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

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. 16-1-00509-0

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**PETITION FOR REVIEW**

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A. IDENTITY OF PETITIONER

The Petitioner, State of Washington, Respondent below, seeks review as outlined below.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the March 5, 2019 unpublished decision of the Court of Appeals in *State v. Grott*, No. 50415-4-II, 2019 WL 1040681, which reversed the defendant's convictions of murder in the second degree and seven counts of assault in the first degree. Appendix A. On April 9, 2019, the Court of Appeals denied the State's timely motion for reconsideration. Appendix B. This petition for review follows.

C. ISSUES PRESENTED FOR REVIEW.

1. Should this Court accept review of a significant issue of constitutional law involving whether a trial court's decision to give a first aggressor instruction is a manifest error of constitutional magnitude that may be raised for the first time on appeal?
2. Should this Court accept review to provide clarification to lower courts as to whether a defendant's charged conduct can be considered in assessing whether to give a first aggressor instruction?

D. STATEMENT OF THE CASE

1. Procedure

The jury convicted Robert Grott (hereafter, defendant) of one count of second degree murder and seven counts of first degree assault.

CP at 1040-58. The trial court's instructions to the jury included self-defense instructions and a first aggressor instruction. CP at 994-1039. The court gave the following 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 and thereupon 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 to murder, manslaughter or assault.

CP 1035. The defendant did not object to the first aggressor instruction. RP at 2215-18.

## 2. Statement of Facts<sup>1</sup>

The defendant's murder of Julian Thomas was the product of a falling out between the one-time friends. The defendant blamed Thomas for stealing a gun from his home, which subsequently led to an incident at the defendant's home on Halloween night in 2015. RP at 1457, 1766-75. The defendant threatened to kill Thomas and assault Thomas' sister. RP 1458. Thomas' sister testified that the defendant told her, "when I see that [N-word], I'm going to kill him. I'm going to dismantle. [sic] I'm going to dismember him." RP at 1458. The defendant had to be restrained by others and threatened to assault Thomas' sister in hopes of getting Thomas

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<sup>1</sup> The facts are largely presented in the light most favorable to the State, which is the standard for assessing the sufficiency of the evidence to give a first aggressor instruction. See *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

to come out from hiding. RP at 1458-59. This may have led Thomas to respond to the defendant's home and fire a single shot into the residence, nearly hitting the defendant. RP at 1775-78. Afterwards, a witness testified that Thomas called someone in the home and threatened to shoot the defendant "on sight." RP at 1788. No one called law enforcement. RP at 1538.

After that night, according to the defendant's own witness, Thomas "just disappeared." RP at 1789. Another witness testified that they never heard from Thomas again and assumed it was all over and that nothing else would happen. RP at 1541-43. Nevertheless, there was evidence that the defendant became preoccupied with additional threats from Thomas. RP at 1818-19. In January 2016, the defendant told a relative that Thomas was telling everyone that the defendant is "a dead man walking." RP at 1818-19.

On February 1, 2016, it is undisputed that the defendant and Thomas crossed paths by coincidence at a convenience store. *See* RP 659, 767-68, 793-95. Thomas was talking to a friend near his car when the defendant rode by on his skateboard. RP at 767-68, 793-95.

What happened next was disputed. The State presented evidence that the defendant chose to retaliate and kill Thomas outside of the store due to the Halloween incident and Thomas' repeated threats. This was

corroborated by several witnesses at the convenience store who heard the defendant repeatedly yell during the shooting, “Where is that [N-word] at?” and “Where the [N-word] go?” and “I’m going to kill the [N-word].” RP at 691-92, 790, 801, 863. Multiple witnesses and cell phone video showed the defendant in an attack mode as he marched towards Thomas’ car while firing 48 rounds, reloading his firearm three times, and taking no defensive posture to protect himself from Thomas. Ex. 127; RP at 678-80, 744-45, 842, 894.

