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NO. 97183-8

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THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ROBERT GROTT,

Respondent.

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Court of Appeals Cause No. 50415-4-II  
Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 13-1-04668-9

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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## I. INTRODUCTION

Robert Grott and Julian Thomas were former friends who turned into bitter enemies. The enmity between the two began when Grott blamed Thomas for stealing his gun. A war of words commenced with Grott threatening to kill Thomas and his sister. Thomas retaliated to these threats by shooting at Grott's home and then threatening to kill Grott "on sight."

In February 2006, Grott was skateboarding near a convenience store when he saw Thomas standing with a group of people in the parking lot. What happened next was disputed. Per the prosecution, Grott began to act strangely and then proceeded toward Thomas. Grott fired 48 rounds at Thomas, reloading his firearm three times, while saying, "Did I get the [N-word]," "I'm going to kill the [N-word]," "Where is that [N-word]," and, "Where did the [N-word] go." Per the defense, when Thomas saw Grott, Thomas quickly reached into his car to grab a gun. Grott believed Thomas was going to make good on his threats and began shooting toward Thomas in self-defense. Thomas' body was found in his car on top of a loaded gun.

At trial, the court instructed the jury regarding self-defense and also gave the first aggressor instruction, which advised the jury that the initial aggressor could not later claim self-defense against the belligerent response he caused. Grott did not object to this instruction.

Grott was convicted of second-degree murder and multiple assaults. He appealed his convictions. The Court of Appeals reversed Grott's convictions finding that Grott's claim that the trial court erred in giving the jury the first aggressor instruction was both cognizable on appeal and had merit. This Court granted review of the Court of Appeals' decision.

Grott's claim is not cognizable on appeal because he failed to object to the first aggressor instruction at trial and failed to demonstrate that the giving of this instruction constituted "manifest constitutional error." The first aggressor instruction did not implicate any constitutional rights and, even if it did, Grott failed to demonstrate how any "error" actually prejudiced him at trial. Moreover, even if cognizable on appeal, Grott's claim of instructional error should be rejected on the merits because more than sufficient evidence warranted the giving of the first aggressor instruction and, even if given in error, any such error was harmless beyond a reasonable doubt. Finally, Grott has failed to demonstrate that his trial counsel rendered ineffective assistance in declining to object to this instruction. This Court should reverse the Court of Appeals' decision and affirm Grott's convictions.

## **II. ASSIGNMENTS OF ERROR**

1. The Court of Appeals erred in finding that the trial court committed manifest constitutional error by giving the first aggressor instruction and thus concluding that Grott's claim

of instructional error was cognizable on review despite the lack of an objection to this instruction at trial.

2. The Court of Appeals erred in finding that insufficient evidence warranted the giving of the first aggressor instruction and in concluding that any such instructional error was not harmless beyond a reasonable doubt.

### III. RESTATEMENT OF THE ISSUES

- A. Did Grott forfeit his ability to raise on appeal his claim that the trial court erred in giving the first aggressor instruction where he failed to object to this instruction at trial and failed to demonstrate that the giving of this instruction constituted manifest constitutional error?
- B. Did the trial court properly instruct the jury with the first aggressor instruction where more than sufficient evidence was presented that Grott was the first aggressor?
- C. Even if the trial court erred in instructing the jury with the first aggressor instruction, was any such "error" harmless beyond a reasonable doubt?
- D. Did Grott's trial counsel render ineffective assistance by declining to object to the trial court giving the first aggressor instruction?

### IV. STATEMENT OF THE CASE

In the interests of judicial economy, the State adopts the Statement of the Case set forth in the State's Petition for Review.

### V. ARGUMENT

- A. **GROTT HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT COMMITTED MANIFEST CONSTITUTIONAL ERROR IN GIVING A FIRST AGGRESSOR INSTRUCTION AND HAS THUS FORFEITED HIS CLAIM OF ERROR BY FAILING TO OBJECT TO THIS INSTRUCTION IN THE TRIAL COURT**

At trial, after the trial court agreed to Grott's request to instruct the jury on self-defense, the prosecutor requested that the trial court give a first

aggressor instruction. CP 1035. Grott did not object to this request and the trial court instructed the jury accordingly. RP 2215-18. The Court of Appeals found that despite Grott's lack of objection to the trial court's giving of the first aggressor instruction, he was allowed to raise his claim of instructional error on appeal because it determined that the trial court committed manifest constitutional error in giving the first aggressor instruction. *State v. Grott*, No. 50415-1-II, 2019 WL 1040681, at \*2-3 (Wash. Ct. App. March 5, 2019) (unpublished) ("*Grott*").

