NO. 95961-7

Court of Appeals No. 34837-7-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON DONTE WILLIAMS, PETITIONER

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY
No. 15-1-00044-9
THE HONORABLE DAVID G. ESTUDILLO

STATE'S RESPONSE TO PETITION FOR REVIEW

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Table of Contents

Table of Authorities

State Cases

Statutes and Court Rules

I. IDENTITY OF RESPONDING PARTY.

The responding party is the State of Washington, by and through the Grant County Prosecuting Attorney's Office.

II. STATEMENT OF RELIEF SOUGHT

The State asks this Court to find Petitioner Jason Donte Williams failed to identify cognizable grounds for discretionary review and deny his Petition pursuant to RAP 13.4(b).

III. FACTS RELEVANT TO THE PETITION.

A. INTRODUCTION OF ISSUES

Division Three of the Court of Appeals affirmed the convictions of petitioner Jason Donte Williams for one count of second degree murder and three counts of second degree assault in an unpublished opinion filed May 8, 2018. *State v. Williams*, No. 34837–7–III, slip op. (Wash. Ct. App. May 8, 2018), http://www.courts.wa.gov/opinions/.

The two issues Williams raised in the Court of Appeals are the issues raised again here: (1) whether, under the facts of his case, the "revenge/retaliation" jury instruction approved in *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999), gave the jury a misleading and incorrect statement of the law that unconstitutionally commented on the evidence and shifted the burden of proof on self-defense, and (2) whether the prosecutor's single, improper closing remark, made without objection,

raises a significant question of constitutional law by shifting the burden of proof to Williams to prove he did not act in self-defense or defense of another.

B. WILLIAMS'S CRIMINAL ACTS

After a night of heavy drinking, Williams and his wife, Martha Mejia, pulled into the drive-through lane of the Moses Lake Jack-in-the-Box restaurant. *Williams*, slip. op. at 1. Mejia was driving. *Id.* Cynthia Martinez and three passengers, all of whom had also been drinking heavily, pulled into the drive-through lane behind the Mejia-Williams vehicle. *Id.* When Mejia tried to back up, Martinez honked her horn to prevent a collision, causing Mejia to leave her vehicle and argue with Martinez. *Id.* When one of Martinez's passengers, Christian Guerra, got out of the car and tried to get Mejia to calm down, Mejia called for Williams's help. *Id.* Williams and Guerra started fighting between the two vehicles. *Id.* Guerra knocked Williams to the ground and continued beating him. *Id.* When the fight ended, everybody returned to their vehicles. *Id.*

Martinez backed up to escape the drive-through lane, but stopped when she hit a curb. *Id.* Mejia again got out of her vehicle, this time to photograph Martinez's license plate. *Id.* A female passenger in Martinez's car yelled to stop taking pictures. *Id.* Mejia responded by reaching through

the car window and grabbing the passenger by her hair, yanking on it until another passenger—not Guerra—got out of Martinez's car and pulled Mejia away, tossing her to the ground. *Id.* Williams then got out of his vehicle and tried to punch Guerra, who was still inside Martinez's car, through the open window. *Id.* Guerra then got out of the car and the two men resumed fighting. *Id.* Guerra won that encounter, as well. *Id.* Guerra was now standing on the driver's side of Martinez's car, in line with the front quarter panel. RP 1890. Mejia and her opponent were diagonally opposite, at the rear passenger side. RP 1889.

Williams went back to his car as his wife struggled with the other passenger, returned with a gun, and pointed it, not at the person battling his wife, but at Guerra, the man who had now beaten him twice. *Williams*, slip op. at 1. Guerra raised his hands above his head. *Id.* Williams admitted Guerra did not move toward him. RP 2269. Williams admitted Guerra's hands remained in the air, away from his body. RP 2269. Williams, holding his arm out straight, walked up to Guerra and fired. RP 856-57. Walking as he fired, Williams briefly lowered his arm, raised it, and fired at Guerra again. RP 972. Guerra dropped to the ground, wounded, and died a short while later. *Williams*, slip. op. at 1. Williams then fired at least three rounds into the front of Martinez's car. RP 1531.

