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NO. 97183-8
COA NO. 50415-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

ROBERT GROTT,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

LISE ELLNER, WSBA #20955
Attorney for Respondent

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

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A. SUPPLEMENTAL ISSUES

1. The Court of Appeals correctly applied RAP 2.5(a)(3) to hold improperly issuing a first aggressor instruction without evidence of an independent provoking act was a manifest constitutional error.

2. Following application of RAP 2.5(a)(3), the Court of Appeals correctly applied a harmless error analysis to determine that the state could not prove beyond a reasonable doubt that issuing a first aggressor instruction without evidence of an independent provoking act was harmless beyond a reasonable doubt.

3. The Court of Appeals correctly held that Mr. Grott was denied his due process right to a fair trial.

4. Mr. Grott was denied his constitutional right to effective assistance of counsel based on counsel's failure to object to the first aggressor instruction.

B. STATEMENT OF THE CASE

Robert Grott is a decorated combat Marine Sergeant who served in Afghanistan and returned home with significant PTSD. RP 1930-1937, 1940-41. Mr. Grott's symptoms escalated after Julian Thompson, the deceased, a known gang member, shot at

Mr. Grott in his home missing his head by inches. RP 1585, 1722, 1842-44, 1940-43, 1963, 2266. Thompson took responsibility for the shooting and told Mr. Grott that he was a “dead man walking”, and that Thomas would “air out the place afterwards” and “it’s on sight”. RP 1586, 1776, 1811, 1842, 1918-19, 1824-25, 1840, 1929, 1944-45, 1949, 2041.

Dr. Kevin Moore, a Marine forensic psychiatrist explained: “**I don’t think that Mr. Grott felt that he had any other alternative but to defend himself.**” 15RP 1964.

C. ARGUMENT

1. THE COURT OF APPEALS CORRECTLY HELD THAT GIVING A FIRST AGGRESSOR INSTRUCTION WITHOUT EVIDENCE OF AN INDEPENDENT PROVOKING ACT WAS MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT THAT COULD BE RAISED FOR THE FIRST TIME ON APPEAL AND CONSTITUTED REVERSIBLE ERROR UNDER A HARMLESS ERROR ANALYSIS

a. The Court of Appeals correctly determined review appropriate under RAP 2.5

Generally, an appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception

exists for a claim of manifest error affecting a constitutional right. *Id.* In order to benefit from this exception, “the appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.’ ” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a “ ‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’ ” *O’Hara*, 167 Wn.2d at 99 (alteration in original) (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). A manifest error is “so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wn.2d at 100; The error in giving the first aggressor instruction was “obvious”.

[“F]ew 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.” *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999); *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990); *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.3d 1230 (1985).

Significant precedent in addition to the WPIC provides that “[f]irst aggressor instructions should be used sparingly“. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04 cmt. at 256 (4th ed. 2016); *State v. Sullivan*, 196 Wn. App. 277, 290, 383 P.3d 574 (2016); *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011); *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989); See also, *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008); *State v. Douglas*, 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005); *Kidd*, 57 Wn. App. at 100; *State v. Thompson*, 47 Wn.2d 1, 7, 733 P.2d 584 (1987); *Wasson*, 54 Wn. App. at 159; *State v. Brower*, 43 Wn. App. 893, 721 P.2d 12 (1986).

“A court may not give a first aggressor instruction unless the moving party presents credible evidence from which: (1) the jury can reasonably determine 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 provoking act must be an independent, intentional act of aggression separate from the acts charged. *Bea*, 162 Wn. App. at

577; *Kidd*, 57 Wn. App. at 100. The aggressor instruction is inappropriate when the only incident that could be seen as a provocation is the defendant's own claimed act of self-defense, i.e. when the defendant appeared on the scene and assaulted someone. *Riley*, 137 Wn.2d at 909-10; *Bea*, 162 Wn. App. at 577; *Kidd*, 57 Wn. App. at 100; *Wasson*, 54 Wn. App. at 159; accord *Brower*, 43 Wn. App. at 902.

In its petition, the state conceded that there was no evidence of any prior act. "There is no indication in the record that Thomas even saw the defendant before the shooting started." (Petition at p. 11). The state also conceded that the first shot was part of the actual charged incident to which Mr. Grott asserted self-defense but argued that the amount of force was not reasonable. (Petition at p. 11).

The degree of force is not the issue in this case. Rather, under *Riley*, *Bea*, *Kidd*, *Wasson*, and *Brower*, the state did not satisfy the criteria for giving the first aggressor instruction because it did not present any evidence of a prior act of aggression. *Riley*, 137 Wn.2d at 909-10; *Bea*, 162 Wn.2d at 577. (Opinion at p. 7). Despite the state's argument that it need not establish a prior provoking act,

this assertion is contrary to established precedent. *Sullivan*, 196 Wn. App. at 290; *Bea*, 162 Wn. App. at 577; *Wasson*, 54 Wn.2d at 159.