The Court of Appeals erred in finding that Grott's claim was cognizable on appeal. The Court of Appeals failed to hold Grott to his burden of demonstrating that any "error" in giving the first aggressor instruction constituted "manifest constitutional error." Instead, the Court of Appeals simply *assumed* that any constitutional error is by definition "manifest error" and improperly shifted the burden to the State to demonstrate that such an "error" was harmless beyond a reasonable doubt. *Grott* at \*3 ("We presume that an error of constitutional magnitude is prejudicial, and the State bears the burden of proving that the error was harmless"). This Court accepted review of the Court of Appeals' opinion, in part, to determine whether a trial court's decision to give a first aggressor instruction is manifest constitutional error that can be raised for the first time on appeal. *State v. Grott*, 447 P.3d 161 (2019).

This Court should answer this question in the negative. A trial court's decision to give a first aggressor instruction, even if in error, is not an "error of constitutional magnitude." Even if it were, a defendant must still show that such a constitutional error was "manifest." To do so, contrary to the Court of Appeals' decision, such a defendant must demonstrate that he was actually prejudiced at trial *and* this prejudice must be apparent from the record. Here, Grott has failed to demonstrate any such actual and substantial prejudice. Accordingly, this Court should reverse the decision of the Court of Appeals finding manifest constitutional error and find that by failing to object to the first aggressor instruction at trial, Grott has forfeited his ability to raise this claim of instructional error on appeal.

An appellate court will generally not consider any claim of error that was not first raised in the trial court. *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). Appellate courts "will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *Id.* at 98. One exception to this general rule is a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

In order to demonstrate such a manifest error under RAP 2.5(a)(3), a defendant must demonstrate both (1) an error of constitutional magnitude and (2) the error is manifest. If the reviewing court determines that the

defendant has claimed a manifest constitutional error, the error is still subject to review for harmless error. *O'Hara*, 167 Wn.2d at 98. “These gatekeeping questions open meritorious constitutional claims to review without treating RAP 2.5(a)(3) as a method to secure a new trial every time any error is overlooked.” *State v. Lamar*, 180 Wn.2d 576, 582, 327 P.3d 46 (2014) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

This “exception” in a narrow one, affording review only of “certain constitutional questions.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Permitting every constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is a waste of limited resources. *McFarland*, 127 Wn.2d at 333; *Scott*, 110 Wn.2d at 685.

An appellate court thus must first determine whether the alleged error impacts a constitutional interest. “We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error.” *O'Hara*, 167 Wn.2d at 98. If the court determines that the alleged error impacts a constitutional interest, it looks next to whether the error is manifest.

The actual prejudice analysis to determine a manifest error is separate from a harmless error analysis. A harmless error analysis occurs

*after* the reviewing court determines that there was a manifest constitutional error. *O'Hara*, 167 Wn.2d at 99. The focus of the actual prejudice analysis is *whether the error is obvious on the record that had a practical and identifiable consequence at trial. Id.* at 99-100.

In the instant case, any “error” committed by the trial court in giving a first aggressor instruction was not an error of constitutional magnitude. The Court of Appeals found that “the first aggressor instruction implicates a defendant’s constitutional rights.” Because such an instruction informs the jury that self-defense is not available to a defendant if the jury finds that the defendant was the initial aggressor, the court reasoned that such an instruction implicates “Due Process” because it relieved the prosecution of its obligation to prove every element of a crime, which here includes the “absence” of self-defense, beyond a reasonable doubt. *Grott* at \*2-3.

However, appellate courts cannot just *assume* that an alleged error is of constitutional magnitude. *O'Hara*, 167 Wn.2d at 98. In fact, this Court has cautioned that not all instructional error that happens to touch upon a constitutional right is an error of constitutional magnitude. Jury instructions must “properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). The failure to instruct a jury on every element of a charged crime is an error of constitutional magnitude.

*State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); *Scott*, 110 Wn.2d at 689. However, “[a]s long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992).

