro, had ridden his bike down North Adams Street; the other, Gehrke, was moving or walking around the front of the parked SUV. RP 170-72. Gehrke appeared to have a cell phone in his hand. RP 173.

As Gehrke came around the vehicle he stopped in the street. RP 172. He approached Pineyro, who was on the bicycle, and kicked him. RP 172-174. The bicycle and Pineyro fell down. RP 174. The two men and the bicycle were only a few feet away from Mr. Olmsted. RP 175. Mr. Olmstead then recognized what had first appeared to be a cell phone in the defendant's hand as being a knife. RP 175. After the defendant pulled out the blade of the knife, the bicyclist, Pineyro, stood up and pulled a hammer out, apparently from behind him. *Id*. The two men began "sparring," not yet swinging their weapons, and moved slightly down the street away from Mr. Olmstead. RP 176. Simultaneously, the two men swung their weapons, but Gehrke's knife stuck Pineyro in the neck. RP 177. The blade of the knife was approximately four and a half inches in length. 489. Mr. Olmstead testified that when the victim was struck in the neck with the knife he did

not complete his swing with the hammer; the hammer dropped and Pineyro fell to the ground. RP 192. Pineyro died as a result of the stab wound to the neck. RP 537. Mr. Olmstead believed the defendant initiated the confrontation. RP 179.

Prior to the altercation, Gehrke was in the rear passenger seat of Ms. Swenson's SUV. RP 560. After shopping at Safeway, they had returned to Ms. Swenson's house at the corner of Maxwell and Adams, where she and Gehrke's girlfriend, Sheri, lived. RP 561. They parked in front of the house on Adams Street. RP 561. Ms. Swenson went into her residence to change. RP 558, 560. Gehrke exited the vehicle to move to the front seat as he and his girlfriend Sheri were going to the mall for an hour. RP 623-25. At that point, they observed Pineyro ride out of an alley and down the street towards them. RP 625-26.

Gehrke was involved in a prior altercation with Pineyro at a 7-11 store approximately one year earlier. RP 709-11; Ex. P-92[1] at 8:22:08-8:22:25, 8:23:41. At that time, Pineyro was screaming words at him and was armed with a baton. Ex. P-92 at 8:22:54, 8:23:35- 8:23:52. Gehrke was not afraid of him. RP 711. He told Pineyro he was not going to fight him in the

[1] Defendant Gehrke's statements and testimony came into trial through his direct testimony and through a videotaped interview that was partially edited. RP 657-719; Ex. P-92 (viewed by the jury at RP 485).

parking lot because the police station was only five blocks away, but, instead, invited him to meet him up the road. RP 711; Ex. P-92 at 8:23:52-8:24:00. Pineyro failed to appear. *Id*.

A year later, Gehrke heard that Pineyro was back in the neighborhood; Gehrke knew there would be a confrontation. Ex. P-92 at 8:22:37. Upon seeing Pineyro, Gehrke walked to the front of the vehicle towards him. *Id.* at 8:45:20. Gehrke stated that as he approached Pineyro, Pineyro stated "I've got something for you bitch." In response, Gehrke kicked Pineyro's bike, causing Pineyro and his bike to fall to the ground. *Id.* at 8:45:25. After falling to the ground, Pineyro threw off his bags and pulled out a hammer. *Id.* at 8:45:32. Gehrke stated it was then that he pulled out his knife. *Id.* at 8:35:48.

In the ensuing altercation, Pineyro swung the hammer at Gehrke, who was armed with the knife. RP 685. On the video of Gehrke's interview with the detectives, Gehrke reenacted the fight, describing how Pineyro would swing the hammer, telegraphing his blows, and how he was able to avoid the blows, dodging, then seeking his opportunity to attack with the knife. Ex. P-92 at 8:35:50-8:36:1; *see also* RP 688. Gehrke attacked with the knife and struck two blows, one in the arm and the fatal blow to his neck

- the carotid artery. *Id.*[2] Gehrke noted that it was obvious that Pineyro did not "know how to fight or even how to nail in a nail." Ex. P-92 at 8:36:25; RP 711. When asked if he was ever hit with the hammer, Gehrke stated "No, I'm too fast for that." Ex. P-92 at 8:46:43. Gehrke testified that throughout the encounter, he was never retreating or leaving the scene. RP 709. He testified he was not the type to run away from a fight. RP 705. The jury found Gehrke guilty of first degree manslaughter, and by special verdict, that he had used a deadly weapon. CP 189, 191. Gehrke was sentenced to a mid-point sentence within the standard range, and was given the mandatory deadly weapon enhancement, for a total of 124 months. CP 232-244. He timely appealed. CP 246-260.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING AN AMENDMENT OF THE INFORMATION BEFORE THE STATE RESTED ITS CASE IN CHIEF.

