Supreme Court No. 97255-9

Court of Appeals No. 35549-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

RICARDO DIMAS, Petitioner

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
Counsel for Petitioner Dimas
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

I. IDENTITY OF PETITIONER

Ricardo Ochoa Dimas, appellant below, petitions this Court for the relief designated in Part II.

II. DECISION OF LOWER COURT

Mr. Dimas seeks review of the unpublished decision *State v. Ricardo Ochoa Dimas*, issued April 23, 2019 by Division Three of the Court of Appeals. The Court concluded the trial court properly gave a first aggressor instruction, the evidence was sufficient to sustain the convictions, and the State's attorney did not commit misconduct. A copy of the Court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. A first aggressor instruction is properly given under specified facts. Where video evidence shows conclusively that Mr. Dimas did not raise his weapon prior to being assaulted by another, and witness testimony did not establish anyone saw the weapon, the trial court improperly gave a first aggressor instruction. The error was not harmless beyond a reasonable doubt.

B. The State did not meet its burden to prove beyond a reasonable doubt that Mr. Dimas did not act lawfully in self-defense.

C. A prosecutor commits prejudicial misconduct by misstating facts and law during closing argument.

IV. STATEMENT OF THE CASE

On the evening, of January 22, 2016, Tabatha Bevin ("Bevins") Christina Coronado ("Coronado") and Christina Sampson-Jones ("Jones") met with Leticia Diaz ("Diaz") in a local store parking lot to give her some clothing. RP 71-72, 123. Diaz asked for a ride to the home of Anna Hargett ("Hargett"). RP 122. Hargett was the aunt of April Jackson ("Jackson"). RP 62. Bevins agreed to take her to Hargett's home. RP 146. They intended to purchase drugs from Hargett. RP 72. Bevins, Diaz, Coronado, and Jones entered Hargett's home. Exh. 2[1].

The home consisted of a garage space set up like a studio apartment. RP 65. There was a man door to enter and leave the garage, which opened into an alleyway. RP 68. The garage occupants shared a bathroom with the main house. RP 99. The owner of the main home, Lisa Donaldson, had set up a video surveillance system that pointed directly at the garage man door. RP 100.

[1] The DVD surveillance video is State's Exhibit 2. The times referred to are the individual clips and the number of seconds from the beginning of that clip. Found at 8:26 pm- 8:30 pm.

Once inside, the women smoked the meth Hargett had in the home. RP 126. Sometime after 8:30 p.m. Bevins and Coronado asked to buy heroin for Coronado. RP 76, 147. Hargett made a call and left to purchase $100 of heroin. RP 76, 148.

When she returned, Coronado and Bevins paid her the $100. RP 76-77, 148, 170, 208. Coronado tested the drug and said the heroin was not good. She wanted her money back. RP 77, 128, 170, 208. Hargett texted the seller who refused to return the money. RP 129, 209. Diaz told them it was not “like K-Mart or Walmart," and they could not get a refund. RP 76. Wanting to keep the peace between the parties, she offered to repay the $100 to Coronado and Bevins, within a few days. RP 77-78, 129. After a heated argument Jones, Bevins, and Coronado left at 9:07 p.m. RP 78-79, 129-130, 171.

Diaz and Jackson stayed at Hargett’s. Diaz reported that as the women left, someone said “It’s not over yet…we’ll be back.” RP 78. However, Jackson said she did not remember anyone saying they were going to come back and had no reason to believe the women would return. RP 225.

The women drove several blocks to Dimas’s mother’s home, where Dimas was getting ready to leave after working on his mother’s home that day. RP 150, 171, 309. Dimas lived in a different part of town,

but always carried a gun when he went to his mother's neighborhood because it was a violent area of town. RP 313.

Bevins told Dimas, her friend of many years, that Coronado was sick, they had tried to buy heroin for her, and it wasn't good. RP 307, 311. Dimas's friend, Andreas, who had been helping him remodel the home, said he knew Diaz and she would "make it right." RP 312-313. Bevins said Dimas did not sound aggressive but told her this was a neighborhood where everyone knew each other; it was his neighborhood. RP 151. She said it did not sound like he intended to threaten or bully anyone. RP 151.