C. TRIAL

1. Williams's trial evidence

At trial, Williams asserted self-defense. *Williams*, slip op. at 2. Williams testified to his fear, alarm, and confusion during the altercation, consistent with this statement:

> I couldn't understand why [the occupants of Martinez's car] were still there. I couldn't understand what was going on like. I don't know, I've just never been in a situation like that, so I didn't - - I didn't know how to react to it like. I just know I had to protect my wife because he was on the side of the car, and I know there was three men who were attacking us, so that's what made me grab my handgun. * * * When I was walking - - I was just thinking like, what are they doing to my wife, like, you know. I was just trying to figure out what was going on on the other side of the car, because I heard yelling.

RP 2147. Williams said he screamed that he had a gun, but Guerra "kept coming, and then that's when I cocked it back again to try to get him to stop coming, but he kept coming towards me." RP 2149. He said he was trying to indicate to Guerra he did not want to fight. RP 2150. He said Guerra "was like basically threatening me, like I'll come and get you, like MF, you know." RP 2153. All Williams was trying to do, he testified, was "to stop them from assaulting me and my wife." RP 2154. Williams did not hint at mixed motives during closing argument. RP 2610-57.

2. Jury Instructions

In opposition to Williams's self-defense argument, the State

argued unjustified retaliation. *Williams*, slip op. at 2. The court gave the following instructions related to the competing theories:

No. 16	Justifiable Homicide—Defense of Self and Others, reciting self-defense is a defense to both first and second degree assault as well as murder, Washington Pattern Instruction (WPIC) Criminal 16.02 (CP at 62);
No. 17	Justifiable Homicide—Resistance to Felony, WPIC 16.03 (CP at 63);
No. 18	Aggressor—Defense of Others, WPIC 16.04.01 (CP at 64);
No. 19	Justifiable Homicide—Actual Danger Not Necessary, WPIC 16.07 (CP at 65)
No. 20	No Duty to Retreat, WPIC 16.08 (CP at 66);
No. 25	Necessary—Definition, WPIC 16.05 (CP at 72);
No. 26	"Justifiable homicide committed in the defense of the slayer, or "self-defense," is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge." (CP at 73).

The court also gave Instruction 1, WPIC 1.02, emphasizing it rendered no comment on the evidence in the case. The instruction read:

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of the testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during the trial *or in giving these instructions*, you must disregard this entirely.

CP 46-47; RP 2508 (emphasis added). During closing, the State talked about Instruction 1 and the judge's role as a gatekeeper, deciding which evidence comes in and which evidence stays out. RP 2557.

> But the judge has not intentionally told you what to think about that evidence. In fact, there's an instruction that says, you know, if you think the judge has commented on the evidence, just disregard that, and it's up to you to decide how important the evidence is. The judge says it comes in or comes out, but doesn't tell you what to think about it.

RP 2558.

2. Prosecutor's Closing Argument

During closing argument, the State, after having just told the jury the State had the burden to disprove self-defense, RP 2563, misstated the law by telling the jury: "you know, you might have a doubt about something. But if you can't assign a reason t that doubt, if you can't articulate or talk about what that doubt is, at that time, you're beyond a reasonable doubt." RP 2563. Williams did not object. RP 2563.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A petition for review will be accepted by this Court only if (1) the decision of the Court of Appeals in is conflict with a decision of the Supreme Court; or (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, or (3) a significant question of law under the Constitution of the State of Washington or of the United

States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Williams's petition involves none of those circumstances.