Prior to resting its case, the State moved to amend the information to include the alternative crime of manslaughter. RP 543; CP 95-96. Defense counsel acknowledged they had been notified of this possibility just before trial started. RP 543-44. Counsel for defendant objected, first

[2] Dr. John Howard testified "death was due to cerebral edema with herniation due to ischemic brain injury due to transection of the carotid artery jugular vein due to a stab wound of the neck." RP 537.

arguing there was no probable cause for the charge of manslaughter because "this was an intentional act of self-defense, not an act of recklessness." RP 544. Counsel then offered that had they known about the proposed amendment earlier, "defense would have likely looked for an opportunity to then potentially get a self-defense expert that would show that Gehrke's actions were not reckless but an appropriate use of force in self-defense." Notably, the defense never requested a continuance.

In response to the defendant's objections, the trial court carefully examined the court rule, CrR 2.1(d), noting that "the pivotal question that the Court always has to focus on in terms of whether [it is] going to provide for an amendment is whether in this judicial officer's mind, that amendment is going to substantially prejudice a defendant and I would suggest that here it does not." RP 547. The trial court also compared how the rule had applied in a prior case. RP 548-49. The trial court found that the facts of this case clearly supported the amendment. RP 548-50.

Of import, the trial court noted that the new charge would not require Gehrke to retool his defense – that self-defense was always the defense in the case, implying that the claim that the defendant could have employed a self-defense expert was not sound because the defense "could have also employed a self-defense for the initial charge of murder in the second degree. That's a strategy situation that isn't affected either way." RP 550.

Defendant now claims that the trial court abused its discretion in granting the amendment pursuant to CrR 2.1(d). He is incorrect.

The trial court's grant of a motion to amend an information is reviewed for abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Under the criminal court rules, a trial court may allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Importantly, the defendant bears the burden of showing prejudice. *State v. Guttierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

Appellant spends much argument on the *Pelkey*[3] rule that prohibits amendments *after* the State has rested. Br. of Appellant 7-9. Conversely, the instant case involves the situation where the amendment occurs *before* the State rests. Under the criminal court rules, a trial court may allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Additionally, when a defendant does not request a continuance, it suggests there is no prejudice. *See State v. Murbach*, 68 Wn. App. 509, 512, 843 P.2d 551 (1993) (absence of request for a continuance indicated

[3] *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

amendment to information was not prejudicial); *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224 (1989) (failure to request continuance waived objection to amended information), *review denied*, 114 Wn.2d 1010 (1990); *State v. Brown*, 55 Wn. App. 738, 743, 780 P.2d 880 (1989) ("the fact that the defendant does not request a continuance is persuasive of lack of surprise and prejudice"), *review denied*, 114 Wn.2d 1014 (1990).

There was no prejudice resulting from the amendment in the instant case. The reduced manslaughter charge involved the same evidence and the same defense – self-defense. "Where the principal element of the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). The trial court addressed the claim that the defendant might have acquired a self-defense expert for the manslaughter charge and found it suspect because it was illogical that a defendant would need a self-defense expert in a manslaughter case, but not in the second degree murder (by assault) case. Additionally, defense counsel never addressed the issue as to why or how an expert could assist in the case. Here, as noted by the judge, the overarching issue in the case was the determination of the first aggressor. It is questionable, under the facts of this case, as to whether a "self-defense expert" could give an opinion on the ultimate decision to be made by a jury.

See ER 704; *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (although witnesses may offer opinions that embrace an ultimate issue, they may not state personal opinions of a defendant's guilt directly or by inference). The trial court did not abuse its discretion by granting the amendment in this case.

B. THE EVIDENCE SUPPORTS THE TRIAL COURT'S DECISION TO GIVE THE FIRST AGGRESSOR INSTRUCTION.

As relevant here, the trial court instructed the jury on self-defense,[4] a person is entitled to act on appearances,[5] there is no duty to retreat,[6] and, over Gehrke's objection,[7] gave the "first aggressor" instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense or defense or another and thereupon kill or 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 or defense of another is not available as a defense.

CP 136 (Instruction 30).

Gehrke claims the trial court abused its discretion by instructing the jury in this manner.