Here, the trial court, after considering all the evidence in the light most favorable to Mr. Grott, ruled that Mr. Grott could argue self-defense. The state did not cross-appeal on this issue. When a defendant claims self-defense, the state bears the burden of proving the absence of self-defense beyond a reasonable doubt. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Mr. Grott has a due process right to have the state prove all of the elements of the crime including disproving self-defense. *State v. Johnson*, 188 Wn.2d 742, 750 , 399 P.3d 507 (2017); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alternation in original) (*citing State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

The Court of Appeals correctly characterized the error as “obvious” under RAP 2.5 based on the trial court issuing a first aggressor instruction without evidence in the record, because this relieved the state of its burden to prove beyond a reasonable doubt that Mr. Grott did not act in self-defense. *Bea*, 162 Wn. App. at 575-76; *State v. Pineda*, 154 Wn. App. 653, 669-72, 226 P.3d 164 (2010).

b. Error not harmless

“A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be 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); *State v. Imokawa*, 4 Wn. App. 2d 545, 559, 422 P.3d 502 (2018).

“An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010) (*quoting State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). This includes proving beyond a reasonable doubt that the defendant did not act in self-defense. *Bea*, 162 Wn. App. at 577.

State v. Stark supports Mr. Grott’s case. Therein, the Supreme Court reversed the trial court’s issuance of a first aggressor instruction where the state failed to present evidence of a provoking act before the crime. *State v. Stark*, 158 Wn.2d 952, 960, 244 P.3d 433 (2010). The state merely established that the defendant was hiding in the kitchen when she shot her husband as he reached for a knife. *Id.*

The defendant arming herself was not an act of aggression; rather, she feared Mr. Stark and armed herself in self-defense. *Id.* The Court held that the first aggressor instruction was not harmless error because it relieved the state of its burden to prove that the defendant did not act in self-defense. *Stark*, 158 Wn.2d at 960-61.

By contrast in *Riley*, the defendant's prior act of aggression consisted of Riley pulling a gun on the victim and demanding he turn over his weapon before Riley shot the victim. *Riley*, 137 Wn.2d at 909-10; *Bea*, 162 Wn. App. at 577.

Here, in Mr. Grott's case, after establishing that giving the first aggressor instruction affected a manifest constitutional right, the Court of Appeals engaged in a harmless error analysis. Reviewing the evidence in the light most favorable to the state, there was not a single shred of evidence of an initial provoking act to support the first aggressor instruction. Yet, this instruction effectively eliminated Mr. Grott's ability to argue self-defense by instructing the jury that he was the first aggressor.

Issuing the first aggressor instruction was not harmless error because as in *Stark*, it improperly relieved the state of its burden to prove the defendant did not act in self-defense. *Stark*, 158 Wn.2d at 960-61. Here, the state could not establish beyond a reasonable

doubt that the outcome would have been the same without the instruction. (Opinion at pp. 5-9). *O'Hara*, 167 Wn.2d at 99-200 (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)).

The state argues that the jury could have disregarded this instruction, but such an argument flies in the face of the due process clause which guarantees the right to a fair trial, not a trial where the jury must violate its oath by disregarding the law set forth in the instructions. *Stark*, 158 Wn.2d at 960-61 (citing *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997)). [W]e cannot assume that the jury attempted to compensate for the court's [instructional] error ... [T]herefore, we cannot say that the error was harmless." *Id.*

c. The state's argument is contrary to precedent.

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. 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; See also; *Anderson*, 144 Wn. App. at 89; *Douglas*, 128 Wn. App. at 562-63; *Kidd*, 57 Wn. App. at 100; *Thompson*, 47 Wn.2d at 7; *Brower*, 43 Wn. App. 893.

Many other cases involving jury instructions that relieve the state of proving an essential element of the crime support the Court of Appeals finding reversal mandatory. See, *State v. Schaler*, 169 Wn.2d 274, 282-83, 236 P.3d 858 (2010) (failure to define “true threats” which infringed First Amendment rights was manifest error that was not harmless); *Smith*, 174 Wn. App. at 364-65, 368-69 (erroneously instructing the jury that it may acquit if in reasonable doubt is structural error where prejudice is presumed): *Pineda*, 154 Wn. App. at 669-72 (error “patently obvious” where jury permitted to convict defendant without finding he took a substantial step towards commission of the charged crime).

In each of these cases the Courts determined the errors could be raised for the first time on appeal and were not harmless beyond a reasonable doubt, because as in Mr. Grott’s case, the state was relieved of proving an element of the crime. *Schaler*, 169 Wn.2d at 282-83; *Smith*, 174 Wn. App. at 364-65, 368-69; *Pineda*, 154 Wn. App. at 669-72.

