

NO. 71948-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PENEUETA,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WILLIAM DOWNING

BRIEF OF RESPONDENT

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A. ISSUES

1. To obtain appellate relief from an error not objected to at trial, a defendant must show manifest constitutional error resulting in actual prejudice. Jury instructions are sufficient if they allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. Sufficient evidence that Peneueta was the first to draw his gun supported the trial court's first-aggressor instruction to the jury, to which Peneueta's counsel did not object. Nor was Peneueta prejudiced because no reasonable jury could have found that Peneueta used lawful force in firing his gun multiple times into busy mid-morning traffic on Rainier, missing his intended target and striking an innocent bystander's vehicle. Has Peneueta failed to show a manifest constitutional error resulting in actual prejudice to him?

2. Where there is credible evidence from which a jury could reasonably determine that the defendant provoked any need to act in self-defense, the trial court may provide a first-aggressor instruction to the jury. Peneueta, a D-Dub gang member, saw a rival gang member, Amrico Flite, in D-Dub territory and informed his companion, James Perkins, that if he saw Flite again he would shoot him. A short while later, Peneueta saw Flite, stopped in the

middle of Rainier Avenue, yelled, "D-Dub," drew his .45 caliber handgun, and fired a minimum of five shots toward Flite's retreating Crown Victoria. One bullet struck Theresa Strutynski's vehicle. Strutynski testified that after she heard the shots fired by the individual behind her, later identified as Peneueta, someone in the black Mercedes in front of her returned fire. Police never identified anyone in the Mercedes. Perkins testified at trial that Flite stopped his vehicle and aimed his gun at Peneueta, contrary to Perkins' prior statement. The trial court included self-defense instructions based on this testimony. Because there was credible evidence that Peneueta approached Flite by venturing into the middle of the street, yelled his own gang's name, and drew his gun first; did the trial court properly give the first-aggressor instruction?

3. Error in providing a first-aggressor instruction to a jury is harmless if the evidence shows beyond a reasonable doubt that no reasonable jury could have found that the defendant acted in self-defense. No reasonable jury could have found that Peneueta used lawful force because overwhelming evidence supported that Peneueta did not act in self-defense, including the audio and video recording of the shooting. Was any error in providing the aggressor instruction to the jury harmless?

4. To succeed on a claim of ineffective assistance of counsel, a defendant must establish that counsel's conduct was both deficient and that he was prejudiced as a result. Trial counsel did not object to the aggressor instruction, which was supported by sufficient evidence, and any error in giving the instruction was harmless. Has Peneueta failed to establish that his counsel was ineffective?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Michael Peneueta by amended information with three counts of second-degree assault, each with a firearm enhancement, and one count of first degree unlawful possession of a firearm. 1RP¹ 32-37; CP 12-13. The Honorable William Downing presided over the jury trial. 1RP 2. The trial court severed the first degree unlawful possession of a firearm, count 2, from the three counts of assault. 1RP 46; CP 12.

The jury found Peneueta guilty of count 1, second-degree assault of Theresa Strutynski, and count 3, second-degree assault of Amrico Flite, and found the firearm enhancements for each

¹ The verbatim report of proceedings consists of six volumes. The State adopts the appellant's method of referencing the record as follows: 1RP (3/10/14); 2RP (3/11/14); 3RP (3/12/14); 4RP (3/13/14); 5RP (3/17/14); 6RP (5/2/14). Br. of App. at 2.

count. 5RP 92-93; CP 21-23. The jury was unable to reach a verdict on count 4, second-degree assault of Donald Massey.² 5RP 91-92; CP 13, 21. At a separate proceeding immediately following the first trial, the jury convicted Peneueta of first degree unlawful possession of a firearm, count 2. 5RP 97; CP 22. The trial court sentenced Peneueta to a standard-range sentence of 103 months. 6RP 13-14; CP 72-75.

2. SUBSTANTIVE FACTS AND JURY INSTRUCTIONS.

a. Substantive Facts From Trial.