Dimas did not think there would be any danger, because they were all women. RP 315. He and Andreas drove to Hargett's in a separate car from Bevins, Coronado, and Jones. RP 314. They arrived in the alleyway outside Hargett's garage apartment at approximately 9:36 p.m. (Exh. 2.at 9:36:54). Everyone but Coronado got out of the cars. RP 173.

At 9:36 p.m. Bevins approached the door and knocked twice. (Exh.2 at 9:36:54 and 7 seconds); RP 134, 152. Twenty seconds later she knocked a second time. Exh. 2. Dimas stood off to one side. Exh. 2. Diaz answered the door at 9:37:46. Bevins asked her to "make it right." RP 133, 152. Diaz testified Dimas said, "You want to rip off my best friend? You want to do her fucking dirty?" RP 83. However, the surveillance tape

does not show Dimas talking to Diaz, but rather, with Bevins. (Exh. 2 9:37:46 at 27-28 seconds).

Diaz and Bevins argued, and Jackson opened the door to get Diaz back inside (Exh. 2 9:38:39 and 7 seconds); RP 211. Jackson joined in the argument and turned to Dimas and said, “Who in the --- are you?” RP 211. She said Dimas just stood there, not saying anything. RP 236, 239.

Jackson testified she was angry with Bevins and their argument got increasingly louder. RP 235. They argued for about 20 seconds before Hargett came out of the door. (Exh. 2 9:38:39 at 20 seconds). Jackson testified she told the group to leave in the 20-second encounter. RP 211.

As Hargett emerged alongside Jackson, Dimas stepped to the side, away from them. (Exh. 2 9:38:38 at 21 seconds). Jackson banged on the wall where Dimas had previously been standing. (Exh. 2 9:38:39 at 21 seconds). Less than two seconds later, Hargett stepped in front of Jackson, and as she moved toward Dimas, she raised an ax as if to strike him. RP 240; (Exh. 2 9:38:39 at 22-23 seconds).

Bevins heard Hargett say she was “going to take care of these mother fuckers and to get the fuck out of here.” RP 136. She saw Dimas back up as Hargett raised and cocked the ax. Bevins was afraid of Hargett because she did not know what she was going to do. RP 156-157. She heard Dimas tell Hargett to back up, or he would "go off on her," but

Hargett continued to move forward. RP 137, 158. Bevins saw Hargett swing the ax. RP 137. Jackson did not see the ax until it was in midair. RP 240.

Dimas testified that as the arguing escalated between the women, he saw Hargett come to the door. He heard someone say, "She has an ax." RP 320. As Jackson came toward him and pounded on the wall, he moved back, and put his hand on his gun[2]. RP 321.

He said that after Jackson pounded on the wall, Hargett stepped forward, yelled "Get the fuck out of here" and raised the ax toward him. RP 337; (Exh. 2 9:38:39 at 22 seconds). Dimas stumbled backward and defensively held his arm up. (Exh.2: 9:38:39 at 23 seconds).

Within two seconds of Hargett's attack, Dimas raised his weapon and fired toward Hargett. (Exh. 2 9:38:39 at 24 seconds). The bullet went through both Hargett and Diaz. RP 216. From the time Dimas arrived at the alleyway until the time Hargett was shot was about two minutes and five seconds. Exh. 2. Hargett died about 30 minutes later. CP 5. Diaz was treated for a gunshot wound to the neck. RP 87. Yakima County Prosecutors charged Dimas and the matter proceeded to a jury trial. CP 50-51.

---

[2] No witness reported seeing Dimas holding his gun; he deliberately did not point it or raise it. RP 322.

The defense theory of the case was that Dimas acted in self-defense and his words alone were insufficient to support a first aggressor jury instruction. RP 6, 369. Dimas objected to a first aggressor instruction. RP 372. The State contended that Dimas's presence in the alleyway was a "malicious trespass," and, therefore, the first aggressor instruction was appropriate. RP 370.

The court agreed that evidence of a trespass was mixed but believed that Dimas and the others had been told "repeatedly to leave." The court concluded there was some evidence that Dimas was the person who started the fight." RP 372-373. Over defense objection the court gave a first aggressor instruction. RP 368; CP 132. The court also gave a defense of self instruction, and a "no duty to retreat" jury instruction. CP 119, 127, 129-130.

