No. 326951

COURT OF APPEALS DIVISION THREE
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Oscar Alfred Alden,

Appellant

ON APPEAL FROM DOUGLAS COUNTY SUPERIOR COURT
Honorable Hon. John Hotchkiss

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. DENIAL OF JURY UNANIMITY

1. The prosecution ignores the jurors' expression of confusion and the logical causes of their confusion.

The State accuses Alden of ignoring the fact that Instruction No. 22 told the jury that it had to be unanimous in order to return a verdict on Count I (Murder 2) and that it had to be unanimous to return a verdict on Count II (Manslaughter 1). CP 329. According to the State, since this correct instruction was given, this Court can be sure that 12 jurors unanimously agreed that Alden was guilty of Murder 2.

But the State simply ignores these undisputed facts in the record:

(1) The jurors explicitly said "***we are confused*** on the charging decisions we are to make." (CP 302) (emphasis added);

(2) Instruction No. 19 told the jurors that if they could not find Alden guilty of Murder 2, then they should consider whether he was guilty of Manslaughter 2. CP 325. ***By skipping over Manslaughter 1, No. 19 seemed to indicate that if the jurors could not find Murder 2 then they were prohibited from finding Manslaughter 1.*** Thus, No. 19 seems to have caused the jurors' confusion, and explains why they explicitly asked whether it "needed to convict on both counts."

(3) ***the prosecution conceded that Alden could not legally be convicted of both Murder 2 and Manslaughter 1.*** RP 1505.

(4) Since a defendant cannot kill a person intentionally while simultaneously killing that person unintentionally, ***the trial judge's response to the jury inquiry***, that permitted the jury to find the defendant guilty of ***both*** Murder 2 and Manslaughter 1 for the killing of Maks, ***could only be sensibly understood as telling the jurors that they did not have to unanimously agree that Alden killed intentionally***; and

When one considers all of the things that the prosecution has ignored, it becomes apparent that this is not the type of case where an

appellate court can apply the normal presumption that the jurors actually followed the instruction (No. 22) that told them they had to be unanimous. This is the unusual case of *admitted* juror confusion. CP 302 ("***We are confused*** on the charging decisions we are to make.").

Moreover, the next two sentences of the jury inquiry strongly imply that the jurors thought it was irrational to ask them to return verdicts on both Murder 2 and Manslaughter 1:

> Is the defendant charged with both 2nd degree murder and 1st degree manslaughter. Do we need to convict on both counts?

CP 302. Quite rationally the jurors thought that Murder 2 and Manslaughter 1 were *alternatives,* that Alden could not be found guilty of both, and they wanted confirmation of their assumption that if they found him guilty of one charge they could simply ignore the other one. The logical nature of this jury assumption is demonstrated by the fact that the State's *first* amended information had explicitly charged Manslaughter 1 *as an alternative* to Murder 2. CP 182. Inexplicably, the language that identified Manslaughter 1 as an *alternative* charge was removed when the Second Amended Information was filed. CP 194.

2. When juror confusion is demonstrated, a supplemental instruction is required to protect the right of jury unanimity.

Ordinarily, in a *routine* case, a court can assume that the jury understood and followed its instructions. But it is well established that if the jury exhibits confusion then a court cannot rely on this presumption:

> The trial judge did give to the jury a single general instruction that their verdict had to be unanimous. This court has held that ***in a***

> ***routine case*** when a jury is presented with multiple counts or schemes, ***it may be possible to protect the defendant's right to a unanimous jury verdict by such a general instruction.*** [Citations].
>
> ***When it appears, however, that there is a genuine possibility of jury confusion*** or that a conviction may occur as a result of different jurors concluding that the defendant committed different acts, ***the general unanimity instruction does not suffice.***

United States v. Echeverry, 698 F.2d 375, *modified by* 719 F.2d 974, 974 (9th Cir. 1983).

Where a "genuine possibility" of jury confusion exists, reliance upon a general instruction on the need for jury unanimity is *not* sufficient. *Id.* Therefore, whenever a jury says that it is confused, it becomes the duty of the trial court judge to give a supplemental jury instruction that reemphasizes the need for jury unanimity:

> To correct any potential confusion in such a case, ***the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree*** to a particular set of facts.

Echeverry, 719 F.2d at 975 (emphasis added). *Accord United States v. Gordon,* 844 F.2d 1397, 1401 (9th Cir. 1988).

3. Jury confusion was clearly manifested here.

When a jury sends the trial judge a note stating that it is confused, then there can be no doubt that it is confused. Indeed, in *Gordon* the jury's inquiry expressed *exactly the same type of confusion* that Alden's jurors expressed. In *Gordon* the defendant was charged with conspiracy to defraud the United States, and there were two different possible conspiracies upon which a conviction could rest.