Here, the first-aggressor instruction “properly inform[s] the jury of the applicable law, [does] not mislead the jury, and permit[s] each party to argue its theory of the case.” *Bennett*, 161 Wn.2d at 307. Rather than relieving the prosecution of its burden of proving every element of a crime beyond a reasonable doubt, it is undisputed that the jury was properly instructed on all of the elements of the crimes charged in addition to the requirement of the prosecution to prove the absence of self-defense beyond a reasonable doubt. The first aggressor instruction just allows the prosecution to prove the absence of self-defense by convincing the jury beyond a reasonable doubt that the defendant was the first aggressor and is thus precluded from claiming self-defense.

Contrary to the Court of Appeals implicit finding that any instruction touching on self-defense is of constitutional magnitude, the first aggressor instruction does not implicate any of the “bedrock” criminal justice interests that courts have long held impact constitutional rights. *See Bennett*, 161 Wn.2d at 315 (finding that the presumption of innocence “is

the bedrock upon which the criminal justice system stands”); *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (finding that instructions that misstate reasonable doubt or shift the burden of proof to the defendant are constitutional errors).<sup>1</sup> Rather, this instruction properly allows the prosecution to prove beyond a reasonable doubt the “absence of self-defense” by demonstrating beyond a reasonable doubt that the defendant was the first aggressor. As the jury was properly instructed on all of the elements of the crimes, including what constitutes self-defense, any “error” here in instructing the jury with the first aggressor instruction constituted only instructional error. As Grott failed to object to any such instructional error at trial, he has forfeited his ability to raise this claim of error for the first time on appeal.

Even if this Court finds that the giving of a first aggressor instruction *does* implicate a defendant’s constitutional rights, this Court should still find Grott’s claim of error forfeited as he has failed to show that such an error was “manifest.” Here, the Court of Appeals erred by finding, in essence, that *any* error of constitutional magnitude is “manifest” error and

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<sup>1</sup> Grott’s reliance on *State v. Kalebaugh*, 183 Wn.2d 578, 355 P.3d 253 (2015), is therefore misplaced. Answer to Petition for Review at 5-6. This case, too, discusses the “bedrock” constitutional principle of the presumption of innocence and the prosecution’s burden of proof. The State does not dispute that instructions that impact such principles are of constitutional magnitude. Here, however, as set forth above, the first aggressor instruction does not implicate this category of constitutional concern.

thus improperly shifted the burden to the State to prove the harmlessness of this error beyond a reasonable doubt. *Grott* at \*3. In doing so, that court ruled contrary to this Court's consistent holdings and should be reversed.

Without an affirmative showing of actual prejudice by the defendant, any asserted error of constitutional magnitude is not "manifest" and thus not reviewable for the first time on appeal under RAP 2.5(a)(3). *McFarland*, 127 Wn.2d at 334. After determining that an error is of constitutional magnitude, an appellate court must *then* determine whether such an error was manifest. *O'Hara*, 167 Wn.2d at 99. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences at trial. *Kirkman*, 159 Wn.2d at 935. It is not enough for the defendant to merely allege prejudice — actual prejudice must appear in the record. *McFarland*, 127 Wn.2d at 334. "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest', allowing appellate review." *Id.* at 333. Any harmless error analysis occurs *after* the court determines that the error is a manifest constitutional error. *O'Hara*, 167 Wn.2d at 99.

Although there is authority holding that where a defendant objects *at trial* to a first-aggressor instruction, and the instruction was erroneously given, the State bears the burden of establishing beyond a reasonable doubt that the error was harmless. *State v. Stark*, 158 Wn. App. 952, 958, 244 P.3d 433 (2010); *State v. Birnel*, 89 Wn. App. 459, 472-73, 949 P.2d 433 (1998). However, a very different standard applies when the defendant raises the issue for the first time on appeal and the “manifest error” test is implicated. The manifest constitutional error test “is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’ The exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” *Scott*, 110 Wn.2d at 687 (citations omitted).

Here, Grott has failed to meet his burden of showing, based on the record, that he was *actually* prejudiced by the trial court instructing the jury with the first aggressor instruction. Thus, he has failed to demonstrate that any error, even if of constitutional magnitude, was “manifest” and his claim of error is thus not cognizable on appeal. However, even if belatedly given the opportunity to attempt to demonstrate “manifest” constitutional error, the record belies Grott’s contention.

The first aggressor instruction provides that self-defense is not available as a defense only if the jury finds beyond a reasonable doubt (1)

that the defendant's intentional acts were reasonably likely to provoke a belligerent response from the victim; and (2) that it was this belligerent response that the defendant asserts was the basis for his need to act in self-defense. If there was no evidence that the defendant was the aggressor, and the instruction was given in error, then the only conclusion is that the instruction was inapplicable and superfluous. The jury would simply disregard the instruction. The jury "could still come to the correct conclusion" and would come to the correct conclusion. *See O'Hara*, 167 Wn.2d at 103.