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[4] CP 133 (Instruction 27).

[5] CP 134 (Instruction 28).

[6] CP 135 (Instruction 29).

[7] Defense objected to the instruction. RP 733.

1. Standard of Review

When the record includes credible evidence from which a reasonable juror could find that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Whether the State produced sufficient evidence to justify an aggressor instruction presents a question of law this court reviews de novo. *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction - here, the State. *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005). "[A]n aggressor or one who provokes an altercation" cannot successfully invoke the right of self-defense. *Riley*, 137 Wn.2d at 909.

Although not favored, an aggressor instruction is proper where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). The provoking act must be intentional conduct reasonably likely to provoke a belligerent response.

State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989). It cannot be words alone. *Riley*, 137 Wn.2d at 912-13. And, it cannot be the charged assault. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

2. Discussion

After hearing arguments of counsel regarding whether it was appropriate to give the first aggressor instruction, the Court ruled it was proper under the facts of the case:

> THE COURT: Thank you. Counsel, let me be a little more efficient then. 16.04, I'll just read it for the record. I don't have the -- my Trial and Practice open to that rule but I'll just read the cite as Counsel gave it to me. The instruction reads: "No person may by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense and thereupon kill, use or 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." Mr. Nagy, you are correct that the comments indicate that this instruction should be used sparingly but used sparingly doesn't mean you shouldn't use it when it applies. I think it does apply here and here's why. We've all been listening to the testimony and the testimony was that maybe there's a factual dispute but that's for the jury to decide. ***It really comes down to who was the first aggressor here? Was Mr. Pineyro pushed off the bicycle and attacked by Mr. Gehrke or did it in some fashion happen the other way around wherein Mr. Pineyro in some manner initiated this altercation between these two gentlemen? This is a crucial point in contention so I'm satisfied that 16.04, although it should be used sparingly, absolutely fits into the fact pattern the Court heard in this case*** and I think I would be, frankly, denying the State the opportunity to present its case in full if I didn't give them the

> opportunity to include 16.04. So I'm going to include 16.04. I think this is one of those cases where it should be applied.

RP 734-35 (emphasis added).

The evidence presented at trial supports the court's decision to give the first aggressor instruction. The evidence meets at all three justifications for offering the instruction. First, Mr. Olmstead's testimony establishes that Gehrke kicked Pineyro or Pineyro's bike causing both to fall to the ground *prior* to Pineyro displaying the hammer. His testimony also establishes that Gehrke pulled his knife before Pineyro displayed his hammer.[8] Therefore, Olmstead's testimony provided credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense, and, therefore, an aggressor instruction was appropriate. *See State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); *Kidd*, 57 Wn. App. at 100. Even Gehrke gave an account establishing he kicked the bike and Pineyro over *before* Pineyro threw down his bags and drew a

[8] As Gehrke came around the vehicle he stopped in the street. RP 172. He approached Pineyro who was on the bicycle, and when he got next to him he kicked him. RP 172-174. The bicycle and Pineyro fell down. RP 174. The two men and the bicycle were only a few feet away from Mr. Olmsted. RP 175. Mr. Olmstead recognized what had first appeared to be cell phone in the defendant's hand as being a knife. RP 175. After the defendant pulled out the blade of the knife, the bicyclist, Pineyro, stood up and pulled a hammer out. *Id*.

hammer.[9] From this evidence (1) the jury could reasonably determine the defendant provoked the fight, and (3) the evidence shows that the defendant made the first move by drawing a weapon.

Gehrke's trial testimony may establish that (2), the evidence conflicts as to whether the defendant's conduct provoked the fight. He testified that Pineyro used words indicating he was ready to fight and was armed. Therefore, the evidence supports the trial court's decision to give the first aggressor instruction, especially where, as here, the trial court also gave the "no duty to retreat" instruction.

C. THE EVIDENCE SUPPORTS THE TRIAL COURT'S DECISION TO REFUSE TO INSTRUCT THE JURY ON WITHDRAWAL AS REVIVING SELF-DEFENSE WAS PROPER WHERE THERE WAS NO EVIDENCE SUGGESTING THE DEFENDANT WITHDREW FROM THE AFFRAY AT ANY TIME.