> The jury was obviously confused because during deliberations it sent a note to the judge ***asking whether it had to find a defendant guilty on both objects*** to convict on Count I. The judge did not answer the question but instead repeated the general conspiracy instructions. In fact, these instructions may have added to the jury's confusion because the judge referred to a conspiracy to defraud and to a conspiracy to obstruct as two distinct conspiracies. Thus, ***the district judge erred in failing to cure the risk of a nonunanimous verdict resulting from the duplicitous indictment.***

Gordon, 844 F.2d at 1401-02 (emphasis added).

In the present case, the jurors asked the exact same question that the *Gordon* jurors asked: "Do we need to convict on both counts?" CP 302. In *Gordon* the two crimes were packaged within the same count. In Alden's case the two crimes were packaged in separate counts. But in both cases the jurors were confused as to whether they were required to find both crimes proved in order to decide the case. The correct answer in both cases was, "No, you need not find both, but all 12 of you must be unanimous *as to one* of the two charges." Neither trial judge said this.[1] This is reversible error because it does not eliminate the risk that a nonunanimous verdict was returned.

In a multiple count case, it is all too easy for a jury to be confused as to *what* it has to be unanimous about. In this case, it is very possible that the twelve jurors mistakenly *thought* they were returning a unanimous verdict because they said to themselves: "All twelve of us agree that he is

[1] The *Gordon* trial judge didn't do anything other than reread the jury the same general instruction on unanimity that it had read before, and the Ninth Circuit held that was *not* sufficient. In this case the trial judge did even *less* than the *Gordon* trial judge did. Alden's trial judge did *not* reread the general jury instruction that informed the jurors of the need for unanimity. Alden's trial judge said *nothing at all* about the need for jury unanimity.

guilty of one of these two crimes." But that is not constitutionally sufficient because it does not negate the very "genuine possibility" that six jurors felt he intended to kill while six others felt he did not intend to kill but acted recklessly.

4. The State tried this case with two counts that were *not* described as alternatives, and later conceded that they *had* to be alternatives, and that Alden could not be convicted of both. This shows that *the prosecution itself was confused* and did not understand the risk of nonunanimous verdicts.

The State ignores the fact that it made the same mistake that the jurors made. By filing the second amended information which *removed* the alternative charging language the prosecution signaled that it believed that Alden could be convicted of both crimes. By telling the jurors, in response to their inquiry, that if they wanted they could find Alden guilty "of both" offenses, the trial judge also committed this mistake.

Belatedly, *after* the verdicts were returned, defense counsel realized that Alden could not be convicted of both; the prosecutor was persuaded and told the sentencing judge "we agree"; and the trial judge was also persuaded and he then dismissed the Manslaughter 1 count. But *during* the trial *everyone* was laboring under the erroneous belief that Alden could be convicted of both.

But there is only one way that anyone could think that Alden could be guilty of both an intentional killing (a Murder 2) and an unintentional killing (a Manslaughter 1). The only way anyone can think that is if they believe that it is sufficient if some jurors think the killing was unjustified

and intentional while others think it was unintentional and reckless. And this is precisely the kind of thinking that, if acted upon, deprives the defendant of his constitutional right to a unanimous jury verdict.

The prosecution wants this Court to hold that there is no genuine possibility that such a violation occurred because Instruction No. 22 told the jurors they had to be unanimous as to each count. But despite the fact that this Instruction was given, the prosecution itself clearly failed – throughout the trial – to understand that juror unanimity would be violated if Alden was convicted of both crimes based on the determination of some that he acted intentionally and the determination of others that he acted recklessly. Having engaged in this kind of unconstitutional thinking itself, the prosecution's contention that there is no danger that Alden's jurors engaged in this kind of forbidden thinking is insupportable.

B. WRONGFUL EXCLUSION OF RES GESTAE EVIDENCE THAT THE VICTIM ATTACKED OTHER PEOPLE EARLIER THAT EVENING.

1. The State ignores the difference between two distinct factual issues: "Did the defendant have a reasonable apprehension of harm?" and "Who was the first aggressor?"

The State attempts to avoid addressing the issue which Alden has raised. Alden has *never* argued that prior violent acts of the victim – which were unknown to Alden – were relevant to establish Alden's reasonable apprehension of harm.[2] Instead, Alden has consistently argued

[2] The State seeks to rely on this passage from *State v. Adamo*, 120 Wash. 268, 271, 207 P. 7 (1922): "Prior violent acts [of the victim] would be relevant to establish [a defendant's] reasonable apprehension on the night of the crime, **but only if it was shown**

(Footnote continued next page)

that such acts are relevant *to show the identity of the first aggressor*. The State simply ignores this distinction.