In the present case, Grott cannot show that he was prejudiced by the first aggressor instruction such that it had practical and identifiable consequences at trial. Grott's theory of the case was that the victim, Thomas, was armed with a loaded gun and was "engaging" with the defendant. RP 2284-89. Grott argued that he feared for his life and acted in self-defense and that it was Thomas who was the aggressor based on the events leading up to the shooting. RP at 2287-90. This allowed Grott to focus on Thomas' prior shooting at his house and Thomas' repeated threats to kill him as part of the provoking incident that led to the shooting and supported his self-defense claim. Thus, the defense presented conflicting evidence as to who provoked the violent encounter. Under these

circumstances, Grott cannot show actual prejudice in giving an instruction that he did not object to and that was actually part of his theory of the case.

Furthermore, despite Grott's claim of self-defense, no reasonable juror would find that Grott's use of force was reasonable force that a reasonably prudent person would find necessary under the circumstances and "not more than necessary." *See* CP 1029-35. Grott's unprovoked gun attack involved him marching directly at Thomas in his car and firing 48 rounds, reloading multiple times, without Thomas getting off a single shot. There is no indication in the record that Thomas even saw Grott before Grott started shooting. No reasonable juror would find self-defense under the circumstances of this case. Thus, Grott has not shown that he was prejudiced such that the instruction had practical and identifiable consequences at trial. This Court should therefore reverse the Court of Appeals and find that Grott forfeited his claim of instructional error.

**B. EVEN IF COGNIZABLE ON REVIEW, THE TRIAL COURT PROPERLY GAVE THE FIRST AGGRESSOR INSTRUCTION AND ANY ERROR IN GIVING SUCH AN INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT**

Even if this Court finds that Grott's claim of instructional error is cognizable on review, this Court should reject Grott's claim on the merits because sufficient evidence was presented to warrant the trial court's giving

of this instruction and any error in giving such an instruction was harmless beyond a reasonable doubt.

The Court of Appeals found that insufficient evidence was presented at trial to warrant this giving of a first aggressor instruction. That court based its decision solely on the rationale that the first intentional provocative act that a “jury could reasonably assume would provoke a belligerent response by the victim” cannot be part of the charged incident to which self-defense is claimed. *Grott* at \*3-4. This Court accepted review, in part, to consider whether a defendant’s charged conduct can be considered in assessing whether to give a first aggressor instruction. *Grott*, 447 P.3d 161.

This Court should answer this question in the affirmative. The Court of Appeals’ analysis and holding were both incomplete and contrary to this Court’s previous holdings finding that the initial intentionally provocative act *can* be part of the charged conduct to warrant a first aggressor instruction. And here, based on Grott’s overall conduct, more than sufficient evidence was presented for a rational jury to find that Grott was the first aggressor and therefore self-defense was not available to him. This Court should reverse the Court of Appeals’ decision and find that the trial court properly instructed the jury.

Courts review de novo whether sufficient evidence justifies a first aggressor instruction. *Stark*, 158 Wn. App. at 959. Whether the evidence was sufficient to support giving the instruction must be viewed in the light most favorable to the party requesting the instruction. *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005). In order to support a first aggressor instruction, the State need only produce some evidence that the defendant was the aggressor. *Stark*, 158 Wn. App. at 959 (citing *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999)). This Court has held that a trial court properly submits a first aggressor instruction 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. *Riley*, 137 Wn.2d at 909-10.<sup>2</sup>

The Court of Appeals did not address all of the above scenarios that warrant a first aggressor instruction. The court noted that a first aggressor

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<sup>2</sup> Although this Court in *Riley* mentioned in dicta that "courts should use care in giving an aggressor instruction" (*Riley*, 137 Wn.2d at 910 n. 2), this caution appears to stem from dicta in a decision from the Court of Appeals, *State v. Arthur*, 42 Wn. App. 120, 125, 708 P.2d 1230 n. 1 (1985) ("Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction"). The court in *Arthur*, however, was analyzing a previous version of WPIC 16.04, which used the phrase "[n]o person may by any unlawful act create a necessity for acting in self-defense . . ." WPIC 16.04 was amended in 1986 to delete the word "unlawful" and amend the phrase to read "by any intentional act reasonably likely to provoke a belligerent response ..." See *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039 (1989). Accordingly, the current version of the first aggressor instruction should be given when warranted by the evidence.