During closing argument, the prosecutor stated:

> When you're looking through your jury instructions, you're going to see if this was necessary force. *Even if you don't believe that he was the primary aggressor in this case, he still needs to prove that he was using the amount of force necessary to protect himself*.

RP 397 (Emphasis added).

Defense counsel objected, and the court told the jury, "There was a misstatement of the law there. The burden of proof is on the state, including the burden to prove that the act was not lawful." RP 397-398.

The prosecutor went on:

> Ladies and gentlemen, having viewed the video several times, it's your job to decide whether or not this was the necessary force in shooting Anna Hargett. *The state's contention is he could have left. He could have walked away*.

RP 398-399.

Defense counsel again objected, citing, "The law says there is no duty to retreat or any of that." RP 399. The court responded:

> Counsel's remarks and statements are argument. They aren't evidence. The jury will need to discern the evidence that it has heard in the course of the trial and apply the law to those facts and reach a verdict in that fashion.

RP 399.

The prosecutor stated:

> Now, reading this instruction clearly, obviously any of these other defenses of self-defense are not available if you find beyond a reasonable doubt that Mr. Dimas was the one who provoked the attack. The evidence has been shown on the screen a number of times. People are telling Mr. Dimas to leave emphatically. People are cussing at each other. They don't want him or any of those people to be there.
>
> *In response, you can see he brings out his firearm. He makes no effort to leave. Would it be reasonable to believe that that would provoke a violent response from a homeowner that's telling you to leave?* The state's contention is that it is.

RP 400-401. (Emphasis added).

> The third is that the slayer employed such force and means as a reasonably prudent person would do under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident. Again, this is somewhat redundant of a similar instruction we discussed whether or not this is the reasonable action. The state's contention is that it's not reasonable *when you have an opportunity to leave*.

RP 403-404. (Emphasis added).

Mr. Dimas was convicted on all counts. CP 38-42; 376-77. He made a timely appeal. CP 387-396.

The Court of Appeals held the trial court properly gave the first aggressor instruction, and the no duty to retreat standard did not apply to Mr. Dimas because the limited license as a visitor to the front door area had been revoked. And because he drew his firearm in a manner likely to provoke an aggressive response, he had a duty to retreat. *Slip Op.* at 7.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should address the issues raised in Mr. Dimas's petition because they raise constitutional issues of due process under the Washington State Constitution and the U.S. Constitution. RAP 13.4(b)(3).

A. A First Aggressor Jury Instruction Prevents A Jury From Considering Whether The State Has Proved Beyond A Reasonable Doubt That The Defendant Did Not Act In Self-Defense. When It Is Erroneously Given, It Implicates A Defendant's Constitutional Rights.

"An error affecting a claim of self-defense is constitutional in nature and cannot be deemed harmless unless it is deemed harmless beyond a reasonable doubt." *State v. McCullum*, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983). The error here went to the heart of the case: whether Mr. Dimas justifiably used a weapon when he was assaulted by Hargett with an ax. The instructional error is not harmless beyond a reasonable doubt.

An individual may use deadly force in self-defense if he reasonably believes he is in danger of imminent harm, even if he is not in actual danger. RCW 9A.16.050. Such force is lawful if the defendant did not instigate or provoke the confrontation, and that conflict would induce a reasonable person, considering all the facts and circumstances known to the defendant, to believe there was imminent danger of great bodily harm about to be inflicted. *State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993).

A first aggressor instruction is not favored; it nullifies a defendant's legitimate right to self-defense, and courts are cautioned to use care in giving them. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847

(1990). In 1999, the Washington Supreme Court wisely reasoned "Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such an instruction." *State v. Riley,* 137 Wn.2d 904, 909, 910 n.2, 976 P.2d 624 (1999).

A first aggressor instruction is proper 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 the defendant made the first move by drawing a weapon. *State v. Anderson,* 144 Wn. App. 85, 89, 180 P.3d 885 (2008). In other words, the defendant must undertake some intentional act that could reasonably be likely to provoke a belligerent response.

The State's theory was that Mr. Dimas provoked Hargett into swinging an ax at him either because he was a "malicious trespasser[3]" or because he had a firearm at his side. The facts of the case do not stand up to the theories.