Many cases from other jurisdictions specifically rely on Dean Wigmore's recognition of this important distinction between (1) offering evidence of the violent conduct of the deceased to show the *defendant's* state of mind (reasonable apprehension of harm); and (2) offering such evidence to show the *deceased's* aggressive state of mind which led him to be the first aggressor. As the West Virginia Supreme Court noted, "this distinction, so often overlooked and so clearly stated by Mr. Wigmore," lead it to approve the following rule:

> The violent conduct of the deceased shortly preceding the homicide, ***though in the absence of and unknown to the accused, is admissible*** to show his [the deceased's] state of mind and characterize his conduct during the fatal difficulty and by some courts regarded as part of the res gestae.

State v. Waldron, 71 W. Va. 1, 75 S.E. 558, 560-61 (1912) (emphasis added). Both the Illinois Court of Appeals[3] and the Connecticut Supreme

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that [the defendant] knew of those incidents." *Brief of Respondent* at 15 (emphasis added by the Respondent).

But Alden has never argued that Maks' earlier acts of violence – acts that Alden was unaware of – were relevant *to establish Alden's reasonable apprehension of harm.* Instead, Alden *has* argued that Maks' prior acts that evening were relevant *to establish who was the first aggressor* (Maks or Alden).

[3] "One purpose of the testimony [regarding the decedent's violent acts] may be to show the reasonableness of the defendant's state of mind in acting in self-defense; a second purpose may be to support the defendant's testimony that the deceased was the aggressor. [Citation] ***These distinct purposes serve different functions and carry different requirements as to the defendant's knowledge of the deceased's character and reputation. 1 Wigmore, Evidence §63 (3d ed. 1940);*** [citation]. When used for the first purpose, the defendant must have known the information concerning the deceased when the act of self-defense occurred. . . . ***A requirement that the defendant knew of the deceased's propensity for violence is unrelated to the second purpose, however.***

(Footnote continued next page)

Court[4] have also relied on Wigmore as persuasive authority for adoption of the same rule.

2. **The State ignores the common law rule recognized by Professor Tegland. Tegland recognizes that *Adamo* actually supports Alden's position that he need *not* have known about the victim's prior violent acts in order for those acts to be admissible to show who was the first aggressor.**

Professor Tegland succinctly distinguishes between the two issues of first aggressor and reasonable apprehension of harm, and states that the defendant's awareness of the victim's prior acts need *not* be shown to be admissible on the first aggressor issue. Moreover, Tegland actually cites to *State v. Adamo,* 120 Wash. 268, 271, 207 P. 7 (1922) – a case cited by the prosecution – as a case containing dicta which actually *supports* Alden's position:

Evidence that the victim was a violent person or committed violent acts helps corroborate the defendant's testimony that the deceased was the initial aggressor; ***the defendant's lack of knowledge concerning the deceased's reputation for character does not affect the relevancy of evidence offered for this purpose."*** *People v. Gossett*, 115 Ill. App.3d 655, 451 N.E.2d 280, 285 (1983) (emphasis added).

[4] Reversing the defendant's murder conviction in *State v. Miranda*, 176 Conn. 107, 110, 405 A.2d 622 (1978) the Court said: "***The case for admissibility of character evidence on the vital issue of who was the aggressor has been cogently stated by Professor Wigmore***. When evidence of the deceased's violent character is offered to show the defendant's state of mind, 'it is obvious that the deceased's character, as affecting the defendant's apprehensions, must have become known to him; i. e. proof of the character must indispensably be accompanied by proof of its Communication to the defendant; else it is irrelevant.' 1 Wigmore, Evidence (3d Ed.) s 63, p. 470. ***But when evidence of the deceased's character is offered to show that he was the aggressor, 'this additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief.' 1 Wigmore, loc. cit.***" (Emphasis added). *Accord State v. Carter,* 228 Conn. 412, 636 A.2d 821, 828 (1994) (because defendant claimed victim was first aggressor it was reversible error to exclude victim's prior convictions for violent crimes notwithstanding fact defendant was unaware of them).

> When the defendant presents evidence of self-defense, it is likely that ***one issue will be whether the defendant or the victim was the first aggressor.*** In this situation, Rule 404(a)(2) allows the defendant to show the victim's quarrelsome or violent disposition. ***The victim's character need not have been known to the defendant to be admissible on the issue of who was the first aggressor***. FN 6.
>
> 6. *State v. Adamo*, 120 Wash. 268, 207 P. 7 (1922) (dictum).

Tegland, Evidence Law and Practice, §404.6 (5th ed. 2007) (emphasis added) (footnotes 4 & 5 omitted).[5]

3. The res gestae theory was not advanced by anyone in *Adamo*, nor could it have been, since the victim's prior act of violence occurred five years earlier.