Gehrke claims the trial court should have given a "withdrawal" instruction that would revive a defendant's ability to claim self-defense after losing the right where it is clear he was the first aggressor. Citing *State v. Craig*, 82 Wn.2d 777, 514 P.2d 151 (1973); *State v. Wilson*, 26 Wn.2d 468,

[9] Gehrke stated that when Pineyro remarked "I've got something for you bitch," he kicked his bike, causing Pineyro and his bike to fall to the ground. Ex. P-92 at 8:45:25. After falling to the ground, Pineyro threw off his bags and pulled out a hammer. *Id.* at 8:45:32.

174 P.2d 553 (1946); and *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990), he offered the following instruction:

> As a general rule, one who is the aggressor or who provokes an altercation in which another is killed cannot invoke the right of self-defense to justify or excuse the homicide. However, the right of self-defense is revived as to the aggressor or the provoker if that person in good faith withdraws from the combat at such time and in such a manner as to clearly apprise the other person that he or she was desisting or intended to desist from further aggressive action.

CP 88.

After discussing the unpredictability of using non-WPIC instructions the trial court ruled the facts of this case did not warrant instruction the jury on the revival of self-defense:

> THE COURT: But even if that [the non-WPIC unpredictability issue] wasn't the case that was causing me concern, I just don't think defense has proposed what I'll call *State v. Craig*, *State v. Wilson* instruction fits the fact pattern that the Court has heard to this point and that's why I gave Mr. Nagy sort of a hypothetical if the defendant in this case had backed up and walked away or run away and was chased by the decedent, and Mr. Schmidt as always does a great job of suggesting that's really to some extent what has happened. I don't think that's what the evidence suggests, not to the extent I should be giving this instruction. I'll decline the defense request for what I'll call the *State v. Craig* instruction and, Counsel, I'm going to file that in the court file so there's no misunderstanding if the appellate courts are looking at this later what we were talking about since it's not an instruction in the WPICs.

The trial court's decision was well-founded. The facts did not warrant such an instruction.

1. Standard of review.

A defendant is not entitled to an instruction unsupported by evidence. *State v. Ager,* 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The trial court will not allow an instruction on a particular theory if there is no evidence from which a jury could reasonably infer the existence of that theory. *See id.* at 96. When evidence of any element of a defense is lacking, the trial court will not give the requested instruction. *Id.* at 95. A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky,* 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

2. Discussion

Gehrke never testified he was retreating in the sense of withdrawing from the combat at such time and in such a manner as to clearly apprise Pineyro that he was desisting or intending to desist from further aggressive action. Indeed, Gehrke testified to just the opposite. When Gehrke reenacted the fight [on video], he described how Pineyro was swinging the hammer, telegraphing his blows, and how he, Gehrke, was able to avoid the blows, dodging, then seeking his opportunity to attack with the knife. Ex. P-92 at

8:35:50-8:36:1; RP 688. Gehrke even noted that it was obvious that "the guy doesn't know how to fight or even how to nail in a nail." Ex. P-92 at 8:36:25; RP 711. Gehrke testified that throughout the encounter, *he was not retreating* or leaving the scene. RP 709. He was not the type to run away from a fight. RP 705. Gehrke may have backed up 17 feet, dodging and parrying d'Artagnan-like while looking for his opportunity to strike a knife blow, but he never retreated in a manner that would clearly apprise Pineyro that he was desisting or intending to desist from further aggressive action. In *Dennison*, *supra*, the Washington Supreme Court found that the trial court correctly refused the defendant's proposed self-defense instruction in a prosecution for felony murder because the defendant did not drop his gun or surrender and did not "clearly manifest a good faith intention to withdraw from the burglary or remove the decedent's fear." *Dennison*, 115 Wn.2d at 618. Likewise, here, there was no error in the trial court's refusal to give an instruction unsupported by the evidence.

V. CONCLUSION

The trial court did not abuse its discretion in allowing an amendment of the information before the state rested its case in chief where the evidence was unchanged and self-defense remained as the only real issue to be decided by the jury. The evidence supported the trial court's decision to give the first aggressor instruction. The trial court's decision to refuse to instruct

the jury on withdrawal as reviving self-defense was correct because there was no evidence suggesting the defendant withdrew from the affray at any time.

Dated this 27 day of April, 2017.

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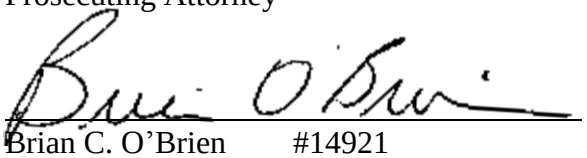

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. MICHAEL LEE GEHRKE, Respondent.	NO. 34360-0-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on April 27, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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4/27/2017	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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