Petra Smith was with Thomas at the convenience store that day. She and Thomas were standing outside the car when the defendant approached a bus stop on his skateboard at the edge of the store property. RP at 793. She testified that he was pacing back and forth and “acting weird,” as though he was on “some type of drug.” RP at 793-95. According to Smith, in the moments before the shooting started, Thomas was sitting in the car preparing to leave and Smith was leaning in to give him a hug. RP at 788-89. When the shooting started, Thomas pulled Smith into the car and told her to lay low. RP at 792-93. During the shooting, Smith heard the defendant exclaiming, “You are not getting away with shooting at my house,” and “Where did the [N-word] go.” RP at 790, 797, 801. Smith did not know the defendant and did not know anything about the history between Thomas and the defendant, including the prior

shooting at the defendant's house. RP at 793-94, 797. At some point, Thomas told Smith to run from the car because the shooting had nothing to do with her. RP at 796. Smith heeded Thomas' warnings and fled from the car, saving her life. *See* RP at 796.

The defense theory of the case was that the defendant froze when he saw Thomas and then Thomas quickly darted into the car. RP at 649. The defendant feared that Thomas was going for a gun to make good on his threats. RP at 649. He pulled his gun and started firing because he believed his life was in danger. RP at 649. Consistent with this account, when Thomas' body was removed from the car, a loaded .40 caliber pistol was found underneath his body. RP at 1407-08; Ex. 8. There was a live round in the chamber, but the gun was never fired. RP at 1408. In closing argument, the defense argued that the defendant was afraid and acted in self-defense because he "had plenty of reasons to believe Mr. Thomas intended to kill him." RP 2287-88. He stressed the fact that a "ready-to-fire gun" was found directly underneath Thomas' hand. RP at 2289. The defendant argued that it was Thomas who was the aggressor based on the events leading up to the shooting. RP at 2290. At the conclusion of trial, the jury convicted the defendant on all counts. CP 1040-58.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE DECISION TO GIVE A FIRST AGGRESSOR INSTRUCTION IS A MANIFEST ERROR OF CONSTITUTIONAL MAGNITUDE THAT CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

The Court of Appeals erred in concluding that if a defendant fails to object to the first aggressor instruction at trial, he may raise the issue for the first time on appeal as a manifest error of constitutional magnitude. Without an affirmative showing of actual prejudice by the defendant, the asserted error is not “manifest” and thus not reviewable for the first time on appeal under RAP 2.5(a)(3). *See State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). This Court has not addressed whether a defendant may raise an objection to a first aggressor instruction for the first time on appeal. This Court should accept review because this is a significant question of constitutional law and because the decision of the Court of Appeals conflicts with both a Supreme Court decision and a published decision of the Court of Appeals. RAP 13.4(b)(1), RAP 13.4(b)(2), and RAP 13.4(b)(3).

CrR 6.15(c) requires that parties make timely and well-stated objections to any instructions given or refused in order for the trial court to have the opportunity to correct any errors. *State v. Scott*, 110 Wn.2d

682, 685-86, 757 P.2d 492 (1988). This Court has repeatedly refused to review asserted instructional errors to which no meaningful objections were made at trial. *Id.* at 686. The failure to object, which is often tactical, deprives the trial court of the opportunity to prevent or cure the error.

*State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

As a general rule, appellate courts will not consider issues raised for the first time on appeal. *McFarland*, 127 Wn.2d at 332-33; RAP 2.5(a). But a claim of error may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). As an exception to the general rule, RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised in the trial court. *McFarland*, 127 Wn.2d at 333. Rather, the exception is a narrow one, affording review only of “certain constitutional questions.” *Scott*, 110 Wn.2d at 687. 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 (“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.”).

Appellate courts do not assume that an alleged error is of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To raise an issue for the first time on appeal under RAP 2.5(a), the defendant must demonstrate that the error was “manifest” and “truly of constitutional dimension.” *Id.* Courts look at whether the asserted claim, if correct, implicates a constitutional interest as opposed to another form of trial error. *Id.*

After determining that the error is of constitutional magnitude, the appellate court must determine whether the 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 *Kirkman*, 159 Wn.2d at 935). 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. A harmless error analysis occurs *after* the court determines that the error is a manifest constitutional error. *O'Hara*, 167 Wn.2d at 99.