On May 3, 2013, at a little before 11:00 a.m., Michael Peneueta, a D-Dub gang member, stopped in the middle of busy traffic on Rainier Avenue, yelled his gang's name, drew his .45 caliber Highpoint Firearms handgun, and fired a minimum of five shots toward rival gang member Amrico Flite. 2RP 11, 67-70; 3RP 24, 46-47, 50-56, 63, 76-81, 84-85; 4RP 26-28; 5RP 21, 23-26, 29-30; Ex. 13,³ file a05072013, camera view 4 at 10:47-

² The State dismissed count 4 at sentencing. 6RP 2; CP 71.

³ Exhibit 13 is the surveillance video from Columbia City Holistic Health that captured the audio and video of the shooting. 3RP 103-04. Exhibit 13 contains two video files labeled a05072013.exe and a05072013-01.exe. The relevant videos are on the file named a05072013.exe, which displays the four surveillance camera views from Holistic Health's cameras. The top right quadrant is camera 2, which displays the interior of Holistic Health, the lower right quadrant is camera 4, which displays the exterior of Holistic Health and captured the shooting. 3RP 49-52; Ex. 13.

10:49. Peneueta and James Perkins, with whom he had been walking, had crossed the street in front of a daycare center; Peneueta fired multiple shots, then the two fled past the Columbia City Holistic Health medical marijuana dispensary. 3RP 46, 103, 111-18; 5RP 35.

Flite, driving northbound on Rainier Avenue in his Crown Victoria, continued on unscathed. 3RP 52-55, 86-87, 97-98. Theresa Strutynski, unknown to Peneueta, was two cars behind Flite on her way to work. 3RP 52-56; 4RP 23-24, 26-38. Before the shots were fired, she had seen two males, later identified as Peneueta and Perkins, venture into the middle of the street, but she continued driving. 4RP 26-27. She then heard a popping noise behind her and turned to see the male in a white t-shirt, later identified as Peneueta, with a gun in his hand firing toward her. 4RP 27-31. Scared, Strutynski turned to face forward and saw a passenger in the black Mercedes directly in front of her fire a gun out of the passenger window. 4RP 29-30. One of the bullets Peneueta fired lodged in the rear bumper of Strutynski's Lexus. 3RP 79; 4RP 31-32.

Strutynski, the only witness to the shooting, was not able to identify anyone; she could say only that the first shooter was a

black male wearing a white t-shirt, and that he was with another black male in a dark shirt. 3RP 94; 4RP 26-32. Detectives were unable to identify the black Mercedes or any individuals associated with it. 3RP 98.

Other witnesses heard the shots and saw Peneueta and Perkins flee. 3RP 2-18, 32, 111-18, 123-31. Maria Harris had just arrived home at the Crescent Apartments when she heard the gun shots and saw two young African American males run past her. 3RP 123-25. The first male had his hair in cornrows. 3RP 123-24. The second male wore a green hat and a white t-shirt and had a slightly heavier build than the first. 3RP 125. The male with cornrows dropped a shiny object that clanked, picked it up, and ran off. The second male appeared calm, but very aware of his surroundings. 3RP 128. Both males headed toward 42nd Avenue and Dawson, the streets behind the Crescent Apartments. 3RP 127-28. Harris reported what she saw to 911. 3RP 128-31.

Based on Harris' and other 911 callers' reports, officers searched the area of 42nd Avenue and Dawson near the Crescent Apartments. 2RP 46-47; 3RP 30-32, 136. Officer Jason Lee saw a male exit the yard of the house at 5050 42nd Avenue South, matching the description of the suspect as a young black male in a

white t-shirt and jeans. 3RP 136-38. The male identified himself as Peneueta. 3RP 140. Peneueta appeared calm, but was sweating profusely. 3RP 139. He explained that he had run from Rainier after seeing occupants of a silver Crown Victoria firing at a black Mercedes. 3RP 139-40. Lee released Peneueta because none of the witnesses believed that they could identify anyone. 3RP 141.

A short time later, more officers arrived and searched the yard of the house at 5050 42nd Avenue. 2RP 46-48. Officer Brandon Eggers found a .45 caliber HighPoint Firearms handgun underneath a bucket on the north side of the house. 2RP 47-49, 68-70. The handgun matched the magazine and .45 caliber shell casings found at the scene of the shooting. 2RP 26-30. Officers continued searching the yard of the house and found a very large green Oakland A's hat on top of a garbage can on the south side of the house. 2RP 48-52, 64-65; 3RP 37, 39. Officers also found a black North Face jacket toward the back of the house on the east side. 2RP 49-50; 3RP 39. Behind the house and hidden behind a shed, officers located Perkins. 2RP 49-53; 3RP 41. Perkins matched the description of one of the suspects; he had his hair braided in cornrows and wore a white t-shirt, jeans, and white shoes. 3RP 41. Officers arrested Perkins. 3RP 54-55.