A. THE COURT OF APPEALS CORRECTLY CONCLUDED THE REVENGE/RETALIATION INSTRUCTION ACCURATELY STATED WASHINGTON LAW AND, TOGETHER WITH THE REMAINING INSTRUCTIONS ON SELF-DEFENSE, ALLOWED EACH SIDE TO ARGUE ITS THEORY OF THE CASE, WAS SUPPORTED BY THE TRIAL EVIDENCE, DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROOF, AND DID NOT COMMENT ON THE EVIDENCE.

Williams asserts this Court should revisit its analysis in *State v. Studd* to address the circumstance in which a defendant claiming self-defense based on reasonable fear was also motivated by anger and a desire for revenge or retaliation.

1. *The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court or with another decision of the Court of Appeals.*

Williams does not argue any conflict between the decision of the Court of Appeals and any decision of this Court or with another decision of the Court of Appeals.

2. *The decision of the Court of Appeals concerning the propriety of the revenge/retaliation instruction does not involve a significant question of law under the Constitution of the State of Washington or of the United States, nor does it involve an issue of substantial public interest that should be determined by the Supreme Court.*

a. Instruction 26 was not a misleading and

incorrect statement of the law warranting review as an issue of substantial public importance.

Williams asserted throughout trial only that he feared for the life and safety of himself and his wife. He now asserts this Court should accept review because the jury instruction first approved by this Court in *Studd*, ("the revenge/retaliation instruction"), precluded him from arguing a theory of the case he identified only after his conviction. He admits the instruction is an accurate statement of the law, Pet. at 10, but asserts it is inappropriate under the facts of his case because anger and a desire for revenge can exist alongside reasonable fear. Pet. at 15.

Williams admits his theory at trial was that he acted in defense of his wife and himself. Pet. at 11. He has not, and cannot, point to any place in the trial record where he so much as hinted his motives might have been a mixture of fear and revenge, although substantial trial evidence supports that conclusion. His attorney did not raise this objection at trial, his brief opposition to the instruction based simply on his inability to find its language during in-trial review of *State v. Studd*. RP 2476.

Williams now asks this Court to revisit its opinion in *Studd* and forbid use of the revenge/retaliation instruction in cases where the evidence demonstrates mixed motives of both vengeance and fear. He argues a reasonable juror could have inferred he was angry and desired

revenge, and that the revenge/retaliation instruction should not be used under those circumstances. Pet. at 15. He writes "if jurors inferred that Williams was only *in part* motivated by revenge, jurors were left with no choice but to reject his defense." *Id.* (emphasis added). That is a very large "if" on which to hang an unpreserved argument.

The claim of error here is that the revenge/retaliation instruction is unconstitutional when evidence establishes a defendant claiming self-defense may have also been motivated by anger and a desire for revenge. Washington appellate courts generally refuse to review claims of error not raised in the trial court. *State v. O'Hara*, 167 Wn.2d 91, 97–98, 217 P.3d 756 (2009) (citing RAP 2.5(a); *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955)).

"To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* at 98 (citing *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). "It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object." *Id.* at 100.

"Generally, unpreserved claims of error involving jury instructions are subject to an analysis of whether the error is manifest constitutional

error." *O'Hara*, 167 Wn.2d at 100 (citing *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988); *State v. Salas*, 127 Wn.2d 173, 181–83, 897 P.2d 1246 (1995)). Shifting the burden of proof to a defendant is a manifest error affecting a constitutional right because such shifting could implicate a defendant's rights to due process. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The State always bears the burden of proving beyond a reasonable doubt the absence of self-defense in a murder prosecution. *Id.* at 491. In *McCullum*, this Court accepted review of an issue first presented on the appellant's petition for review. 98 Wn.2d at 487. One of the jury instructions stated: "the burden is upon the defendant to prove that the homicide was done in self-defense." *Id.* Because self-defense is explicitly a lawful act under Washington law, it negates the element of unlawfulness and the burden remains with the State to prove absence of self-defense. *Id.* at 495. The instruction was clearly in error.

