IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER PAUL PARTRIDGE, Appellant.	No. 38586-4-II UNPUBLISHED OPINION

Bridgewater, J. — Christopher Paul Partridge appeals from his conviction of two counts of first degree assault with firearm enhancements. We affirm.

FACTS

On September 18, 2007, while driving along SR 500, Partridge fired a gun at Lorna Williams' vehicle after she cut him off. The bullet pierced the lower driver's door and stopped on the driver's side floorboard near the accelerator. Williams' daughter, Mary McDaniel, was a passenger in the vehicle. Neither Williams nor McDaniel were injured.

The State charged Partridge with two counts of first degree assault with firearm enhancements on both counts. At trial, Partridge asserted self-defense. He claimed that he

perceived a danger from Williams because of post-traumatic stress disorder (PTSD) he acquired after serving in Iraq.

Jury instruction 17 informed the jury that a person is entitled to act in self-defense when he reasonably believes he is about to be injured and when the force used is not more than is necessary. Jury instruction 18 stated:

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of *great personal injury* which is an injury that would produce severe pain and suffering, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP at 29 (emphasis added). Defense counsel's proposed appearances instruction stated the apprehension of danger as "great bodily harm." Supp. CP at 63.

The jury found Partridge guilty of two counts of first degree assault with the firearm enhancements. The sentencing court sentenced Partridge on both counts of first degree assault and both firearm enhancement findings.

ANALYSIS

I. Ineffective Assistance of Counsel

First, Partridge contends that he received ineffective assistance of counsel because his trial counsel proposed an incorrect self-defense instruction. Ineffective assistance may be raised for the first time on appeal, and a wrongful jury instruction misstating the law on self-defense is an error of constitutional magnitude. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). We employ the familiar standard for ineffective assistance set forth in *Strickland v. Washington,* 466

U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), looking for (1) deficient performance and (2) prejudice.

Partridge is correct that jury instruction 18 misstated the level of harm he had to fear before he could act in self-defense. It set Partridge's burden as being a reasonable apprehension of great personal injury, when the burden was merely "injury." *Kyllo*, 166 Wn.2d at 863-64.

But, although Partridge styles his case as one of self-defense, there are no facts that justify giving a self-defense instruction—his defense of PTSD was really one of diminished capacity. He knew he had a firearm; admitted firing a shot at Williams' vehicle because she cut in front of his car; and after the one shot, he drove home. Road rage is not self-defense, even if the situation called for aggressive, evasive driving responses. Firing a deadly weapon was not self-defense in this instance. There is not a reasonable probability that but for counsel's deficient performance the outcome of the proceedings would have differed. *McFarland*, 127 Wn.2d at 335. Partridge did not receive ineffective assistance of counsel.

II. Double Jeopardy

Second, Partridge argues that the firearm enhancements for first degree assault committed with a firearm violates double jeopardy. He argues that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), mandates courts to characterize firearm enhancements as an additional element of the crime for double jeopardy purposes. Our Supreme Court recently rejected the same argument in *State v. Kelley*, 168 Wn.2d 72, ___, ___ P.3d ____ (2010).

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.