Perkins, a gang member affiliated with the Down Wit The Crew or D-Dub and Goon Squad Clique gangs, made a statement to Detective Damon Deese. 3RP 58-62; 4RP 75-76. Perkins explained that Peneueta and he had been walking to the marijuana dispensary on Rainier when Peneueta saw Flite. 5RP 17-18. Peneueta, a D-Dub gang member, said, "If I see him again, I'm shooting there." 4RP 60-61, 78; 5RP 21-22. A short time later while they crossed Rainier, they again saw Flite exiting the dispensary. 5RP 22-23. Peneueta yelled out, "D-Dub," which Perkins assumed was Peneueta indicating that the area was his "turf" or "hood." 5RP 23. Flite entered his car, a Crown Victoria and pulled away. 5RP 24. Peneueta stopped in the middle of Rainier and then fired multiple shots from his .45 caliber gun. 5RP 29-30. After the shooting, Peneueta gave the gun to Perkins. 5RP 31. They met up again near 42nd Avenue and Dawson. 5RP 32. Perkins hid behind a shed and was later arrested. 5RP 32.

The day of the shooting Perkins wore a black North Face jacket and jeans. 5RP 24. Officers returned the black North Face jacket to him that they had found in the yard of 5050 42nd Avenue. 3RP 39; 5RP 24. Peneueta wore a white t-shirt, jeans, and a green hat. 5RP 24. Perkins was about six feet tall and weighed

approximately 185 pounds. 5RP 35. Peneueta was larger and taller than Perkins at approximately 6'5" and 300 pounds. 2RP 33-34; 5RP 35.

Flite was an East Union Street Hustlers gang member, a Central District gang, in conflict with D-Dubs, a South End gang. 4RP 51-52, 55, 60, 63, 70. East Union Street Hustlers or Union Street have their territory in the Central District around Union Street. 4RP 51. D-Dubs have their territory in the South End, including the area of Rainier Avenue South, 42nd Avenue, and Dawson. 4RP 62-63. Gang members place a great importance on their territory, understand the boundaries, and generally live within them. 4RP 54, 58-59. For a Central District gang member in conflict with a South End gang to venture into South End territory, such as Rainier Avenue, would be considered unacceptable and require the South End member to address it. 4RP 58-60.

Prior to any act of violence, a gang member would announce his gang in order to claim it and gain greater respect within the gang. 4RP 64-65. If a D-Dub member yelled, "D-Dub," at an East Union Street Hustlers member in D-Dub territory, it would be reasonable for the East Union member to feel threatened. 4RP 64-65. Unlike D-Dubs, Goon Squad Clique, with which Perkins was

more strongly affiliated, is not in conflict with East Union Street.
4RP 67-68, 75-76.

After speaking to Perkins, Deese focused his investigation on Peneueta. 3RP 63. He also obtained the surveillance video from Columbia City Holistic Health, the marijuana dispensary, and spoke to the owner, Graham Jennings. 3RP 46. Jennings explained that shortly before the shooting Flite, whom he knew as "Rico," and Donald Massey, whom he knew as "Messy," visited his shop. 3RP 106-10. They left in Flite's Crown Victoria. 3RP 108-10.

The video shows Flite and Massey inside the dispensary. 3RP 106-07; Ex. 13, file a05072013, camera view 2. Several minutes later, the outside camera view, which includes audio, shows Flite's Crown Victoria drive away, then a black Mercedes drives off, Strutynski's Lexus drives through the frame, then a young male in a green hat running in the middle of Rainier Avenue fires multiple shots north, the same direction that Flite drove. 3RP 46-56, 108-09; Ex. 13, file a05072013, camera view 4. With the male in the street was another male in a black jacket that appeared to have been the same as the North Face jacket officers found near

Perkins. 3RP 47-48. Perkins identified Peneueta as the male in the green hat and himself as the male in the black jacket. 5RP 29.