In the context of RAP 2.5(a)(3), for an error to be "manifest" there must be a showing of actual prejudice. *O'Hara*, 167 Wn.2d at 99. Actual prejudice requires a plausible showing by an appellant of practical and identifiable consequences. *Id.* Williams testified at length to his fear, alarm, and confusion during the altercation, consistent with this statement:

> I couldn't understand why [the occupants of Martinez's car] were still there. I couldn't understand what was going on like. I don't know. I've just never been in a situation like

> that, so I didn't - - I didn't know how to react to it like., I just know I had to protect my wife because he was on the side of the car, and I know there was three men who were attacking us, so that's what made me grab my handgun. * * * When I was walking - - I was just thinking like, what are they doing to my wife, like, you know. I was just trying to figure out what was going on on the other side of the car, because I heard yelling.

RP 2147. Williams said he screamed that he had a gun, but Guerra "kept coming, and then that's when I cocked it back again to try to get him to stop coming, but he kept coming towards me." RP 2149. He said he was trying to indicate to Guerra he did not want to fight. RP 2150. He said Guerra "was like basically threatening me, like I'll come and get you, like MF, you know." RP 2153. All he was trying to do, he testified, was "to stop them from assaulting me and my wife." RP 2154.

The error in *McCullum* was manifest—no defendant has the burden of proving self-defense. Any error in Williams's case is not. Williams does not challenge the propriety of the revenge/retaliation instruction in any circumstance other than when evidence demonstrates that a defendant claiming self-defense is motivated both by fear and by a desire for vengeance. He raises this for the first time on appeal. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *O'Hara*,

167 Wn.2d at 99 (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)) (internal quotation marks omitted).

The revenge/retaliation instruction did not prevent Williams from arguing that, while he might have been angry, his fear was reasonable and overrode any other emotion. He did not raise the possibility this could have been his defense theory until after his conviction.

Williams's assertion of error is unpreserved. This Court should deny review.

b. Instruction 26 did not unconstitutionally shift the burden to Williams to prove he acted in self-defense or defense of another.

As the Court of Appeals pointed out, the record in this case supported giving the revenge/retaliation instruction as part of the packet of instructions related to self-defense. *Williams*, slip. op. at 2. The self-defense instructions included "a series of instructions focusing on differing aspects of the justifiable use of force." *Id.* The concept of necessity was addressed in Instruction 18, advising that one acting in self-defense can use only necessary force. *Id.*; CP at 62. Instruction 25 defined "necessary." *Id.*; CP at 64. "It was in this context that Instruction 26 advised jurors that revenge was not a necessity." *Id.* (citing CP at 73). Division Three correctly concluded none of the self-defense instructions purported to be the complete law of self-defense, but each "had a specific

part to play in explaining the concept of self-defense in its totality. *Id.* Under Williams's argument, this instruction would be prohibited in any self-defense case in which the defendant might reasonably be angry with the person killed in self-defense.

This Court should conclude, as did the Court of Appeals, that the instruction packet, including Instruction 26, allowed each side to argue its theory of the case without misleading the jury on Washington's law of self-defense. *Id.*

c. Instruction 26 was not an unconstitutional comment on the evidence presented in this case.

This Court concluded in *Studd* that the revenge/retaliation instruction neither unfairly emphasized the State's theory of the case nor commented on the evidence. *Williams*, slip. op. at 3 (citing *Studd*, 137 Wn.2d at 550). Both the trial court and the State took pains to inform and remind the jury that the judge's comments were in no way intended to indicate how he felt about the evidence. CP at 46-47; RP 2508, 2557-58.

Cases in which a defendant was motivated by both vengeance and fear are, arguably, a common circumstance, potentially present in every case in which someone dies during a fight. Williams does not explain how the instruction, which he admits is proper under other circumstances, is transformed into a comment on the evidence when the State asserts a

defendant acted out of vengeance instead of necessity. Nothing prohibited Williams from arguing: "Yes. I *was* angry—look what they did to me and my wife. But I would not have shot Guerra if I hadn't been scared out of my wits."

d. The revenge/retaliation instruction should not be limited to cases in which the evidence demonstrates only vengeance.