---

[3] RCW 9A.04.110(12) defines maliciously as having evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

Diaz testified she never told the group to leave. RP 85. Jackson argued with the group and testified she probably told them to leave a couple of times in the 20 second encounter. RP 211-212. Mr. Dimas testified that Hargett was the only one who told them to leave. RP 337. But, within seconds she raised the ax.

Mr. Dimas's presence outside the door was not as a malicious trespasser. Even if Mr. Dimas's presence could conceivably be considered "malicious", Ms. Hargett's intentional act of swinging an ax at him was not justified. *See State v. Bland*, 128 Wn. App. 511, 116 P.3d 428 (2005); *State v. Bea,* 162 Wn. App. 570, 254 P.3d 948 (2011).

Mr. Dimas did not knock on the door[4]. He never entered the garage. He stood off to one side. He did not argue with Diaz. (Exh.2 9:37:46). He did not argue with Jackson and barely responded to her when she asked who he was. (Exh. 2 9:38:39 at 15 seconds). As the conflict between the women escalated, he stepped to the side and away from Jackson as she approached him. He put his hand on his gun but did not raise it, point it, or threaten with it. RP 321; Exh. 2. He reported he deliberately did not point it or raise it. RP 322. The video camera captured

[4] Bevins knocked on the door two different times, twenty seconds apart. The video shows she did not pound on the door either time. Exh.2 9:36:54 at 6 seconds and again 20 seconds later.

his movement of holding the gun at his side, but no witness reported seeing the gun.

Mr. Dimas stood in the same place when Hargett stepped forward toward him. He told her to back up, she yelled, and raised the ax to swing at him. RP 337, (Exh. 2 9:38:39 at 22 seconds). One second later, Mr. Dimas stumbled backward and defensively held up his arm. (Exh.2: 9:38:30 at 23seconds). At 9:38:39 at 24 seconds, Mr. Dimas raised his weapon and fired toward Hargett in response to her attack.

The instruction was prejudicial because it nullified Mr. Dimas's claim of self-defense, effectively and improperly removing it from the jury's consideration. *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005).

To prove a constitutional error "harmless", the State bears the burden of showing that any reasonable fact-finder would have reached the same result absent the error "and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Where the error is not harmless, the defendant is entitled to a new trial. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Here, the prejudicial instructional error requires reversal. *State v. Townsend*, 142 Wn.2d 838, 848, 15 P.3d 145 (2001).

B. The State Did Not Disprove Beyond A Reasonable Doubt Mr. Dimas Lawfully Acted In Self-Defense.

Due process rights, guaranteed under both the Washington Constitution and the United States Constitution, require the state to prove every element of a crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). Sufficiency of the evidence is a question of constitutional magnitude. *State v Baeza,* 100 Wn.2d 487,488, 670 P.2d 646 (1983).

Where, as here, a claim of self-defense is made, the absence of self-defense becomes another element of offense, which the State must prove beyond a reasonable doubt. *State v. Acosta,* 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). A self-defense claim is rooted in the right of every citizen to reasonably defend himself against an unwarranted attack. *Janes,*121 Wn.2d at 237.

The issue here is the caveat that evidence of self-defense must be assessed from the viewpoint of a reasonably prudent person, "knowing all the defendant knows and seeing all the defendant sees." *State v. Woods,*138 Wn. App. 191, 198, 156 P.3d 309 (2007). Mr. Dimas knew the neighborhood was a violent one. He knew Hargett sold drugs. He knew the women had used methamphetamine about an hour earlier. He knew the situation had escalated from a loud argument to one that was suddenly

unpredictable and violent. He warned Hargett to back off. Instead, she stepped forward and raised the ax toward him.

The surveillance video showed that in the second it took him to regain his balance and Hargett to bring the ax down, she continued to yell at him. She did not back up nor did she drop the ax. Mr. Dimas had no assurance she was not going to do a follow-up swing or hurl it at him. Deadly force may only be used in self-defense if the defendant reasonably believed he was threatened with death or great personal injury. *State v. Walden*, 131 Wn.2d 469, 474-75, 932 P.2d 1237 (1997). Mr. Dimas fired his weapon one time within 2 seconds of Hargett's attack. Mr. Dimas was justified in defending himself.

C. The Prosecutor Committed Flagrant Prejudicial Misconduct Incurable By A Trial Court's Instruction In Response To The Objection.