The *res gestae* theory of admissibility was not at issue in *Adamo* because in that case the victim's prior bad act was committed five years before the defendant killed the victim. Accordingly, no one argued in *Adamo* that the victim's prior bad acts were part of the *res gestae* of the incident in which the victim was killed. In *Adamo* the victim's prior bad act was committed in 1916 and the defendant shot and killed the victim in 1921. Although the defendant said he had been told about the victim's prior bad act, the Supreme Court ruled that it was not admissible to prove that the defendant had reason to fear bodily harm because the prior bad act

[5] Tegland correctly characterizes the *Adamo* Court's statement about the admissibility of the victim's prior bad act on the first aggressor issue as dicta because defendant Adamo never argued that the victim's prior bad act was admissible to show that the victim was the first aggressor. Moreover, since the Supreme Court reversed Adamo's homicide conviction for instructional error, everything else stated in the *Adamo* opinion is dicta. Nevertheless, the opinion contains dicta that is favorable to Alden, as Professor Tegland has recognized.

was too old: "The occurrence connected with the [defendant's] offer *happened five years before the commission of the offense charged, and we must hold that it is too remote*." *Id.* at 270 (emphasis added). In sharp contrast, the violent acts of victim Tom Maks occurred just a few hours earlier on the same evening that he was killed. Given these factual circumstances, no one could have argued that the *res gestae* exception applied. Thus, the State's contention that *Adamo* somehow rejected Alden's *res gestae* theory of admissibility is frivolous.

4. The State's reliance on *LeFaber* and *Walker* is similarly misplaced. Neither of the defendants in these cases ever raised a *res gestae* theory of admissibility and neither defendant argued that the victim's prior act of violence was admissible to show who was the first aggressor.

The State also purports to rely on *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975). But the most cursory reading of *Walker* shows that it does not address the issue which Alden has raised. Walker attempted to argue that "the FBI record of his victim, [which] showed arrests for crimes involving violence," should have been admitted. But the defendant *never* argued that these prior acts were admissible under the *res gestae* doctrine and there is no indication that these prior arrests occurred close in time to the date of Walker's killing of the victim. Moreover, the opinion specifically states that the defense did *not* seek to introduce this evidence to corroborate the defendant's claim that the deceased was the aggressor. *Id.* at 550. Thus *Walker* actually supports Alden's position that a defendant's knowledge of the victim's prior acts of aggression is utterly

irrelevant to admissibility when the evidence of those acts is offered to show who was the first aggressor.

Similarly, the State purports to rely on *State v. LeFaber*, 77 Wn. App. 766, 893 P.2d 1140 (`1995), rev'd on other grounds, 128 Wn.2d 896, 913 P.2d 1996). But once again, in *LeFaber the* defendant never argued that the victim's prior acts of violence should have been admitted to show that the victim was the first aggressor. Nor did he ever argue that the evidence was admissible under the *res gestae* doctrine. Thus *LeFaber* is simply irrelevant to the issues raised in this appeal.

5. The State misrepresents *Callahan* and ignores *Cloud,* the case that *Callahan* cites to. The State also ignores Division Two's Opinion in *Stepp.*

These two sentences appear in the opinion in *State v. Callahan,* 87 Wn. App. 925, 943 P.2d 676 (1997):

> A victim's reputation for violence is admissible when the defendant alleges self-defense and shows that knowledge of the victim's reputation for violence contributed to his apprehension. [Citation]. ***This evidence is also admissible to support the inference that the victim was the aggressor.***

Id. at 934, citing *State v. Cloud*, 7 Wn. App. 211, 217-18, 498 P.2d 907 (1972).

The State quotes selectively from the *Callahan* opinion, quoting only the first sentence, which deals with admissibility to show reasonable apprehension of harm, and completely ignoring the second sentence, that recognizes admissibility to show that the victim was the first aggressor. Moreover, the State fails to cite *Cloud*, the case that the *Callahan* Court

relied upon. The *Cloud* opinion explicitly recognizes that the defendant need *not* have been aware of the victim's proclivity for violence in order to have such evidence admitted to show that the victim was the aggressor:

> If the deceased's reputation for violence was ***unknown to the defendant*** at the time of the affray, ***it is admissible nonetheless to corroborate a defendant's claim that the deceased was the aggressor.*** Thus the deceased's reputation for violence ***can be admitted*** to assist the jury in evaluating the deceased's acts at the time of the homicide ***even if the defendant was unaware of this reputation.***

Cloud, 7 Wn. App. at 217-18(emphasis added).

There is a similar sentence of dicta in *State v. Stepp*, 18 Wn. App. 304, 569 P.2d 1169 (1977). It reads:

> Moreover, although the reputation of a victim for violence, if known to the defendant at the time of the altercation, may be admitted to support a claim of self-defense, Stepp did not know Pierce. Such a bad reputation for violence may be admissible, ***even if unknown to the accused, to corroborate his claim that the other was the aggressor.***

Id. at 311, citing to *Cloud*, *supra* (emphasis added). The State also ignores the *Stepp* dictum even though Alden cited it in his opening brief.