In this case, the Court of Appeals concluded that the first aggressor instruction implicates a defendant's constitutional rights because it obviates the need for the State to prove self-defense as an element of the crime if the jury determines the defendant was the first aggressor. *Grott*, 2019 WL 1040681 at \*3. The Court of Appeals then concluded that “[w]e presume that an error of constitutional magnitude is prejudicial, and the State bears the burden of proving that the error was harmless.” *Id.*

The Court of Appeals erred by presuming that all errors of constitutional magnitude are prejudicial and by placing the initial burden on the State to prove the error was harmless. It is the defendant who must show actual prejudice. *See O’Hara*, 167 Wn.2d at 99; *McFarland*, 127 Wn.2d at 333. When a defendant raises an issue for the first time on appeal, he is the one who bears the burden of showing that the alleged error actually affected his rights and had practical and identifiable consequences at trial. *Kirkman*, 159 Wn.2d at 935.

Here, any error in giving the instruction was not “manifest” and the defendant has not shown actual prejudice. 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.

Further, the defendant cannot show that he was prejudiced by the instruction such that it had practical and identifiable consequences at trial. The defendant’s theory of the case was that Thomas was armed with a loaded gun and was “engaging” with the defendant. RP 2284-89. He argued that the defendant 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 the defendant to focus on Thomas’ prior shooting at the defendant’s house and his repeated threats to kill the defendant 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, the defendant cannot show actual prejudice in giving the instruction that he did not object to and that was part of his theory of the case.

Finally, despite the defendant's claims of self-defense, no reasonable juror would find that the defendant'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. The defendant'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 the defendant before the defendant started shooting. No reasonable juror would find self-defense under the circumstances of this case. Thus, the defendant has not shown that he was prejudiced such that the instruction had practical and identifiable consequences at trial. And any error in giving the instruction was harmless.

This Court should accept review as this case raises a significant question of constitutional law that has not previously been addressed by this Court: Can a first aggressor instruction be challenged for the first time on appeal as a manifest constitutional error? Further, the decision of the Court of Appeals conflicts with this Court's decision in *O'Hara*. In *O'Hara*, this Court held that appellate courts must determine if an error was "manifest," which requires the defendant to show actual prejudice. *O'Hara*, 167 Wn.2d at 99. As this Court explained, it is only after the defendant makes this showing, that the court engages in a harmless error

analysis. *Id.* Rather than “presuming” prejudice, appellate courts must determine on a case-by-case basis whether an unpreserved claim of error regarding self-defense jury instructions constitutes a manifest — i.e. prejudicial — constitutional error. *Id.* at 101.

The decision of the Court of Appeals also conflicts with a published decision from Division I. See *State v. Davis*, 60 Wn. App. 813, 808 P.2d 167 (1991). In *Davis*, the defendant did not object to the first aggressor instruction proposed by the State at trial. *Id.* at 815-16. He raised the issue for the first time on appeal, and the Court of Appeals held that his claim that the trial court erred in giving the first aggressor was not of constitutional magnitude. *Id.* at 23. Because the claimed error was not raised below, the Court declined to review it on appeal. *Id.* Because the decision of the Court of Appeals in this case conflicts with a decision of the Supreme Court and a published decision of the Court of Appeals, this Court should accept review of this issue.

2. THIS COURT SHOULD ACCEPT REVIEW TO PROVIDE CLARIFICATION TO LOWER COURTS ON WHETHER A DEFENDANT’S CHARGED CONDUCT CAN BE CONSIDERED IN ASSESSING WHETHER TO GIVE A FIRST AGGRESSOR INSTRUCTION.

This Court should accept review to clarify the law regarding first aggressor instructions and whether the defendant’s charged conduct can be

taken into account in assessing whether to give a first aggressor instruction. This is an issue of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(4).

Courts review de novo whether sufficient evidence justifies a first aggressor instruction. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). 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.