In closing argument, the prosecutor misstated the law regarding the burden of proof. RP 397. The prosecutor told the jury that even if it did not believe Mr. Dimas was the primary aggressor, "he still needs to prove that he was using the amount of force that was necessary to protect himself." RP 397. This was a gross misstatement of the law. Once Mr. Dimas met his burden of proving sufficient evidence for the claim of self-defense, negating intent, the burden shifted to the State to disprove that claim. *Acosta*, 101Wn.2d at 617.

Where a prosecutor makes an argument contrary to settled law, it is flagrant, prejudicial misconduct and incurable by a trial court's instruction in response to an objection. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). Reducing the State's burden by impermissibly shifting it to the defendant is a violation of a defendant's due process rights. *Id*. at 686.

The prosecutor further misstated the law when he told the jury that Mr. Dimas "could have left" and "had an opportunity to leave". RP 398, 404. The objectionable remarks were part of the State's theory that Mr. Dimas was a "malicious trespasser," justifying Hargett's use of the ax and negating Mr. Dimas's right to defend himself. The prosecutor's statement to the jury advanced a theory that when Mr. Dimas stood outside a door while the women argued and Hargett eventually came outside to tell them to leave, amounted to Mr. Dimas having no right to be there previously.

Less than five seconds passed between Hargett telling the group to leave and swinging her ax. "Flight, however reasonable an alternative to violence, is not required." *State v. Williams*, 81 Wn. App. 739, 743-44, 916 P.2d 445 (1996). The prosecutor may not misstate the law and thereby mislead the jury. *State v. Gotcher*, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988).

The prosecutor misstated the evidence when he said:

> People are telling Mr. Dimas to leave emphatically. People are cussing at each other. They don't want him or any of those people to be there.
> In response, you can see he brings out his firearm. He makes no effort to leave. Would it be reasonable to believe that that would provoke a violent response from a homeowner that's telling you to leave? The state's contention is that it is.

The State presented no evidence that Hargett ever saw the firearm. Counsel has latitude in closing argument to draw and express reasonable inferences from the evidence but may not mislead the jury by misstating the evidence. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

Whether Mr. Dimas was justified in defending himself was the issue at trial. The comments affirmatively misled the jury when the prosecutor said Mr. Dimas had to prove the amount of force he used was necessary, by repeating twice that he should have walked away, and stating that Hargett was responding to Mr. Dimas having a weapon.

A curative instruction by the court is not a guarantee that the prejudice caused by prosecutorial misconduct is cured. *State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect. *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

The misleading of the jury on these crucial points could not be cured by a judicial instruction, in particular, the "why didn't he just leave" remarks. The State injected the impermissible inference, more than once, that Mr. Dimas should have walked away from a situation that had unfolded in seconds.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Dimas respectfully asks this Court to grant his petition for review.

Respectfully submitted this 23rd day of May 2019.

/s/ Marie Trombley, WSBA 41410
P.O. Box 829
Graham, WA 98338
marietrombley@comcast.net
253-445-7920

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Ricardo Ochoa Dimas, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid, on May 23, 2019 o:

Ricard Ochoa Dimas DOC 843993
Airway Heights Correction Center
PO Box 2049
Airway Heights, WA. 99001

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Yakima County Prosecuting Attorney (at appeals@co.yakima.wa.us).

/s/ Marie Trombley, WSBA 41410
P.O. Box 829
Graham, WA 98338
marietrombley@comcast.net
253-445-7920

APPENDIX A

FILED
APRIL 23, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. RICARDO OCHOA DIMAS, Appellant.	)))))))))	No. 35549-7-III UNPUBLISHED OPINION

PENNELL, J. — Ricardo Ochoa Dimas appeals his convictions for second degree murder, first degree assault, and unlawful possession of a firearm. We reject all of Mr. Ochoa Dimas's challenges save two: (1) Mr. Ochoa Dimas's convictions for counts 2 and 5 must be vacated based on double jeopardy principles and (2) Mr. Ochoa Dimas is entitled to relief from payment of the $100 deoxyribonucleic acid (DNA) collection fee based on recent changes to Washington's legal financial obligations statutes.