6. The State ignores all of the cases from other states that recognize the Wigmore rule and which are consistent with the dicta in *Callahan* and *Stepp*.

For more than a century courts have routinely recognized that even if the defendant did not know about them, the victim's prior acts of violence are relevant and admissible to corroborate the defendant's testimony that the decedent was the first aggressor. In his opening brief, Alden discussed at length three cases from other jurisdictions which

recognize and apply this rule. *See State v. Waldron*, 71 W. Va. 1, 75 S.E. 558 (1912); *State v. Creighton*, 330 Mo. 1176, 52 S.W.2d 556 (1932); and *State v. Beird*, 118 Iowa 474, 92 N.W. 694 (1902). Several other cases recognizing the same rule were also cited. *See Brief of Appellant* at 41-46. Virtually all of these cases resulted in the reversal of murder convictions and yet the State simply ignores them all.[6]

7. The State ignores the *Thompson* and *Grier* cases and ignores the fact that when an act is part of the *res gestae*, it isn't an "other" wrongful act and therefore ER 404(b) is inapplicable.

In his opening brief Alden cited to both *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987) and *State v. Grier*, 168 Wn. App. 635, 278 P.3d 225 (2012). *Thompson* recognizes that when an uncharged criminal act is part of "a continuing course of provocative conduct during the course of an evening," the act is relevant and admissible to show who was the initial aggressor. The *Grier* Court explained that such evidence is properly admitted under the *res gestae* exception. *Grier* holds that res gestae evidence is not an "exception" to ER 404(b). Analytically, if the criminal act is part of the *res gestae* then ER 404(b) simply doesn't apply at all because criminal acts committed on "the night of the murder were not 'evidence of other crimes, wrongs, or acts' under ER 404(b)." *Grier* at 644. Rather, such acts are "relevant and admissible under ER 401 and 402 as part of the events leading up to and culminating in the murder." *Id.*

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[6] *See Creighton,* 330 Mo. at 1200; *Waldron*, 75 S.E. at 562 (1912); *Barnes v. Commonwealth*, 214 Va. 24, 197 S.E.2d 189, 191 (1973); *State v. Beird*, 92 N.W. at 697; *United States v. Burks*, 470 F.2d 432, 435 (D.C. Cir. 1972).

Grier and *Thompson* show that the trial judge erred when he declined to admit evidence of Tom Maks' violent acts in the hours shortly before the murder. The State has simply ignored these cases.

8. The error was not harmless under either the constitutional or the non-constitutional harmless error test.

Predictably, the State falls back on the argument of harmless error, asserting that it would not have made any difference if Alden had been allowed to inform the jury that a few hours before he died, Tom Maks committed an unprovoked attack against April Tedders and tried to pick a fight with a bartender. In closing argument the prosecutor repeatedly emphasized that Maks did *not* lunge towards Alden, and that he was not moving when he was shot:

> Tom . . . ***was not moving,*** and if [he] was, it was minimal. ***Tom was not lunging.*** He was not engaged in a fight at that moment or the moment before the shooting with anyone.

RP 1382-83 (emphasis added).

> Andrew Ross will tell you that . . . ***Tom was crouched and unmoving*** and that no one was standing by him. . . . No one was standing next to Tom. No one. ***And they all said Tom was not lunging. And I submit to you that's the credible evidence.*** That's the credible evidence. I'll discuss why Oscar's version of the events is not credible or is not reasonable.

RP 1383-84 (emphasis added).

> Actual and imminent . . . those are the standards by which we will judge whether or not Oscar Alden was justified in shooting an unarmed, ***unmoving man*** . . . .

RP 1385 (emphasis added).

> ***You do not have to believe Oscar when he tells you*** he thought he saw a fight and ***somebody lunged at him.*** And nobody, neither Ray nor Dane nor Andrew will tell you that there was fighting, in the midst of a fight, and ***they certainly tell you*** that Oscar had not lunged – or, excuse me, ***that Tom had not lunged.***

RP 1393 (emphasis added).

> We know that ***the lunge did not happen*** . . . Tom did not lunge.

RP 1395 (emphasis added).

> We know that Tom was on his knees. We know ***he wasn't lunging.***

RP 1397 (emphasis added).

> Tom was unarmed, nearly naked, beaten into submission, lying motionless on the ground, there was not a fight in progress and ***there was no lunge.***

RP 1400 (emphasis added).