instruction is appropriate where there is credible evidence that the defendant provoked the need to act in self-defense. *Grott* at \*3. Relying on *State v. Sullivan*, 196 Wn. App. 277, 383 P.3d 574 (2016), the Court of Appeals held that the trial court erred in giving the first aggressor instruction because the provoking act “cannot be the actual charged incident to which self-defense is claimed.” *Grott* at \*3. At the same time, the Court of Appeals overlooked the language in *Sullivan* indicating that the provoking act can be part of a “single course of conduct” that leads to the assault. *See Sullivan*, 196 Wn. App. at 290.

The Court of Appeals’ ruling that the provoking act cannot be part of the charged assault is contrary to this Court’s decisions in *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986) and *State v. Gregory*, 79 Wn.2d 637, 488 P.2d 757 (1971), overruled on other grounds by *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974). In both *Hughes* and *Gregory*, there was evidence that the defendant initiated the attack against the victim and thus, anything the victim may have done in defensive response could not have been used to support a claim of self-defense. In both cases, a first aggressor instruction was appropriate despite the fact that the provoking act was part of the charged act. Thus, the provoking act justifying a first aggressor instruction can be part and parcel of the charged crime.

This Court has also held that a first aggressor instruction is appropriate where the defendant made the first move by drawing a weapon. *Riley*, 137 Wn.2d at 909-10; *Wingate*, 155 Wn.2d at 823. In *Wingate*, it was undisputed that the defendant was the only person to draw a gun and aim it at another person. *Wingate*, 155 Wn.2d at 823. It was this “aggressive conduct” that warranted giving a first aggressor instruction. *Id.*

In the instant case, the first aggressor instruction was warranted because, based on the entirety of Grott’s conduct, more than sufficient evidence was presented to support a finding that Grott was the initial aggressor who committed the first intentionally provocative act. Not only was there credible evidence that Grott made the first move by drawing a weapon but also that he provoked the entire incident. Viewing the evidence in the light most favorable to the State, Grott was angry that Thomas had stolen his gun, shot into his house, and threatened to kill him. RP at 1457, 1766-75, 1818-19. The State presented evidence that Grott decided to retaliate and kill Thomas and that he provoked the incident at the convenience store. Witnesses heard the defendant yelling various things during the shooting, including “Where is that [N-word] at?” and “I’m going to kill the [N-word].” and “You are not getting away with shooting at my house.” RP at 691-92, 790, 797, 801, 863. The jury likely found that Grott was the first one to take an aggressive act by walking toward Thomas’ car

and pulling his gun. Grott subsequently advanced on Thomas' car and fired at least 48 shots, having to stop, pause, and reload multiple times.

The jury could have reasonably concluded that Thomas did nothing wrong and only reached for his gun after Grott pulled out a gun and started shooting at him. Given that Thomas' body was found on top of a loaded handgun, it was likely he was holding that gun before he was killed, as the defense argued. RP at 2279-89. The question for the jury was whether Grott was entitled to claim self-defense based on Thomas reaching for a gun or arming himself with a gun when he did so only because "the defendant made the first move by drawing a weapon" and "the defendant's conduct precipitated [the] fight." *See Riley*, 137 Wn.2d at 910. These were exactly the kinds of considerations that made a first aggressor instruction appropriate. The jury understandably rejected Grott's self-defense claim where the evidence indicated he fired 48 rounds at Thomas, reloading his firearm multiple times, without Thomas getting off a single shot.

Finally, Grott's alternate theory of the case also supported a first aggressor instruction. In closing, Grott argued that he feared Thomas was going to make good on his threat to kill him and he knew Thomas was armed from prior events. RP at 2279-90. This theory was supported by a "ready-to-fire" gun found under Thomas' hand. *See* RP at 2279-89. Grott argued that it was Thomas who was the aggressor based on all the events leading

up to the shooting. RP at 2290. Thus, even under Grott's theories of the case, the first aggressor instruction was warranted because he introduced conflicting evidence that Thomas was the aggressor and provoked the incident.