FACTS

On the night of January 22, 2016, Mr. Ochoa Dimas fired a single shot from a handgun, killing Anna Hargett and injuring another woman, Leticia Diaz. Mr. Ochoa Dimas had accompanied some friends to Ms. Hargett's residence in order to protest the quality of heroin received in a recent drug transaction. The interaction between

Mr. Ochoa Dimas's companions and the residents of Ms. Hargett's home was heated. The incident was recorded by a surveillance camera, albeit without sound.

The surveillance video shows Mr. Ochoa Dimas and four other individuals (three women and one man) arriving at Ms. Hargett's residence. One of the women knocked on the front door as Mr. Ochoa Dimas stood watch. Mr. Ochoa Dimas's back was directly against a wall, located to the left of the front door. Because the wall ran perpendicular to the door, the left side of Mr. Ochoa Dimas's body was directly opposite the front of the doorway. At that point in time, Mr. Ochoa Dimas did not have anything in his hands. He was, however, fidgeting with something near his right-hand front pocket.

Ms. Diaz answered the door and stepped outside. She closed the door behind her and began arguing with Mr. Ochoa Dimas and his companions. After several minutes, the door opened and Ms. Hargett and her niece displaced Ms. Diaz at the front door. At that point, Mr. Ochoa Dimas removed a firearm from the area of his right pants pocket and held it by his side, pointing it toward the ground.

Once Ms. Diaz was displaced, the verbal confrontation continued with Ms. Hargett's niece standing in front of Ms. Hargett in the home's open doorway. According to Ms. Hargett's niece, she and Ms. Hargett told Mr. Ochoa Dimas and his companions to leave "several times." 3 Report of Proceedings (RP) (Aug. 29, 2017)

at 211. Ms. Hargett's niece did not mention whether, at that point, she noticed Mr. Ochoa Dimas holding the gun.

The video then depicts the following events over the course of less than five seconds: Ms. Hargett moved around her niece as Mr. Ochoa Dimas stepped away from the wall and turned his body to face the front door. Mr. Ochoa Dimas was still holding the gun in his right hand, pointing it toward the ground. Mr. Ochoa Dimas and Ms. Hargett then exchanged words. At that point, the video shows Mr. Ochoa Dimas's gun in full view, within the possible eyesight of Ms. Hargett. Ms. Hargett then pulled an ax from behind her body and lunged at Mr. Ochoa Dimas. Mr. Ochoa Dimas put up his left arm in an apparent attempt to shield himself and took several steps backward. Ms. Hargett then started to lower the ax. As she did so, Mr. Ochoa Dimas fired a shot at Ms. Hargett.

The bullet fired by Mr. Ochoa Dimas went through Ms. Hargett's chest and then traveled to hit Ms. Diaz in the neck. Mr. Ochoa Dimas and his companions then fled the scene. Police arrived and Ms. Hargett and Ms. Diaz were taken to the hospital. Ms. Diaz recovered from her wounds; Ms. Hargett did not.

The State charged Mr. Ochoa Dimas with five felony counts: (1) second degree murder, (2) second degree felony murder, (3) first degree assault, (4) first degree

unlawful possession of a firearm, and (5) second degree unlawful possession of a firearm. Mr. Ochoa Dimas exercised his right to a jury trial as to counts 1, 2 and 3. He agreed to a bench trial on counts 4 and 5.

During the jury trial, Mr. Ochoa Dimas asserted self-defense. He testified on his own behalf and claimed he shot Ms. Hargett in self-defense after she stepped toward him with the ax. Mr. Ochoa Dimas denied being asked to leave prior to being threatened with the ax. He also claimed his gun remained hidden until the moment of the shooting.

Based on the evidence admitted at trial, the trial court provided the jury a full panoply of self-defense instructions, including instructions regarding no duty to retreat (Instruction 16) and an initial aggressor instruction (Instruction 18).

The jury found Mr. Ochoa Dimas guilty of all pending charges. The trial court then found Mr. Ochoa Dimas guilty of the two firearms charges. Mr. Ochoa Dimas received a total sentence of 576 months' imprisonment. He appeals.

ANALYSIS

Initial aggressor jury instruction

Mr. Ochoa Dimas claims the facts at trial did not justify a first aggressor instruction. We disagree.