Deese called Peneueta and Peneueta made a statement. 3RP 68. Peneueta said that he had been returning to his house on Dawson when a car that was either a Crown Victoria or a Grand Marquis⁴ slowly drove past him and Perkins. 3RP 68-69. He and Perkins continued on toward the dispensary on Rainier Avenue. 3RP 70. He did not recognize anyone in the car, but it appeared that the car noticed them because it drove slowly. 3RP 69-70. Peneueta saw the car again and a second car behind it, a black Mercedes, by the dispensary. 3RP 69-71. Someone he did not recognize hopped into the Crown Victoria and someone else got in the Mercedes. 3RP 70-71. The individual who got in the Mercedes stopped and said something, such as, "What are you looking at?" 3RP 70-71. Then the Crown Victoria drove off and so did the black Mercedes. 3RP 71. The passenger in the black Mercedes then pulled out a gun and shot at him. 3RP 71. Peneueta claimed he and Perkins then ran toward his grandmother's house. 3RP 72. He denied that he had a gun or fired any shots. 3RP 73-74.

⁴ A Grand Marquis looks similar to a Crown Victoria. 5RP 39.

At the scene on Rainier, officers found only a .45 caliber Highpoint magazine and .45 caliber shells. 3RP 43-45, 79-80. The location of the shells indicated that the shooter would have been firing from near the dispensary shooting north, rather than driving north and shooting south. 3RP 79-80. The magazine would have fit the Highpoint Firearms gun found at 5050 42nd Avenue had it not been damaged by vehicles driving over it. 3RP 45.

At trial, Perkins, who had already pled guilty to first-degree unlawful possession of a firearm for his involvement, testified that Flite had stopped his Crown Victoria in the middle of the street, drawn a gun, and shot toward Peneueta and Perkins.⁵ 3RP 58; 5RP 26. He claimed that Flite had pointed a revolver at him and Peneueta. 5RP 38-39. He later retreated from the statement that Flite had fired any shots. 5RP 42. He claimed that Peneueta had drawn his gun and fired it only after Flite had fired. 5RP 26. Perkins watched the video and identified Flite's Crown Victoria, himself as the male in the black jacket running across Rainier and Peneueta as the male in the green hat firing the gun running across Rainier. 5RP 28-29. Perkins' other testimony was consistent with

⁵ Perkins' charge was based on his statement to Deese and the fact that the firearm located had been stolen during a burglary several months before in which Perkins' prints were found in the home. 3RP 58-60. Perkins testified only after the Court ordered him to do so. 5RP 2-12, 15.

his statement to Deese. 5RP 17-42. Peneueta did not testify at trial. 5RP 49.

b. Peneueta's Defense And The Jury Instructions.

Prior to trial, Peneueta's trial counsel stated that he was not arguing self-defense. 1RP 63. During trial, after Strutynski had testified and Peneueta's statement to Deese had been introduced, Peneueta's trial counsel submitted a memorandum of law requesting self-defense instructions. CP 14-17. He argued that the evidence that an unidentified person in the black Mercedes had displayed or fired a gun warranted the instructions, but clarified that he might not rely on this argument in closing. CP 17.

After the request for self-defense instructions, the trial court informed the parties that it was considering the instruction and that the evidence that someone in the black Mercedes had a gun might support self-defense. 4RP 83-84. The trial court prepared the jury instructions and included the self-defense and first-aggressor instructions, although neither party requested the latter. 5RP 44-47. The trial court provided the following aggressor instruction:

A person may not, by an intentional act of physical aggression which is reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person. Therefore, if you find beyond a reasonable doubt

that the defendant was the aggressor and that his acts or conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 43.

In closing argument, Peneueta's counsel focused on the lack of DNA or other "hard evidence" that Peneueta was the shooter. 5RP 79-80. Regarding self-defense, Peneueta's counsel simply argued that the only evidence regarding Flite was that Flite had pointed a gun at Peneueta and that that was sufficient for someone to respond by firing a handgun. 5RP 82.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY GAVE THE FIRST-AGGRESSOR INSTRUCTION TO THE JURY.