Analytically indistinguishable from these cases, under the harmless error analysis, the Court of Appeals in Mr. Grott's case correctly held reversible error for giving a first aggressor instruction without evidence of an initial act of aggression. Here as in the cases cited, the instruction relieved the state of proving the essential element that Mr. Grott did not act in self-defense, thus depriving him of his due process right to a fair trial. Under these facts, "we presume that the error was prejudicial." (Opinion at p. 8).

Possible need for clarity

Confusion may arise in cases like *Riley* and *Hughes* that focus on conflicting evidence of a provoking act, rather than focusing on an absence of a provoking act. For example in *Riley*, the Court held that the act of drawing the gun first and aiming it at the victim was sufficient to warrant the first aggressor instruction because Riley "provoke[d]" the altercation, and later shot the victim. *Riley*, 137 Wn.2d at 909-10.

Similarly, in *Hughes*, the defendant and police drew weapons and fired shots. Hughes, however, fired an intentional independent shot when resisting arrest, a crime that was not charged. *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986). Later, he

shot and killed the officers. This was the charged crime. *Id.* Unlike in these cases, here there was no independent, provoking act.

Recently Division Three in *State v. Wallette*, 8 Wn. App. 1023 (2019) (unpublished- cited under GR 14.1 for illustrative purposes only), cited to at least 9 different cases to explain the law on first aggressor instructions. Many of the cases cross-reference each other for various points, but many do not articulate in detail the applicable law in its entirety.¹ *Wallette*, may not be representative of all of the various cases addressing first aggressor instructions, but this Court may consider it prudent to provide in one opinion, a concise statement of law regarding the limits on issuing a first aggressor instruction.

The state's assertion that Mr. Grott's case conflicts with other cases is meritless

Contrary to the state's claim, the decision in Mr. Grott's case does not conflict with the decades old cases of: *Hughes*, 106 Wn.2d at 191-92; *State v. Gregory*, 79 Wn.2d 637, 488 P.2d 757 (1971) (*overruled on other grounds in State v. Rogers*, 83 Wn.2d 552, 520

¹ In order cited in *Wallette*: *Riley*, 137 Wn.2d at 909-10; *Stark*, 158 Wn. App. at 959; *Douglas*, 128 Wn. App. at 563; *Kidd*, 57 Wn. App. at 100;11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04 cmt. at 256 (4th ed. 2016); *Bea*, 162 Wn. App. at 577; *Anderson*, 144 Wn. App. at 89; *Sullivan*, 196 Wn. App. at 289; *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005); *Wasson*, 54 Wn. App. at 158-59; *Brower*, 43 Wn. App. at 902.

P.2d 159 (1974)) or *State v. Davis*, 60 Wn. App. 813, 808 P.2d 167 (1991). Each of these cases is easily distinguishable.

In *Gregory*, unlike in Mr. Grott's case, the state presented evidence of an independent intentional act separate from the charged crime. *Gregory* was charged with only murder based on a single gunshot but the provoking act consisted of four uncharged shots, followed by the fifth shot, which killed the victim. On this basis, the Court held the first aggressor instruction proper. Here, by contrast, there was no independent intentional act, outside the charged crimes. Accordingly, Mr. Grott's case does not conflict with *Gregory*. *Gregory*, 79 Wn.2d at 637-38, 645-46.2

For the same reasons, the decision in Mr. Grott's case does not conflict with *Hughes*. As discussed, in *Hughes*, the police pulled their guns and tried to arrest Hughes, who started shooting. *Hughes*, 106 Wn.2d at 179-180. The shooting lasted 7 minutes, killing two officers. Hughes first shot was an attempt to resist a lawful arrest, a crime Hughes was not charged. *Hughes*, 106 Wn.2d at 179-180. In Mr. Grott's case, there was no intentional provoking act other than the charged crimes.

² A Westlaw Shepard's search indicates, the *State v. Gregory* has never been cited for its decision on the first aggressor instruction.

Mr. Grott's case cannot conflict with *Davis* because the court in *Davis* expressly declined to address the first aggressor instruction issue in favor of addressing the other issues raised. *Davis*, 60 Wn. App. at 816.

2 MR. GROTT WAS PREJUDICED BY
COUNSEL'S CONSTITUTIONALLY
DEFICIENT PERFORMANCE.

The right to counsel, and to effective assistance of counsel, goes to the very integrity of the fact-finding process. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); U.S. Const. Amends. VI; XIV; Wash. Const. art. I, § 22. Denial of the assistance of counsel constitutes a per se violation of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. Amend. VI; art. I, § 22.