A first aggressor instruction may be issued 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). Here, the video evidence shows Mr. Ochoa Dimas drew his gun and positioned himself squarely in front of Ms. Hargett's door prior to being threatened with an ax. Given the context—a heated confrontation over drug money and refusal to leave after repeated requests—the mere act of pulling out a firearm and holding it in a low-ready position was an act of provocation, likely to elicit a belligerent response. The initial aggressor instruction was appropriate.

Sufficiency of the evidence

In addition to his instructional challenge, Mr. Ochoa Dimas claims the State's evidence was insufficient to overcome his claim of self-defense. When reviewing a sufficiency challenge, we assess the facts in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). As previously noted, the facts at trial suggested Mr. Ochoa Dimas escalated a verbal dispute into a violent confrontation by drawing a firearm and refusing repeated requests to leave. Because the law of self-defense does not apply to an individual who provokes an act of violence,

State v. Wingate, 155 Wn.2d 817, 822, 122 P.3d 908 (2005), the State provided sufficient proof to justify Mr. Ochoa Dimas's convictions.

Prosecutorial misconduct

Mr. Ochoa Dimas argues the prosecutor engaged in misconduct by making two misstatements of law during summation. Neither claim merits relief from conviction.

Mr. Ochoa Dimas's first complaint is that the prosecutor improperly shifted the burden of proof by arguing as follows:

> When you're looking through your jury instructions, you're going to see if this was necessary force. Even if you don't believe that he was the primary aggressor in this case, he still needs to prove that he was using the amount of force that was necessary to protect himself.

4 RP (Aug. 30, 2017) at 397.

While this statement was improper, it does not warrant reversal because it was adequately addressed by the trial judge. Immediately after the prosecutor's statement, defense counsel objected, the prosecutor apologized, and the trial court issued a curative instruction, explaining that the prosecutor had misstated the law and that "[t]he burden of proof is on the state, including the burden to prove the act was not lawful." *Id*. at 397-98. We presume that juries follow the court's instructions. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). There are no facts in the record sufficient to rebut this presumption.

Second, Mr. Ochoa Dimas claims the prosecutor committed misconduct by repeatedly arguing Mr. Ochoa Dimas had a duty to retreat from Ms. Hargett's residence. This complaint rests on a flawed legal premise. The State properly argued Mr. Ochoa Dimas had a duty to retreat for two distinct reasons. First, the no duty to retreat standard applies only to individuals whose presence is lawful. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999); *State v. Allery*, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). At the time of the shooting, Mr. Ochoa Dimas had no right of continued presence because his limited license as a visitor to the front door area of Ms. Hargett's home had been revoked. *See In re Pers. Restraint of Harvey*, 3 Wn. App. 2d 204, 216-17, 415 P.3d 253 (2018). Second, the right to stand one's ground does not apply to an initial aggressor. *Id.* at 220-21. Once Mr. Ochoa Dimas drew his firearm in a manner likely to provoke an aggressive response, he lost his right to continued presence. Rather than proceeding to act in a violent manner, he had a duty to retreat. *Id*. at 220. The prosecutor appropriately argued this point to the jury.

Double jeopardy

As the parties agree, double jeopardy[1] protects Mr. Ochoa Dimas from being convicted of two counts of second degree murder and two counts of unlawful possession

[1] U.S. CONST. amend. V; WASH. CONST. art. I, § 9.

of a firearm. *See State v. Womac*, 160 Wn.2d 643, 656, 160 P.3d 40 (2007). This matter is therefore remanded with instructions to vacate the convictions for counts 2 and 5.[2]

Legal financial obligations

Citing *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), Mr. Ochoa Dimas has filed a supplemental brief, requesting we strike discretionary costs and the $100 DNA collection fee from his judgment and sentence. *Ramirez* was decided after Mr. Ochoa Dimas filed his opening brief. The decision held that the 2018 amendments[3] to Washington's legal financial obligations scheme apply prospectively to cases on direct review at the time of enactment. Relevant here, the 2018 amendments prohibit imposition of filing fees and costs on defendants who are indigent, as defined by RCW 10.101.010(3)(a)-(c), at the time of sentencing. RCW 10.01.160(3); RCW 36.18.020(2)(h). In addition, the amendments prohibit the State from collecting more than one $100 DNA collection fee. RCW 43.43.7541.