Peneueta contends that his convictions must be reversed because the trial court erred in providing the jury with the first-aggressor instruction. Peneueta's claim fails. He did not object to the instruction and fails to show manifest constitutional error that actually prejudiced his rights at trial. The evidence that Peneueta ventured into the middle of a busy street, yelled his gang affiliation, and drew his handgun before Flite or anyone else did so supported the instruction. Even if giving the instruction was error, no reasonable jury could have found that Peneueta acted in self-

defense given the video and Strutynski's testimony that established that Peneueta drew and fired his gun first and that Flite did not stop the Crown Victoria in the middle of the street and draw a gun.

a. Peneueta Waived Any Error.

A defendant must generally make a "*timely and well-stated*" objection to a jury instruction so that the trial court may correct any errors. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (emphasis in original); CrR 6.15(c). The appellate court may refuse to review any claim of error not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

As an exception to this rule, manifest constitutional errors may be challenged for the first time on appeal if a defendant demonstrates that (1) the error is manifest, and (2) the error is truly of constitutional dimension. RAP 2.5(a); O'Hara, 167 Wn.2d at 98. If an error is constitutional, it is manifest only if the defendant shows *actual* prejudice—meaning it is so obvious on the record that it warrants review. O'Hara, 167 Wn.2d at 99. The analysis "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Jury instructions, read as a whole, must correctly inform the jury of the law, not be misleading, and allow a defendant to present his theory of the case. O'Hara, 167 Wn.2d at 105. Constitutional due process is satisfied when the jury is instructed on each element of the crimes charged, and that the State has the burden to prove each element beyond a reasonable doubt. Id. When the defendant claims self-defense, the State must disprove it beyond a reasonable doubt. Id.

Peneueta contends that the error was constitutional because it deprived him of the ability to present a complete defense and relieved the State of its burden to disprove self-defense. He is incorrect. Because the trial court did not err in giving the first-aggressor instruction, as will be addressed below, Peneueta was not deprived of his right to present a defense. Moreover, even if this Court were to determine that giving the instruction was error, Peneueta cannot show actual prejudice as a result because no reasonable jury could have found that Peneueta acted in self-defense, as will also be addressed below. This claim of error is waived.

b. Sufficient Evidence Supported The First-Aggressor Instruction.

A trial court's decision regarding a jury instruction is reviewed for abuse of discretion if it is based on a factual dispute. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the trial court's decision is based upon a ruling of law it is reviewed *de novo*. Id. To determine whether there is sufficient evidence to support giving the instruction, the reviewing court views the evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

A first-aggressor instruction is appropriate where "(1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon." State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008) (citing State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999)). The State need only produce some credible evidence that the defendant was the aggressor to meet its burden of production.

State v. Stark, 158 Wn. App. 952, 959, 244 P.3d 433 (2010) (citing Riley, 137 Wn. 2d at 909-10).

The provoking act precipitating the fight cannot be the assault itself. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990); see also State v. Brower, 43 Wn. App. 893, 897, 721 P.2d 12 (1986) (error to give aggressor instruction when the only act was that the defendant drew his gun and that was sole basis for the assault charge). Words alone are insufficient to support the instruction. Riley, 137 Wn.2d at 911.

State v. Thompson is instructive. 47 Wn. App. 1, 7, 733 P.2d 584 (1984). In Thompson, the defendant had been with friends at a tavern and encountered another group, which included the two victims. 47 Wn. App. at 2-3. The surviving victim testified that Thompson approached their group of friends and drew a gun. Id. at 4. Thompson shot the first victim, killing him, and then shot the second victim. Id. Thompson's testimony contradicted the surviving victim's account. Id. at 3-4. Because "Thompson made the first move by drawing his gun" on the victims, the trial court properly provided the first-aggressor instruction despite the fact that Thompson's testimony conflicted with this evidence. Id. at 7. The Washington Supreme Court has twice reaffirmed that the aggressor

instruction is appropriate if the evidence, even if conflicting, shows that the defendant was the first to draw a weapon. Riley, 137 Wn.2d at 910; State v. Wingate, 155 Wn.2d 817, 822-23, 122 P.3d 908 (2005).

Here, Peneueta claims that there was not sufficient evidence to support the aggressor instruction. Peneueta's claim fails. Viewing the evidence in the light most favorable to the State, the trial court did not abuse its discretion in finding that the evidence that Peneueta was the first to draw his firearm supported the aggressor instruction.⁶ See Walker, 136 Wn.2d at 771-72; see Fernandez-Medina, 141 Wn.2d at 455-56.