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *Kyllo*, 166 Wn.2d at 862. Review is de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*,

466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. *Id.* The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Kyllo*, 166 Wn.2d at 869.

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *Strickland*, 466 U.S. at 290-91; *Kyllo*, 166 Wn.2d at 862. In *Kyllo*, the Supreme Court held there was no valid tactical or strategic purpose:

for counsel's proposal of an instruction that incorrectly stated the law [and] eased the State of its proper burden of proof on self-defense.... [T]he court [of appeals] could not conceive of any reason why the defendant's lawyer would propose the defective instructions, since they decreased the State's burden to disprove self-defense. We agree.

Kyllo, 166 Wn.2d at 869.

The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *Kyllo*, 166 Wn.2d at 862; *Strickland*, 466 U.S. at 876.

"An attorney has an obligation to object to instructions that appear

to be incorrect or misleading and must also propose instructions necessary to support argument of the client's theory of the case." *State v. Hood*, 196 Wn. App. 127, 134-35, 382 P.3d 710 (2016), *review denied*, 187 Wn.2d 1023 (2017) (use of pattern WPIC not manifest error). CrR 6.15(c) also plainly states that counsel has a duty to object to improper instructions to provide the court the opportunity to correct its errors. *Id.*

The jury instructions in a case of self-defense are particularly crucial in allocating the burden of proof and accurately conveying the law to the jury. *Kyllo*, 166 Wn.2d at 862. First aggressor instructions are rarely appropriate because the parties can easily argue their case without them *Riley*, 137 Wn.2d at 909-10.

In *Kyllo*, the defendant was denied effective assistance because his attorney offered an improper self-defense instruction that could not be considered tactical because it eased the state's burden of proof in a self-defense case. *Kyllo*, 166 Wn.2d at 869.

As in *Kyllo*, here too Mr. Grott's entire case was based on self-defense. Counsel's failure to object to the first aggressor instruction could not be considered tactical, and was prejudicial, because failing to object to the first aggressor instruction, eased the state's burden to prove Mr. Grott did not act in self-defense.

In Mr. Grott's case, counsel did not propose the first aggressor instruction but rather failed to object, despite arguing in closing that Thomas not Grott was the first aggressor, and despite well settled case law such as *Bea*, *Kidd*, and *Brower*, which do not permit a first aggressor instruction without an independent, provoking act. Counsel should have known the shooting itself could not justify the first aggressor instruction, and objected. This is the type of research counsel is expected to conduct. *Strickland*, 466 U.S. at 290-91; *Kyllo*, 166 Wn.2d at 862. Competent counsel would have objected to the aggressor instruction on those grounds, because the state did not present any evidence to support that Mr. Grott engaged in an independent provoking act. *State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 988 (2005).

The aggressor instruction did nothing to advance the defense theory; instead it undermined Mr. Grott's defense and assisted the prosecution in arguing its case. The jury having been instructed on self-defense, there was no point in permitting the jury to disregard the self-defense theory by permitting an instruction that essentially told the jury that the defense was unavailable. The only purpose of an aggressor instruction is to remove self-defense from the jury's consideration. Having ultimately argued that defense, there would be no legitimate tactical reason for defense counsel not to object to the instruction.

There is a reasonable probability the outcome would have been different but for counsel's failure to object because if counsel objected and presented to the trial court the case law prohibiting issuing a first aggressor instruction without evidence of a provoking act, the trial court would have been unable to issue the instruction without violating established case law.

There is a reasonable probability the outcome of the trial would have been different because a reasonable jury could have concluded Mr. Grott's fear was reasonable in light of Thomas' history of violent threats and attempts to kill Mr. Grott. Because counsel did not object, however, the aggressor instruction went to the jury and permitted a finding (which was urged by the prosecutor in closing) that Mr. Grott provoked the incident and was thus not entitled to his claim of self-defense. This error undermined confidence in the outcome of the trial.

D. CONCLUSION

In Mr. Grott's case, the Court of Appeals correctly determined it was reversible error to provide the first aggressor instruction because it relieved the state of its burden to disprove self-defense. Under this opinion, as well as *Kyllo*, counsel's performance was deficient and prejudicial.

For the reasons stated herein and in the opening brief, this Court

should affirm the Court of Appeals and find that the Court of Appeals correctly analyzed the propriety of reviewing the first aggressor instruction under RAP 2.5(a)(3), and affirm the Court of Appeals finding reversible error and remand for a new trial.

DATED this 4th day of October 2019.

Respectfully submitted,



LISE ELLNER, WSBA No. 20955
Attorney for Respondent

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Robert Grott/DOC#399611, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla WA 99362 a true copy of the document to which this certificate is affixed on October 4, 2019. Service was made by electronically to the prosecutor and Robert Grott by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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