However, even if the trial court erred by giving the jury the first aggressor instruction, any such error was harmless beyond a reasonable doubt. Even if a defendant has demonstrated manifest constitutional error, such an error is still subject to a harmless error review. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) ("If an error of constitutional magnitude is manifest, it may nevertheless be harmless. . . . The burden of showing an error is harmless remains with the prosecution. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967) (establishing State's burden to show harmless error beyond a reasonable doubt)); *accord, McFarland*, 127 Wn.2d at 333.

Here, the jury was instructed that if, and only if, it found beyond a reasonable doubt that Grott was the aggressor, the defense of self-defense was not available to Grott. CP 1035. At trial, Grott's defense was one of pure self-defense - he argued that he was not the initial aggressor and that he only acted in self-defense after he accidentally encountered Thomas and either saw Thomas reach for his gun or otherwise reasonably believed that his life was in danger. Accordingly, if the jury believed the defense theory,

it would have acquitted Grott based on self-defense, notwithstanding the first aggressor instruction, because the jury would have necessarily had to conclude that Grott was not the initial aggressor. In other words, even if the trial court erred in concluding that sufficient evidence was presented to warrant the giving of a first aggressor instruction, such an instruction had absolutely no impact on the jury as the jury would not have even had to consider this instruction if it found that the victim was the aggressor and Grott was acting in self-defense. Simply put, if there were no factual basis to give the first aggressor instruction, there is no basis to conclude that the jury nevertheless used this instruction to defeat Grott's claim of self-defense.<sup>3</sup> Accordingly, any error in giving the initial aggressor instruction was harmless beyond a reasonable doubt.

**C. GROTT'S DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE WHEN HE DECLINED TO OBJECT TO THE TRIAL COURT INSTRUCTING THE JURY WITH THE FIRST AGGRESSOR INSTRUCTION**

In his Answer to Petition for Review, Grott claims that he was prejudiced by his trial counsel's deficient performance in "failing" to object to the first aggressor instruction. Notably, although Grott accurately sets

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<sup>3</sup> This is especially true given the present circumstances where overwhelming evidence was presented that Grott's unprovoked gun attack involved him marching directly at Thomas and firing 48 rounds, reloading multiple times, without Thomas getting off a single shot. There is no indication in the record that Thomas even saw Grott before he started shooting. Again, although the first aggressor instruction had no impact on the jury's determination of whether Grott acted in self-defense, no reasonable juror would find self-defense under the circumstances of this case in any event.

forth the law regarding ineffective assistance of counsel, he fails to apply the facts of this case to the law, relying instead on the Court of Appeal's incorrect determination that it was reversible error for the trial court to give the first aggressor instruction. Answer to Petition for Review at 13-17. Grott's claim should be rejected.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that "(1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). An appellate court presumes that the defendant was properly represented and that performance was not deficient. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 335. Prejudice results when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v.*

*Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If either part of the test is not satisfied, the inquiry ends. *Lord*, 117 Wn.2d at 883–84.

Here, Grott fails to show that his trial counsel rendered deficient performance. As set forth above, more than sufficient evidence was presented to support the giving of the first aggressor instruction and counsel does not perform deficiently by failing to make a warrantless objection. In addition, as Grott's counsel undoubtedly recognized the dispute in the evidence regarding who was the initial aggressor, trial counsel properly concluded that such an instruction was eminently proper.

In any event, as set forth above, there is no reasonable probability that, even if trial counsel objected to the giving of this instruction, the result of the trial would have been different. First, as sufficient evidence warranted the giving of the first aggressor instruction, any objection would likely have been overruled. However, even if the trial court would have agreed with defense counsel and declined to give the jury this instruction, as demonstrated above, the lack of such instruction would not, and could not, have impacted the jury's findings. Finally, there remains the overwhelming evidence, outlined above and not repeated here, demonstrating that Grott did not act in self-defense and that no reasonable jury would have found that he did, with or without this instruction.

Therefore, Grott has failed to demonstrate that trial counsel rendered deficient performance and that this deficient performance prejudiced him. Therefore, this Court should reject Grott's attempt to circumvent the forfeiture rule and deny his claim of ineffective assistance of counsel.

## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the Court of Appeals' decision and affirm Grott's conviction.

RESPECTFULLY SUBMITTED this 4th day of October, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

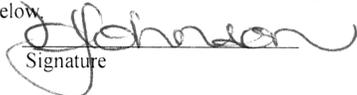


THEODORE M. CROPLEY WSB# 27453  
Deputy Prosecuting Attorney

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The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

10/4/19  
Date

  
Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**October 04, 2019 - 10:46 AM**

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