The evidence showed that Peneueta ventured into the middle of Rainier Avenue, yelled his gang's name, drew his .45 caliber gun, and aimed it at Flite's Crown Victoria. 2RP 11, 67-70; 3RP 24, 46-47, 50-56, 63, 76-81, 84-85; 4RP 26-28; 5RP 21, 23-26, 29-30; Ex. 13, file a05072013, camera view 4 at 10:47-10:49. Strutynski testified that she clearly heard several shots behind her before she saw someone in the black Mercedes respond by firing a gun. 4RP 27-30. The individual firing behind

⁶ Although the trial court offered the aggressor instruction on its own, the instruction was more to the State's benefit putting the State in the position equivalent to the party proposing an instruction. 1RP 63; 6RP 44-45; see Fernandez-Medina, 141 Wn.2d at 455-56.

her was Peneueta as shown by the video, by Perkins' testimony, and by the clothing description. 3RP 124-28; 5RP 29; Ex. 13, file a05072013, camera view 4 at 10:47-10:49. Based on this evidence, trial counsel argued that Peneueta was entitled to self-defense instructions, and the trial court provided the self-defense and first-aggressor instructions to the jury. 4RP 83. The trial court did not abuse its discretion by including the aggressor instruction because the evidence showed that Peneueta drew his weapon before anyone else did.

Peneueta's physical act of crossing the street and stopping in the middle of traffic on Rainier Avenue South, yelling his gang affiliation at a rival gang member on Peneueta's gang's territory, and drawing his firearm were sufficient aggressive, physical acts to support the instruction. Yelling "D-Dub" in combination with his physical actions amounted to aggressive, threatening acts, and were more than simply words, which would not be sufficient to support the instruction. See Riley, 137 Wn.2d at 911, 913-14.

Perkins' trial testimony that Flite drew a gun first and pointed it at Peneueta does not change this analysis. Ample other evidence and Perkins' own previous statement contradicted the testimony that Flite had drawn a weapon at the outset. 5RP 29-30,

40-41. Regardless, at the most, Perkins' testimony amounted to conflicting evidence, which does not preclude the instruction. See e.g. Wingate, 155 Wn.2d at 822 (instruction warranted even if there is conflicting evidence of the defendant's conduct).

Peneueta contends that the evidence did not support a physical act other than the actual assault, relying on State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986), and one of the prosecutor's statements in closing argument. Br. of App. at 9. Peneueta fails to recognize that in Brower the *only* assault was the defendant drawing and aiming a gun at the victim. By contrast, Peneueta not only drew his gun, but he fired it multiple times toward Flite's Crown Victoria spraying shell casings along Rainier Avenue and striking Strutynski's Lexus. Each act could support a charge of second-degree assault. RCW 9A.36.021(c). Peneueta's actions immediately preceding him firing his gun—his aggressive physical acts of venturing into Rainier Avenue, yelling, "D-Dub," and drawing his gun—were distinguished from the actual assaults.

Further, the context of the prosecutor's statement shows that the reference to the aggressor instruction was correct. In closing argument, the prosecutor addressed self-defense, stating that perhaps someone in the Mercedes had drawn a gun in response to

Peneueta's shots. 5RP 75. The prosecutor read the aggressor instruction:

Basically that says hey, I'm going to start a fight – I can't then later be like well, I was acting in self-defense. Right? I'm the initial belligerent, I pull out a gun and I start shooting people, and somebody returns fire, i.e., maybe the Mercedes, I can't then say I was acting in self-defense.

5RP 78-79. The prosecutor continued reading:

'And thereupon use force upon or toward another person. Therefore, if you as jurors find beyond a reasonable doubt that the defendant was the aggressor here,' i.e., he shot first, 'and that his acts or conduct provoked or commenced the fight, then self-defense is not available as a defense.' Not available.

5RP 79. The evidence showed a gun fight on Rainier Avenue. In that context, the prosecutor's statement was correct because Peneueta could not have acted in self-defense if he fired his gun, someone in the Mercedes returned fire, and Peneueta fired again. The trial court did not abuse its discretion.

c. Any Error Was Harmless.