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 instruction is appropriate where there is credible evidence that the defendant provoked the need to act in self-defense. *Grott*, 2019 WL

1040681 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*, 2019 WL 1040681 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 decision in *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986). In *Hughes*, officers approached the defendant’s truck with guns drawn to make an arrest and a gun battle ensued, during which the defendant shot and killed an officer. *Id.* at 178-79. This Court held that the trial court properly gave the first aggressor instruction because there was credible evidence from which the jury could reasonably conclude that it was the defendant who provoked the gun battle by shooting first. *Id.* at 191-92. Thus, in *Hughes*, the provoking act and the charged act were the same, *i.e.*, shooting at the victim officers.

Similarly, in *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), this Court upheld the giving of a first aggressor instruction where there was evidence that the defendant was the aggressor because he fired the first shot. *Gregory*, 79 Wn.2d at 638-39, 645-46. In *Gregory*, there was a “shoot out” between the defendant and a cab driver with conflicting evidence as to who was the aggressor. *Id.* at 638-39. The Court found it significant that there was evidence which, if believed, established that the defendant was the aggressor. *Id.* at 645-46. Notably, the provoking act and the charged act were the same, *i.e.*, shooting at the cab driver.

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 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; *State v. Wingate*, 155 Wn.2d 817, 823, 122 P.3d 908 (2005). 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.* Here, there was credible evidence that the defendant made the first move by drawing his weapon. Thus, under *Riley* and *Wingate*, the first aggressor instruction was appropriate.

The first aggressor instruction was also appropriate because there was credible evidence that the defendant not only 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, the defendant 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 defendant had made his own threats to kill Thomas. RP at 1458. The State presented evidence that the defendant 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 could have found that the defendant was the first one to take an aggressive act by walking toward the car and pulling his gun. The defendant 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 the defendant pulled out a gun and started shooting at him. The medical examiner and a defense crime scene reconstruction expert each opined that Thomas was alive and facing the defendant when he was shot in the forehead. RP at 1326, 2106. The medical examiner testified that this injury would have been “immediately fatal.” RP at 1332. 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 the defendant is 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 the defendant’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, the defendant’s alternate theory of the case also supported a first aggressor instruction. In closing, the defendant 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. The defendant 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 the defendant’s theory of the case, the first aggressor instruction was appropriate because he introduced conflicting evidence that Thomas was the aggressor and provoked the incident.

Thus, the facts at trial supported a first aggressor instruction under *Riley*. But the Court of Appeals held that the instruction was given in error because the provoking act cannot be part of the charged incident. This holding adds another layer to first aggression instructions that this Court has not addressed. This Court should accept review to provide guidance to lower courts on the application of first aggression instructions in self-defense cases.

F. CONCLUSION

This court has narrowly construed RAP 2.5, recognizing that permitting every constitutional claim to be raised for the first time on appeal undermines the trial process and runs contrary to a myriad of significant interests. This Court should accept review to determine whether a trial court’s decision to give a first aggressor instruction is a manifest error of constitutional magnitude that may be raised for the first

time on appeal. Further, this Court should accept review of whether a defendant's charged conduct may be considered in determining whether to give a first aggressor instruction in order to provide guidance and clarity to lower courts. The State respectfully requests that the Court grant review in this matter.

DATED: May 9, 2019

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Certificate of Service:

The undersigned certifies that on this day she delivered by *efile* U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his 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.

*5/9/19* *[Signature]*  
Date Signature

# **APPENDIX “A”**

*Unpublished Opinion*

## WESTLAW

2019 WL 1040681

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

**State v. Grott**

Court of Appeals of Washington, Division 2. | March 5, 2019 | Not Reported in Pac. Rptr. | 2019 WL 1040681 (Approx. 6 pages)

STATE of Washington, Respondent,

v.

Robert Deshawn GROTT, Appellant.

No. 50415-4-II

March 5, 2019

Appeal from Pierce County Superior Court, 16-1-00509-0, Honorable Bryan E. Chushcoff, Judge.

**Attorneys and Law Firms**

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## UNPUBLISHED OPINION

Worswick, J.