Williams analogizes the revenge/retaliation instruction to the "unfavored" first aggressor instruction, implying neither should be given except in the most unusual of circumstances. Pet. at 12. The aggressor instruction, however, is appropriate when evidence allows a jury to reasonably determine the defendant provoked the fight or is in conflict over who provoked the fight, or shows "the defendant made the first move by drawing a weapon." *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). These are exactly the facts established in Williams's case. He fails to distinguish why the jury is not entitled to know Washington law does not include as "necessary" acts done in retaliation or revenge.

Williams argues the revenge/retaliation instruction should be given only when substantial evidence establishes a defendant acted solely from a need for vengeance. Pet. at 14. He asserts the instruction shifted the burden of proof by forcing him to prove his motive was *not* revenge. *Id.* But the jury here was instructed the State bore the burden, and that if the

jury "found 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 at 62, 63. Juries are presumed to follow the court's instructions when instructed the State bears the burden of proving each element of the crime beyond a reasonable doubt. *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314, 319 (1990) (citing *State v. Mak*, 105 Wn.2d 692, 702, 718 P.2d 407 (1986)).

Williams admits jury instructions supported by sufficient evidence which accurately state the law do not constitute an impermissible judicial comment on the evidence. Pet. at 17. Substantial evidence supported that Williams was far more interested in retaliating against Guerra for besting him twice than he was in defending himself and his wife. He did not go to her aid when he exited his vehicle a second time. He went to where Guerra sat in a car and provoked a second fight. *Williams*, slip. op. at 1. After Guerra beat him again, he went back to his vehicle and got a gun. *Id.*. He fired twice at Guerra when Guerra's hands were in the air. *Id.* He fired three rounds into the front of Martinez's car when Mejia was standing toward the rear of car with her opponent. RP 1531, 1889.

As this Court did in *Studd*, it should now find substantial evidence supported giving the instruction here and that, under those circumstances, the instruction was not an improper comment on the evidence.

B. THE DECISION OF THE COURT OF APPEALS CONCERNING THE PROSECUTOR'S IMPROPER CLOSING REMARK DOES NOT INVOLVE A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON OR OF THE UNITED STATES, NOR DOES IT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

The Court of Appeals correctly determined Williams suffered no prejudice from the prosecutor's improper closing remark. *Williams*, slip. op. at 3-4. Williams failed to object at trial, so the error was deemed waived unless a curative instruction could not have cured a flagrant and ill-intentioned remark. *Id.* at 3. The Court of Appeals found the remark to be "the only statement of its kind occurring during a lengthy closing argument." *Id.* The comment immediately followed a statement telling jurors the burden of proof always remained at the prosecutor's side of the table. *Id.* The jury convicted Williams only of lesser charges on all counts. *Id.* The Court found critical the fact that "the error was close enough that an objection could easily have led to a correction or clarification of the statement. This passing remark simply was not so egregious that the court could not have cured the problem." *Id.* at 4.

It is this conclusion on which Williams focuses now, asserting without meaningful argument, that a clarification instruction would have confused the jury. He is wrong. The jury obviously attended to its reasonable doubts, declining to convict Williams of first degree murder

and assault and finding him guilty only of second degree murder and assault.

This Court should conclude, as did the Court of Appeals, that "[a]lthough erroneous, the remark simply was no so flagrant that the fairness of this trial was impacted." *Id.* This Court should decline review.

V. CONCLUSION

Williams fails to establish either of his asserted grounds supporting discretionary review. This Court should deny his petition.

Respectfully submitted this 3rd day of July, 2018.

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CERTIFICATE OF SERVICE

That on this day I served a copy of the State's Response to Petition for Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: July 3, 2018.

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

July 03, 2018 - 4:32 PM

Transmittal Information

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