Any error in giving the aggressor instruction was harmless. Erroneous use of the aggressor instruction is reviewed under the constitutional harmless error standard. Stark, 158 Wn. App. at 961. The error is harmless if the appellate court is persuaded beyond a reasonable doubt that it is harmless. Kidd, 57 Wn. App. at 101-02.

Peneueta argues that any error from giving the first-aggressor instruction cannot be harmless because the instruction prevented Peneueta from fully asserting his self-defense theory. Br. of App. at 12. Peneueta is incorrect. No reasonable jury could have found that Peneueta responded reasonably with lawful force.

The jury must evaluate a self-defense claim from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The defendant must show a reasonable apprehension of imminent harm, although actual danger is not necessary. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The critical determination is whether the defendant acted *reasonably* by using force. Id. at 239.

First, there was minimal evidence that Peneueta acted in self-defense. He did not testify, and the only testimony supporting self-defense came from Strutynski and Perkins. 4RP 29-40; 5RP 24-27, 49. Strutynski's testimony was clear that Peneueta, firing from behind her, fired the first shot. It is no surprise that the jury rejected the claim of self-defense, because Peneueta could not

have used lawful force by firing *before* an unidentified individual in a Mercedes ever drew or fired his weapon.

The second basis on which Peneueta claimed to have acted in self-defense was Perkins' testimony that Flite stopped his vehicle in the middle of the street, drew a gun, and fired at Peneueta and Perkins. 5RP 25-26. Later, Perkins retreated from the statement that Flite had fired the gun. 5RP 42. The video contradicted Perkins' trial testimony as it showed traffic moving freely on Rainier and then multiple shots are heard in rapid succession and at about the same volume, indicating that they were all fired from the same gun. 3RP 99; Ex. 13, file a05072013, camera view 4 at 10:47-10:49. Strutynski's testimony also contradicted Perkins' account as she testified that she was driving along slowly, but with traffic, when she heard shots from behind her. 4RP 25-30. That contradicted Perkins' claim that Flite stopped his Crown Victoria, which was two cars in front of Strutynski's Lexus, in the middle of Rainier, drew a gun, and fired. 5RP 25-28. Further, Perkins' own statement to Detective Deese that Peneueta had been the only one to draw and fire a gun contradicted his trial testimony. 5RP 29-30. Any error was harmless beyond a reasonable doubt.

2. DEFENSE COUNSEL WAS NOT INEFFECTIVE BY NOT OBJECTING TO A PROPERLY GIVEN FIRST-AGGRESSOR INSTRUCTION.

Peneueta contends that, in the alternative, his trial counsel was ineffective for failing to object to the trial court's first-aggressor instruction. Because the evidence supported the instruction, and, even if given in error, any error was harmless, Peneueta fails to show that his counsel was ineffective or that he was prejudiced.

To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced him. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 687, 108 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The first prong of the test "requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689). The prejudice prong requires a showing that there is a reasonable probability that, but for counsel's error, the result of the trial would have been different. Id.

In reviewing such claims, the appellate court engages in a strong presumption that trial counsel was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Trial counsel's legitimate strategy or tactics cannot be the basis for a claim of ineffective assistance. Id. at 336.

Peneueta's trial counsel's performance did not fall below an objective standard of reasonableness. Sufficient evidence supported the aggressor instruction because the evidence, even if conflicting, showed that Peneueta drew his gun first. See Riley, 137 Wn.2d at 910. While courts have commented that the instruction should be used sparingly and with care, it is not error to give the instruction when supported by the evidence. Riley, 137 Wn.2d at 918 n.2. Thus, this is not a case where counsel failed to research the relevant law. See State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Moreover, Peneueta has failed to establish any prejudice from the allegedly deficient performance of his counsel. Even if the trial court erred by giving the aggressor instruction, the jury would undoubtedly have rejected the minimal evidence that Peneueta acted in self-defense even in the absence of the instruction. The evidence showed that Peneueta announced his intention to shoot

Flite if he saw him again and then that he did exactly as he had announced and was the first to draw a gun. Perkins' testimony that Flite drew a gun first was not credible given the conflicting other evidence. Thus, Peneueta cannot establish that he was prejudiced by his attorney failing to object to the aggressor instruction.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Peneueta's convictions.

DATED this 6th day of February, 2015.

Respectfully submitted,

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