\*1 A jury found Robert Grott guilty of second degree murder of Julian Thomas and seven counts of first degree assault. Grott appeals, arguing that the trial court erred by giving a first aggressor jury instruction and that the State failed to present sufficient evidence of the crimes.<sup>1</sup>

We hold that that the trial court improperly instructed the jury on first aggressor and that sufficient evidence supported the convictions; we do not address Grott's remaining arguments. We reverse and remand.

## FACTS

**A. BACKGROUND**

Grott enlisted in the Marines and deployed to Afghanistan. In 2012, after leaving the Marines with an honorable discharge, he returned home to California. Grott's family reported that he had changed after being in Afghanistan.

Sometime in 2015, after experiencing traumatic experiences in California, Grott moved to Tacoma and lived with his brother and two cousins. Grott's cousins were friends with Thomas, and Thomas would spend time at Grott's house. In August 2015, Grott's handgun was stolen. Grott believed that Thomas had stolen it.

October 31, 2015, Grott had an argument, which ended with Thomas shooting Grott's front door, nearly hitting Grott in the head. Thomas continued threatening to kill Grott in the subsequent months. After the October 2015 shooting, Grott experienced a significant increase in anxiety and vigilance, often inspecting his house for potential threats. He also started carrying a gun. Grott became isolated and paranoid. Grott confided in a family member that he was hurting and afraid of someone, and that his life was in danger.

**B. THE SHOOTING**

On February 1, 2016, Grott rode his skateboard past an AM/PM gas station. There were several people in the parking lot and in the convenience store associated with the gas station. From the street, Grott saw Thomas parked in the AM/PM parking lot. Thomas was in his car talking to Petra Smith. Grott began firing his weapon toward Thomas, and

continued to fire as he walked closer. Grott fired 48 rounds, killing Thomas who was facing Grott at the time of the shooting. In the course of the shooting, bullets from Grott's gun shattered the window of the AM/PM store. Thomas died at the scene; no one else was injured. A firearm was found under Thomas's body.

After the shooting, Grott returned to his home. Shortly after, Grott's uncle informed him that Grott was being threatened, and Grott and his brother drove to California where Grott turned himself in.

The State charged Grott with first degree murder of Thomas, and seven counts of first degree assault of the bystanders of the shooting, namely Smith, Tannisha McCollum, Jeanette Basher, Robin Lyons, Shawn Chargualaf, Debora Green, and Karmanita Vaca.

### C. TRIAL

At trial, Grott presented two affirmative defenses: diminished capacity based on PTSD (post-traumatic stress syndrome) and self-defense. Grott presented Dr. Kevin Moore to testify as an expert in support of his diminished capacity defense.

\*2 Dr. Moore is a psychiatrist, retired from the military. He had several years' experience treating marines and combat veterans. Dr. Moore examined Grott, who made statements about the incident to Dr. Moore. Dr. Moore diagnosed Grott with PTSD.

#### 1. Testimony

Dr. Moore testified that he and Grott discussed Grott's childhood, military service, experiences after the military, issues with Thomas, the incident on October 31, 2015, the events between October 31, 2015 and February 1, 2016, and the incident on February 1. Dr. Moore testified that PTSD would likely result in someone over-perceiving or focusing on potential threats in the environment, affecting how they interpret others' actions. When asked about Grott's understanding of the risk of harm on February 1, Dr. Moore testified, "I don't think that Mr. Grott felt that he had any other alternative but to defend himself." 15 Verbatim Report of Proceedings (VRP) at 1964. Dr. Moore also testified that Grott's ability to premeditate was impaired.

Grott did not testify. The parties presented over thirty witnesses, who testified about the shooting, the subsequent investigation, and Grott's history. Except for Vaca, each alleged victim of first degree assault testified.

Grott's cousin testified that he had spoken with Thomas, who said, "When he sees [Grott], it's either [Grott] or me." 14 VRP at 1842. Grott's cousin testified that before the shooting, he had conveyed Thomas's threat to Grott. He also testified that he took Thomas's threat seriously because he knew Thomas's reputation, and that "[Thomas] is gang-affiliated, and I know exactly what [he] does." 14 VRP at 1842. Grott's cousin reported being "very afraid" for Grott.