Defense counsel argued that the only reason the other witnesses didn't see Maks lunge was because they weren't looking at Maks; they were looking at Alden and at the gun that he was holding in his hand:

> They're looking at the gun. They're looking at Oscar and the gun. What did Andrew say? He said, "Pulled the gun up, took aim, one hand." What's, what's Andrew looking at? That's right, he's looking at the gun. He's not looking at Tom Maks and he doesn't see this. He doesn't see any movement, however slight from Tom Maks because he isn't looking that direction. ***We know that hand come up without them seeing it,*** so what are they looking at? Their attention is diverted, like the magician.

RP 1473 (emphasis added).

No matter what harmless error test is applied, it is clear that it was not harmless error to exclude evidence that earlier that evening Maks made an unprovoked attack on a store manager (Tedders) and tried to start

a fight with a bartender (Flores). If the jurors had heard that earlier that same evening Tom Maks was starting fights and attacking other people, that evidence would have made Alden's testimony that Maks suddenly lunged at him much more credible.

The State mistakenly assumes that the non-constitutional error harmless error test applies. Under that test, the "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected." *State v. Smith,* 106 Wn.2d 772, 780, 725 P.2d 951 (1986). But even under that test the error was not harmless. In this case, the defense was self-defense and the dispute was over whether the State had disproved self-defense. It was undisputed that just minutes earlier Maks had been armed with a gun and had been threatening to kill people. It was also undisputed that minutes later, when he was shot, Alden did not know that Maks no longer had his gun.[7] But it was sharply disputed whether Maks lunged at Alden before Alden fired. There is a "reasonable probability" that had the evidence been admitted the prosecution would *not* have been able to persuade the jurors that Maks did not lunge at Alden, and thus would *not* have been able to persuade the jurors that Alden did not act in self-defense. Therefore, there is a reasonable probability that "the outcome of the trial was materially affected." *Id.*

Moreover, the error in this case was of constitutional dimension

[7] The prosecutor said "what [Oscar] knew was that there was a fight going on and that . . . Tom may have been armed." RP 1399.

because, as the Court recognized in *State v. Burk*, 114 Wash. 370, 374, 195 P. 16 (1921), the right to use force to defend one's life is a fundamental constitutional right. *See also State v. Vander Houwen*, 163 Wn.2d 25, 33, 177 P.3d 93 (2008) (recognizing constitutional right to defend one's property).[8]

The source of the constitutional right to self-defense may be found in three separate places. It is a fundamental liberty right protected by art. 1, §3; it is a retained but enumerated right protected by art. 1, §30; and it is a right embedded in the art. 1, §24 right to bear arms in self-defense (*Cf. Town of Canton v. Madden,* 120 Mo. App. 404, 96 S.W. 699, 700 (1906). Finally, it is a retained right under the Ninth Amendment and a right within the scope of the Second Amendment right to bear arms.

Since "the right to have a jury consider self-defense evidence . . . is fundamental," (*Egelhoff,* 518 U.S. at 56), the constitutional harmless error test applies. Under that test, the error is presumed to be prejudicial unless the prosecution proves beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Chapman v. California*, 318 U.S. 18, 22 (1967). The *Chapman* contribution test does not permit an appellate court to consider what a reasonable jury would have done if the error had not

[8] The U.S. Supreme Court has also indicated that the right of self-defense is a natural right of constitutional dimension. in *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) the Court said that the assertion that "the right to have a jury consider self-defense evidence (unlike the right to have a jury consider evidence of voluntary intoxication) is fundamental, a proposition that the historical record may support." *Accord McDonald v. Chicago*, 561 U.S. 742, 744 (2010) ("[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and the *Heller* Court held that individual self-defense is 'the central component' of the Second Amendment right.").

occurred. "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). In this case, the prosecution clearly cannot carry its burden of proving, beyond a reasonable doubt, that the verdict in this case was surely unattributable to the exclusion of the evidence of Maks' unprovoked attack on another person committed just hours before he encountered Alden.

C. THERE IS NO RULE THAT FRIENDS CANNOT CONSTITUTE A REPUTATIONAL COMMUNITY.

The trial judge flatly stated without any qualification whatsoever, "I don't believe that his friends that he associates with, etcetera, constitutes a community." RP 184. Thus he applied a *per se* rule that friends of the defendant may *never* constitute a community for purposes of reputation testimony.

The State fails to cite a single case that supports the trial judge's *per se* rule. The best the State can do is to cite a case which holds that "the inherent nature of familial relationships often ***precludes family members*** from providing an unbiased and reliable evaluation of one another." *State v. Gregory,* 158 Wn.2d 759, 804, 147 P.3d 1201 (2006). Moreover, in *Gregory* the size of the entire "family community" which the defendant proffered was two people (a father and a sister). *Gregory* says *nothing* about whether the defendant's *friends* can ever constitute a reputational community.

