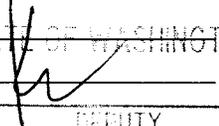


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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AQUARIUS WALKER, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz, Judge

No. 06-1-03531-5

---

**BRIEF OF RESPONDENT**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the defendant’s convictions should be affirmed where the record shows that the defendant made the decision to testify after being properly informed that jury instructions have to be supported by evidence..... 1

2. Whether the trial court properly gave a first aggressor instruction..... 1

3. Whether the trial court properly instructed the jury regarding defense of others. .... 1

4. Whether the defendant has failed to meet his burden of showing prosecutorial misconduct or that the unchallenged argument was flagrant or ill-intentioned. .... 1

5. Whether the defendant had effective assistance of counsel where his trial counsel’s failure to object can be characterized as a legitimate tactical decision..... 1

6. Whether the defendant’s convictions should be affirmed where there was no error committed and therefore, the cumulative error doctrine is inapplicable. .... 1

7. Whether the trial court complied with double jeopardy provisions where the defendant’s second-degree murder verdict was not reduced to judgment and not conditionally vacated..... 1

B. STATEMENT OF THE CASE..... 2

1. Procedure..... 2

2. Facts ..... 8

C.	<u>ARGUMENT</u> .....	30
1.	THE RECORD SHOWS THAT DEFENDANT MADE THE DECISION TO TESTIFY AT TRIAL AFTER BEING PROPERLY INFORMED THAT JURY INSTRUCTIONS HAVE TO BE SUPPORTED BY EVIDENCE.....	30
2.	THE TRIAL COURT PROPERLY GAVE A FIRST AGGRESSOR INSTRUCTION. ....	45
3.	THE COURT’S INSTRUCTIONS REGARDING DEFENSE OF ANOTHER SHOULD BE AFFIRMED BECAUSE THEY WERE PROPER.....	50
4.	THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT AND THAT THE UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED. ....	53
5.	THE DEFENDANT HAD EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL’S FAUILURE TO OBJECT AT POINTS DURING THE STATE’S CLOSING ARGUMENT CAN BE CHARACTERIZED AS A LEGITIMATE TACTICAL DECISION. ....	78
6.	THE DEFENDANT’S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THERE WAS NO ERROR COMMITTED AND THEREFORE, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE. ....	83
7.	THE TRIAL COURT COMPLIED WITH DOUBLE JEOPARDY PROVISIONS BECAUSE THE DEFENDANT’S SECOND-DEGREE MURDER VERDICT WAS NOT REDUCED TO JUDGMENT AND NOT CONDITIONALLY VACATED.....	84
D.	<u>CONCLUSION</u> . ....	86

## Table of Authorities

### State Cases

<i>In Re Rice</i> , 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) .....	79, 80
<i>Rutger v. Walken</i> , 19 Wn.2d 681, 143 P.2d 866 (1943).....	33
<i>State v. Acosta</i> , 101 Wn.2d 612, 619, 683 P.2d 1069 (1984) .....	31
<i>State v. Adams</i> , 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) .....	80
<i>State v. Allery</i> , 101 Wn.2d 591, 594, 682 P.2d 312 (1984).....	30
<i>State v. Anderson</i> , 153 Wn. App. 417, 427, 220 P.3d 1273 (2009) .....	passim
<i>State v. Belgarde</i> , 110 Wn.2d 504, 507, 755 P.2d 174 (1988).....	53
<i>State v. Bowerman</i> , 115 Wn.2d 794, 808, 802 P.2d 116 (1990).....	79
<i>State v. Brightman</i> , 155 Wn. 2d 506, 522-23, 122 P.3d 150 (2005) .....	74
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997) .....	54, 63
<i>State v. Brown</i> , 157 Wn.2d 44, 561, 134 P.3d 221 (1997) .....	53
<i>State v. Brown</i> , 3 Wn. App. 401, 404, 476 P.2d 124 (1970) .....	31, 45
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	78, 79, 81
<i>State v. Davis</i> , 119 Wn.2d 657, 666, 835 P.2d 1039 (1992) .....	45-46
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578, 79 P.3d 432 (2003) .....	53
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 445-56, 6 P.3d 1150 (2000) .....	31, 46, 49
<i>State v. Fisher</i> , 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009) .....	54
<i>State v. Garrett</i> , 124 Wn.2d 504, 518, 881 P.2d 185 (1994).....	80
<i>State v. Gilmore</i> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	80

<i>State v. Gohl</i> , 109 Wn. App. 817, 824, 37 P.3d 293 (2001) .....	85
<i>State v. Greiff</i> , 141 Wn. 2d 910, 929, 10 P.3d 390 (2000).....	84
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996) .....	79
<i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991) .....	53
<i>State v. Hopson</i> , 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).....	78
<i>State v. Janes</i> , 121 Wn.2d, 220, 238, 850 P.2d 495 (1993) .....	30
<i>State v. Johnson</i> , 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) .....	80, 81, 82
<i>State v. Johnston</i> , 143 Wn. App. 1, 177 P.3d 1127 (2007) .....	78, 79
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	31
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) .....	79, 80
<i>State v. McKenzie</i> , 157 Wn.2d 44, 52, 134 P.3d 221, 226 (2006).....	53, 54, 55
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002) .....	80
<i>State v. Olsen</i> , 30 Wn. App. 298, 633 P.2d 927 (1981) .....	33
<i>State v. Pastrana</i> , 94 Wn. App. 463, 479, 972 P.2d 557 (1999).....	54
<i>State v. Riley</i> , 137 Wn.2d 904, 909, 976 P.2d 624 (1999) .....	45, 46, 49, 50, 52
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	55
<i>State v. Swan</i> , 114 Wn.2d 613,661, 790 P.2d 610(1990) .....	53
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....	79
<i>State v. Thompson</i> , 47 Wn. App. 1, 7, 733 P.2d 584 (1987) .....	46, 49
<i>State v. Townsend</i> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	80, 82
<i>State v. Trujillo</i> , 112 Wn. App. 390, 411, 49 P.3d 935 (2002) .....	84, 85