#### 2. Jury Instructions

The jury was instructed on first degree murder and the lesser included offense of second degree murder. The trial court also instructed the jury on assault, including the common law definition of assault.

Grott requested that the jury be instructed on self-defense; the State objected. The trial court ruled that Grott was entitled to self-defense instructions, and instructed the jury on self-defense related to the murder and assault charges.

The State proposed, and the trial court gave, a first aggressor instruction. The trial court instructed the jury that:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon 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 to murder, manslaughter or assault.

CP at 1035. Grott did not object to this instruction.

The jury found Grott guilty of second degree murder and seven counts of first degree assault while armed with a firearm. Grott appeals.

## ANALYSIS

## A. FIRST AGGRESSOR INSTRUCTION

Grott argues that the trial court erred by giving a first aggressor instruction. The State argues that the first aggressor instruction was proper because Grott fired the first shot and that it was not required to demonstrate intentional provoking conduct prior to the shooting. We agree with Grott.

1. *Issue Preserved for Review*

As an initial matter, Grott failed to object to the first aggressor instruction in the trial court. To raise this issue for the first time on appeal, Grott must show that giving the instruction constitutes a manifest error affecting a constitutional right. RAP 2.5(a)(3). Grott has made this showing.

\*3 Due process requires the State to prove every element of the charged offense beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). Once raised by a defendant, the absence of self-defense becomes an element of the crime that State has the burden of proving beyond a reasonable doubt. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). A first aggressor instruction informs the jury that if it determined Grott was the first aggressor, then his self-defense claim is unavailable and the jury does not have to consider whether the State has proved beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Bea*, 162 Wn. App. 570, 575-76, 254 P.3d 948, *review denied*, 173 Wn.2d 1003 (2011). Therefore, the first aggressor instruction implicates a defendant's constitutional rights.

We presume that an error of constitutional magnitude is prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The error is harmless if this court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Guloy*, 104 Wn.2d at 425. Because this claim is of constitutional magnitude, we consider it for the first time on appeal.

2. *Legal Principles*

We review de novo whether sufficient evidence supports the first aggressor instruction. *Bea*, 162 Wn. App. 577. We determine whether the evidence at trial was sufficient to support the giving of an instruction, viewing the evidence in the light most favorable to the party that requested the instruction. *Bea*, 162 Wn. App. at 577.

One who provokes a fight cannot invoke the right of self-defense. *Bea*, 162 Wn. App. at 575. A first aggressor instruction directs the jury to determine whether the defendant's acts precipitated a confrontation with the victim. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Because a first aggressor instruction potentially removes self-defense from the jury's consideration, and relieves the State of its burden of proving that a defendant did not act in self-defense, the instruction should be given only sparingly. *Bea*, 162 Wn. App. at 575-76.

A first aggressor instruction is appropriate when the record demonstrates credible evidence to allow a jury to reasonably determine that the defendant provoked the need to act in self-defense. *Riley*, 137 Wn.2d at 909-10. The first provoking act must be intentional, and must be an act that a "jury could reasonably assume would provoke a belligerent response by the victim." *Bea*, 162 Wn. App. at 577 (internal quotation marks omitted) (quoting *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989)). The provoking act "must be related to the eventual assault as to which self-defense is claimed." *Bea*, 162 Wn. App. at 577. The provoking act cannot be mere words alone, and it cannot be the actual charged incident to which self-defense is claimed. *State v. Sullivan*, 196 Wn. App. 277, 290, 383 P.3d 574 (2016), *review denied*, 187 Wn.2d 1023, 390 P.3d 332 (2017); *Bea*, 162 Wn. App. at 577. It is improper to give a first aggressor instruction where there is no evidence that the defendant "initiated any act toward [the victim] until the final assault." *Wasson*, 54 Wn. App. at 159.

3. *No Evidence of Provoking Act*

Grott was charged with first degree murder, and seven counts of first degree assault. He asserted that he was acting in self-defense. The trial court ruled that Grott was entitled to a jury instruction on self-defense. In order to issue a first aggressor jury instruction, the State was required to produce *some* evidence that Grott made an intentional act—*prior to the shooting*—that a jury could reasonably assume would provoke a belligerent response from the victim. See *Sullivan*, 196 Wn. App. at 290; *Bea*, 162 Wn. App. at 577; *Wasson*, 54 Wn.