At least one published Washington case shows that trial judges can and do admit reputation testimony from a defendant's friends. In *State v. Stacy*, 181 Wn. App. 553, 326 P.3d 136 (2014), the defendant was charged with second degree assault. The opinion states:

> ***Stacy's friends*** Ted Aadland, Sarah Sheldon, Wendy Fleckenstein, and Marion Lee, ***testified that Stacy had a reputation for peacefulness*** and honesty.

Id. at 562 (emphasis added). *No one objected* that this testimony was improper, or that the defendant's friends could not legally constitute an adequate community. And this is not surprising because there is no bar to receiving reputation testimony from a community composed of the defendant's friends.

In the present case, the State falls back again on the contention that the exclusion of reputation testimony was harmless error. But the erroneous exclusion of reputation testimony is seldom deemed harmless. In *State v. Eakins*, 127 Wn.2d 490, 503, 902 P.2d 1236 (1995) the Court rejected the State's harmless error argument and reversed the defendant's Assault 2 conviction where evidence of a peaceful reputation was wrongfully excluded. *See also Kennewick v. Day*, 142 Wn.2d 1, 15, 11 P.3d 304 (2000) (error in excluding testimony of reputation of abstaining from drug use was not harmless error).[9]

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[9] The similar facts and the reasoning in *State v. Brown*, 592 A.2d 163 (Me. 1991) are instructive. There the defendant was convicted of assaulting his wife, but the Supreme Judicial Court of Maine reversed his conviction stating: "Because evidence of Brown's reputation for nonviolence tends to reduce the likelihood that he initiated an unprovoked assault, *it cannot be said that the court's error in excluding all such evidence was harmless.*" *Id.* at 165 (italics added). The same is true here.

D. THE SECOND SENTENCE IN THE TO-CONVICT INSTRUCTION FOR MURDER 2 MISSTATED THE LAW.

1. No. 7 falsely told the jurors that it was "their duty to return a verdict of guilty" if they found each of three enumerated elements had been proved.

The principal problem with Instruction No. 7 is that its second sentence is false. The first sentence states that in order to convict the defendant of Murder 2 three elements must be proved beyond a reasonable doubt and it then lists those three elements, but it makes no mention of the absence of self-defense. The second sentence reads: "If you find from the evidence that each of these three elements has been proved beyond a reasonable doubt, ***then it will be your duty to return a verdict of guilty***." CP 313 (emphasis added).

This second sentence is false. It is simply wrong to tell the jury that they are required to convict if the three elements are proved. In fact, to be accurate this sentence should read: "If *only* these three elements are proved, then it will be your duty to return a verdict of not guilty."

2. No. 7 conflicted with the last sentence of No. 15 which told the jurors that it was their duty to acquit if the absence of self-defense was not proved.

In direct conflict with the second sentence of Instruction No. 7, the last sentence of Instruction No. 15 says: "If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty." CP 321. If the jury concluded that the State *did* prove all three elements listed in Instruction No. 7, but that it *did not* prove the absence of self-defense, then the two instructions

give them contradictory commands: Instruction No. 7 tells the jurors that they must convict while Instruction No. 15 simultaneously tells them that they must acquit. The prosecution never comes to grip with this conflict, or with the erroneous sentence in Instruction No. 7.

3. As in *Lewis*, reversal of the murder conviction is required.

This case is controlled by *State v. Lewis*, 6 Wn. App. 38, 491 P.2d 1062 (1971) where this Court reversed a Murder 2 conviction because the trial judge gave conflicting jury instructions on self-defense. The first instruction told the jury that it is lawful for a person under attack to "stand her ground and defend herself." The second instruction told the jury that in assessing the claim of self-defense it should consider "the availability to defendant of a means of escape from danger." Recognizing that these two instructions were contradictory, this Court reversed the defendant's conviction. There was no analysis of whether the defendant could *prove* that the jury considered the availability of a means of escape. Instead, the Court held that the defendant was entitled to a new trial simply because two jury instructions contradicted each other:

> [I]nstruction No. 14 was confusing. It told the jury it could consider the availability of a means of escape . . . when it had just been told by instruction No. 13 she could stand her ground and defend if her apprehension was reasonable.

Lewis, 6 Wn. App. at 42. The same is true in this case. There is no way of knowing that the jurors followed the last sentence of Instruction No. 15. There is no way of knowing that the jurors did not follow the second sentence of Instruction No. 7 instead. Here, as in *Lewis*, the defendant's

Murder 2 conviction must be reversed.

4. The giving of conflicting instructions is *per se* reversible error.

The rule has been established for roughly a century that a litigant is entitled to a reversal and a new trial *without* having to show anything more than the fact that two jury instructions were in conflict with each other:

> The defendant was clearly entitled to correct instructions upon the questions presented, and to instructions which were not contradictory in themselves. ***Contradictory instructions necessarily lead to confusion.*** Correct instructions clear up and make plain to the jury the issues which they are to determine.
>
> For the reason that the instructions above noticed were contradictory, erroneous and misleading, the judgment is reversed.