The record before the court indicates Mr. Ochoa Dimas is entitled to relief under *Ramirez*. Mr. Ochoa Dimas proffers that his extensive felony criminal history

[2] It is unclear whether the trial court entered judgment on both firearm counts (counts 4 and 5) or just first degree unlawful possession of a firearm (count 4). Given this confusion, correction on remand is appropriate.

[3] LAWS OF 2018, ch. 269.

demonstrates he has previously paid a $100 DNA collection fee. We accept this representation and agree the current fee should be struck on remand unless the State produces evidence that the DNA fee has not previously been collected.

Mr. Ochoa Dimas also claims the court should strike a $200 criminal filing fee and $250 jury demand fee because those two fees are costs that, under current law, cannot be assessed against indigent defendants. Had the trial court actually imposed a $200 criminal filing fee and $250 jury demand fee, we would agree with Mr. Ochoa Dimas's position. However, the two aforementioned fees were already struck by the trial judge at the original sentencing hearing. We cannot provide further relief.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Ochoa Dimas has filed a statement of additional grounds for review (SAG) under RAP 10.10, alleging numerous errors in his convictions. Our review of Mr. Ochoa Dimas's SAG is limited to issues that are clearly defined, not repetitive of existing briefing, and adequately supported by the existing appellate record. RAP 10.10(c); *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008); *State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496 (2013).

The majority of Mr. Ochoa Dimas's SAG arguments refer to facts outside the existing record and therefore are not eligible for review on direct appeal. These include

claims that: (1) Ms. Hargett was not a lawful tenant and therefore had no authority to order Mr. Ochoa Dimas to leave her doorway, (2) Mr. Ochoa Dimas was denied access to legal resources during a critical stage in his case when he did not have counsel, (3) the trial court sealed juror records prior to the close of voir dire, (4) the prosecutor substituted evidence and failed to disclose exculpatory evidence, and (5) defense counsel provided ineffective assistance by failing to call witnesses, to consult with Mr. Ochoa Dimas about whether to seek a lesser included offense instruction, and to timely disclose a plea offer.

Two claims remain. Both fail on the merits.

First, Mr. Ochoa Dimas argues the trial court's instructions provided conflicting standards of self-defense. We disagree. The only instructions discussed with specificity in Mr. Ochoa Dimas's SAG are numbers 18 (the initial aggressor instruction) and 15 (a person acting in self-defense may act on appearances).[4] These instructions are not inconsistent. As written, neither undermines the standard that a defendant may rely on reasonable appearances when acting in self-defense.

Second, Mr. Ochoa Dimas claims his counsel engaged in improper trial strategy by failing to pursue a lesser included offense. We disagree. The decision to forgo a lesser included offense is a strategic matter that "ultimately rests with defense counsel."

[4] Mr. Ochoa Dimas erroneously refers to this instruction as number 20.

State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The mere fact that counsel's all-or-nothing trial strategy was unsuccessful does not support an ineffective assistance of counsel claim. *Id.* at 43.

CONCLUSION

This matter is remanded with instructions to strike counts 2 and 5 from Mr. Ochoa Dimas's judgment of conviction. The trial court is also instructed to strike Mr. Ochoa Dimas's $100 DNA collection fee unless the State produces evidence that a DNA fee has not previously been collected. In all other respects, Mr. Ochoa Dimas's judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

MARIE TROMBLEY

May 23, 2019 - 3:09 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35549-7
Appellate Court Case Title:	State of Washington v. Ricardo Ochoa Dimas
Superior Court Case Number:	16-1-00171-3

The following documents have been uploaded:

- 355497_Petition_for_Review_20190523150802D3622458_2207.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Dimas P4R FINAL.pdf

A copy of the uploaded files will be sent to:

- appeals@co.yakima.wa.us
- joseph.brusic@co.yakima.wa.us
- tamara.hanlon@co.yakima.wa.us

Comments:

Sender Name: Valerie Greenup - Email: valerie.mtrombley@gmail.com
Filing on Behalf of: Marie Jean Trombley - Email: marietrombley@comcast.net (Alternate Email:)

Address:
PO Box 829
Graham, WA, 98338
Phone: (253) 445-7920

Note: The Filing Id is 20190523150802D3622458