App. at 159. There is no evidence in the record of an intentional act that preceded the shooting, which a jury could reasonably assume would provoke a belligerent response.

\*4 The State argues that the first aggressor instruction was proper because Grott fired the first shot. This argument fails because the State concedes that the first shot is part of the actual charged incident to which self-defense is claimed. To support a first aggressor instruction the evidence would have to show that Grott made an intentional act *before* the shooting that a jury could reasonably assume would provoke a belligerent response. *Bea*, 162 Wn. App. at 577. The evidence makes no such showing.

The State also argues that it was not required to demonstrate intentional provoking conduct prior to the shooting. But this contention is unsupported by the law. As discussed above, the provoking act cannot be the charged assault. *Sullivan*, 196 Wn. App. at 290; *Bea*, 162 Wn. App. at 577; *Wasson*, 54 Wn. App. at 159.

Because there is no evidence that Grott made an intentional act *before* the shooting that a jury could reasonably assume would provoke a belligerent response, we hold that the first aggressor instruction was improper. And because the instruction relieved the State of its burden to prove that Grott did not act in self-defense beyond a reasonable doubt, we presume that the error was prejudicial. Thus, the State has the burden to demonstrate that the improper instruction was harmless beyond a reasonable doubt. *State v. Imokawa*, 4 Wn. App.2d 545, 559, 422 P.3d 502 (2018); *Guloy*, 104 Wn.2d at 425.

#### 4. Error Not Harmless Beyond a Reasonable Doubt

The State's only argument that any error was harmless is that the trial court should not have allowed self-defense in this case. Because the defense itself was improper, the argument goes, the negation of the defense was harmless. We disagree.

Grott's self-defense theory was that he perceived an imminent threat to his life when he encountered Thomas unexpectedly. His perception was based on his knowledge of Thomas and his prior experiences with Thomas and were influenced by PTSD. The trial court, after considering all the evidence in the light most favorable to Grott, ruled that Grott could argue self-defense. The State did not cross-appeal on this issue.

The State has not demonstrated that the improper instruction was harmless beyond a reasonable doubt. The first aggressor instruction allowed the jury to improperly find that Grott was the first aggressor based on the very act of shooting, which was the crime for which he claimed self-defense. And by doing so, the first aggressor instruction relieved the State of proving beyond a reasonable doubt that Grott was not acting in self-defense. Under the record here, we cannot determine that the error was harmless beyond a reasonable doubt. Accordingly, we reverse Grott's convictions.

## B. SUFFICIENT EVIDENCE OF SECOND DEGREE MURDER AND ASSAULT<sup>2</sup>

Grott argues that the State failed to present sufficient evidence of second degree murder and first degree assault.<sup>3</sup> Specifically, Grott argues that the State failed to present sufficient evidence of the actus reus of the crimes. Grott's argument fails.

\*5 Due process requires the State to prove every element of the charged crimes beyond a reasonable doubt. *Johnson*, 188 Wn.2d at 750. We review sufficiency of evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Johnson*, 188 Wn.2d at 750-51. In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We also "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-75.

#### 1. The Actus Reus Is Not an Element

Grott argues that the State failed to prove the actus reus of both second degree murder and first degree assault. Grott invites this court to hold, contrary to established law, that the State is required to prove the actus reus as an element of the crime. Grott's claim fails under *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012). *Deer* held that the State is not required to prove the actus reus or a volitional act as an element of the crime. *Deer*, 175 Wn.2d at 738, 741.