Paysse v. Paysse, 84 Wash. 351, 355-56, 146 P. 840 (1915) (emphasis added). *Accord Renner v. Nestor*, 33 Wn. App. 546, 549, 656 P.2d 533 (1983) ("Instructions which provide inconsistent decisional standards are erroneous and require reversal."); *Coyle v. Seattle*, 32 Wn. App. 741, 747, 649 P.2d 652 (1982) ("The giving of conflicting and inconsistent instructions on a material issue is prejudicial error requiring reversal."). The instructions in this case did provide "inconsistent decisional standards," and therefore they "require reversal."

E. FAILURE TO OBJECT TO ERRONEOUS CLOSING ARGUMENT REMARKS REGARDING THE BURDEN OF PROOF CONSTITUTED INEFFECTIVE ASSISTANCE.

The State does not dispute the fact that the prosecutor misstated the law when he told the jury that "there's three elements" to self-defense . . . which means that all three must be satisfied in order for you to return a verdict of not guilty by reason of self-defense." RP 1386. The defendant

does not have to show anything "in order for [the jury] to return a verdict of not guilty by reason of self-defense." On the contrary, the State has to prove (beyond a reasonable doubt) the *absence* of the elements of self-defense *in order for the jury to return a verdict of guilty.* If the State doesn't do that then the jury *must* return a verdict of *not* guilty.

The prosecution argues that the next sentence that the prosecutor spoke shows that "in context" there was no misstatement of the law. That sentence is: "The state does bear the burden of showing that there's insufficient evidence to support that, and the State gladly bears that burden." RP 1386. But that additional sentence *also* misstates the law. The State bears a much heavier burden that merely showing that there is "insufficient" evidence to "support" a claim of self-defense, The State bears the burden of proving that there is sufficient evidence of proving the *absence* of self-defense. There is a critical difference between failing to prove the *presence* of self-defense (which is what the prosecutor called "insufficient" evidence of support for the claim) and successfully proving the *absence* of self-defense (which is proof beyond a reasonable doubt that the defendant did not act in self-defense). The prosecution still doesn't get it. Both sentences were misstatements of the law.

F. AVOIDING GIVING OFFENSE TO THE VICTIM'S FAMILY IS NOT A PERMISSIBLE REASON FOR REFUSING TO IMPOSE AN EXCEPTIONAL SENTENCE.

The State attempts to avoid the issue raised by this appeal by claiming that sentence imposed is simply unreviewable. The State cites to *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997),

which holds: "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range."

But that is exactly what happened in this case. The trial judge *did* rely on an impermissible basis. He relied on the fact that an exceptional sentence below the standard range would offend the victim's family. He justified his refusal to decide whether "the victim was an initiator, willing participant, aggressor, or provoker of the incident" (RCW 9.94A.535(1)(a)) on the ground that it would offend the victim's family if he were to decide that that statutory mitigator applied.[10]

The State argues that Alden's argument should be rejected because Alden cannot cite to a case that says that a judge cannot allow a victim's family to veto an appropriate sentence. (Although Alden *did* cite to a case that holds that a judge cannot allow a prosecutor to veto an appropriate sentence.) Alden submits that all of the cases which hold that a criminal defendant is entitled to a neutral and impartial judge are applicable and support his position. A judge that delegates his sentencing responsibility to the victim's family is not a neutral and impartial judge.

Particularly in a sparsely populated county like Douglas County, there is a risk that judges will fail to act in an impartial and independent

[10] He did *not* make a factual finding that it did not apply, and indeed, if he had made such a finding it would not have been supportable because the record does not contain *any* evidence that would support such a finding. No rational person could find that this mitigating factor did not apply. Similarly, no rational person could find that the imperfect self-defense mitigating factor did not apply.

manner. In an opinion that reversed a murder conviction for a "most dastardly and atrocious crime" that "induced an enraged community," and "naturally aroused a great and well justified public indignation," Hugo Black once said: "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are . . . nonconforming victims of prejudice and public excitement." *Chambers v. Florida*, 309 U.S. 227, 241 (1966). Similarly, this Court should not permit a judge to abdicate his sentencing responsibility to determine the applicability of a statutory mitigating factor simply because it would offend the victim's family if he were to find – as any rational judge would have to find in this case—that their son provoked the incident that led to his own death.

II. CONCLUSION

For the reasons stated above, appellant Alden asks this Court to reverse his conviction and to order a new trial. In the alternative, Alden asks this Court to vacate the judgment and sentence, and to remand for a new sentencing hearing before a different Superior Court judge.

Respectfully submitted this 28th day of September, 2015.

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By _____
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 28th day of September, 2015.

Deborah A. Groth, Legal Assistant