Grott relies on *State v. Eaton*, 168 Wn.2d 476, 229 P.3d 704 (2010). But *Eaton* is distinguishable. *Eaton* held that a defendant could not be subject to a sentencing enhancement under RCW 9.94A.533(5) for possession of a controlled substance inside of

a jail when the police officers had transported Eaton involuntarily to the jail. *Eaton*, 168 Wn.2d at 479, 487. "The concern in *Eaton* was the absurdity of interpreting [the sentencing statute] to impose liability for a circumstance within the State's control, rather than the defendant's." *Deer*, 175 Wn.2d at 739. *Eaton* does not hold that the State is required to prove the actus reus as an element of the crime, and does not support Grott's argument. See *Deer*, 175 Wn.2d at 738 (rejecting the Court of Appeals' reliance on *Eaton* to hold that the State was required to disprove the voluntariness of the act). Because the State is not required to prove a volitional act as an element of the crime, Grott's argument fails.

2. *Grott's Alternative Argument That the Evidence Supports Only Second Degree Assault* Grott argues in the alternative that the evidence does not support first degree assault. Specifically, he "submits that the facts in this case represent more closely assault in the second degree." Br. of Appellant at 48. Grott reasons that the facts in his case are similar to the facts in *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007), where the jury found the defendant guilty of second degree assault, not first degree assault. But here, the jury found Grott guilty of first degree assault. The jury's verdict in *Smith* does not render the jury's verdict here unsupported by sufficient evidence.

Grott also asserts that the State "did not present sufficient evidence to establish beyond a reasonable doubt that Vaca experienced reasonable fear."<sup>4</sup> Br. of Appellant at 49. Grott's only argument in this regard appears to be that Vaca did not testify.

Debora Green, the store manager at the time of the shooting, testified that Vaca worked at the AM/PM and was behind the cash register at the time of the shooting. The State presented video footage from the AM/PM security cameras.<sup>5</sup> The State contends that the video footage demonstrates Vaca's apprehension of harm. The State describes the video as showing Vaca "taking all types of actions consistent with concern for her safety, including ducking to the ground, taking cover. At one point ... she runs to the back of the store to try and protect herself." 14 VRP at 1742. Grott does not provide meaningful argument, authority, or citation to the record to support his argument that the State failed to prove that Vaca experienced fear. Taking the evidence in the light most favorable to the State, the jury could have found that Vaca experienced reasonable fear.

\*6 We hold that the improper first aggressor instruction relieved the State of its burden to prove beyond a reasonable doubt that Grott did not act in self-defense, and we reverse his convictions and remand for further proceedings consistent with this opinion.<sup>6</sup>

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Melnick, J.

Sutton, J.

### All Citations

Not Reported in Pac. Rptr., 2019 WL 1040681

### Footnotes

- 1 In his brief and his Statement of Additional Grounds (SAG) for Review, Grott makes multiple additional arguments concerning evidentiary rulings, jury instructions, prosecutorial misconduct and ineffective assistance of counsel.
- 2 Although we reverse Grott's convictions, we address sufficiency of the evidence because if the evidence is insufficient to support the convictions, the double jeopardy clause prohibits a retrial. *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009).
- 3 Grott's assignments of error also include: "The state failed to disprove beyond a reasonable doubt, self-defense" and "[t]he state failed to disprove beyond a reasonable doubt, justifiable homicide." Br. of Appellant at 1 (Assignments of Error 5, 6). Grott does not offer argument regarding either assignment of error, and therefore we do not address them. RAP 10.3(a)(6); *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012).

- 4 Count VIII was first degree assault of Karmenita Vaca.
- 5 Exhibit 137 is a video included in this court's record, but because of the proprietary software needed to view it, the video was unviewable in the form submitted. Thus, we rely on the parties' descriptions.
- 6 Because we reverse on other grounds, we do not address Grott's remaining arguments.

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## **APPENDIX “B”**

*Order Denying Motion for Reconsideration*

April 9, 2019

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

ROBERT DESHAWN GROTT,

Appellant.

No. 50415-4-II

ORDER DENYING  
MOTION FOR RECONSIDERATION

Respondent filed a motion for reconsideration of the opinion filed March 5, 2019 in the above entitled matter. After consideration the Court denies appellant's motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Worswick, Melnick, Sutton

**FOR THE COURT:**

  
PRESIDING JUDGE

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 09, 2019 - 2:08 PM**

**Transmittal Information**

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**Superior Court Case Number:** 16-1-00509-0

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