<i>State v. Turner</i> , __P.3d__ (2010)(WL 3259876).....	85, 86
<i>State v. Venegas</i> , 155 Wn. App. 507, 523, 228 P.3d 813 (2010) .....	60, 61, 62, 63, 64, 65, 83, 84
<i>State v. Walden</i> , 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) .....	30, 41, 52, 74, 77
<i>State v. Walker</i> . 136 Wn.2d 767, 773, 966 P.2d 883 (1998) .....	30, 34, 35, 41, 45, 50, 52
<i>State v. Ward</i> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	85
<i>State v. Womac</i> , 160 Wn.2d 643, 660,160 P.3d 40 (2007) .....	85
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009) .....	78, 80, 82
<i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007).....	54, 63, 69, 78
<i>State v. Ziegler</i> , 114 Wn.2d 533, 540, 789 P.2d 79 (1990).....	53

**Federal and Other Jurisdictions**

<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	54
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	78, 79, 83
<i>United States v. Doddington</i> , 822 F.2d 818, 822 (8 <sup>th</sup> Cir. 1987).....	33
<i>United States v. Gary</i> , 74 F.3d 304, 308-09 (1 <sup>st</sup> Cir. 1996) .....	33

**Constitutional Provisions**

Sixth Amendment, United States Constitution.....	72, 78, 79, 83
Article I, section 22 (amendment X), Washington State Constitution .....	78

**Statutes**

RCW 9A.16.050(2).....	74
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**Rules and Regulations**

CrR 3.5.....2  
ER 404(b) .....63

**Other Authorities**

11 Washington Practice 240 (2008) .....74  
11 Washington Practice 241 (2008) .....46  
11 Washington Practice 253 (2008) .....51  
11 Washington Practice 262 (2008) .....51  
11 Washington Practice 3-8 (2008) .....3  
11 Washington Practice 85 (2008) .....58  
WPIC 1.01 .....3  
WPIC 1.02 .....70  
WPIC 16.03 .....73, 76  
WPIC 16.04 .....46  
WPIC 17.02 .....51  
WPIC 17.04 .....51  
WPIC 4.01 .....58

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant's convictions should be affirmed where the record shows that the defendant made the decision to testify after being properly informed that jury instructions have to be supported by evidence.
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B. STATEMENT OF THE CASE.

1. Procedure

On April 30, 2009, by second amended information, the State charged Appellant Aquarius Walker, hereinafter referred to as “defendant,” with first-degree murder by extreme indifference for the homicide of Tavarrus Moss in count I, second-degree felony murder for the homicide of Tavarrus Moss in count II, first-degree assault pertaining to Henri Moss in count III, first-degree assault pertaining to Rooney Key in count IV, and second-degree unlawful possession of a firearm in count V. CP 126-28. Counts I through IV included firearm sentence enhancements. *Id.*

The case was called for trial on March 17, 2010. 03/17/09 RP 2<sup>1</sup>.

The court conducted a hearing pursuant to CrR 3.5 on March 19 and March 23, 2009. 03/19/09 RP 46-74, 03/23/09 RP 125-75. During that hearing, the trial court reminded the defendant that he had “the right to remain silent during the trial in chief.” 03/23/09 RP 167. At the close of testimony and argument, the court found the defendant’s statements to be admissible at trial. 03/23/09 RP 173-74.

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<sup>1</sup> References to the 24 volumes of consecutively-paginated verbatim report of proceedings are denoted as “RP;” references to other volumes of the verbatim report of proceedings are denoted as [date of proceeding] RP.

On March 19, 2009, the parties argued motions in limine. 03/19/09 RP 74-101. Juror questionnaires were distributed the same day, 03/19/09 RP 101-25, and the parties subsequently selected a jury. 03/24/09 RP 3-189, 03/25/2009 RP 192-293, 03/25/09 RP 296-394. The court administered the oath to that jury on March 26, 2009. 03/26/09 RP 400-05. *See* 11 Washington Practice 3-8 (2008)(WPIC 1.01). That oath included the following:

The lawyers' remarks, statements, or arguments are intended to help you understand the law and the evidence. They are not evidence, however. You must disregard any remarks, statements, or arguments which are not supported by the evidence or by the law as I will give it to you.

03/26/09 RP 403.

The matter was then recessed until Monday, March 30, 2009, when the parties were scheduled to further argue motions in limine and give opening statements. 03/26/2009 RP 406. However, the matter was recessed Monday, March 30 and Tuesday March 31, at defense request due to a medical condition of the defense attorney. 03/26/09 RP 193-203. On April 1, 2009, the matter was recessed until April 6, 2009 for the same reason. *Id.*

On April 6, 2009, the court heard the State's motions in limine, RP 206-21. The parties then gave their opening statements. RP 226; 04/06/2009 RP 409-32, 433- 47.

The State then called Catherine Moore, RP 226-46, Detective Bryan Johnson, RP 246-309, RP 1269-1432, Investigator Jeffery Martin, RP 311-61, 379-409, Dr. John Howard, M.D., RP 409-71, 496-525, Henri Moss, RP 537-640, 643-77, Detective Steve Parr, RP 678-742, Officer Andrew Gildehaus, RP 755-800, Officer Darcy Olsen, RP 802-17, Officer David Butts, RP 817-60, Police Explorer Joshua Caron, RP 860-86, Officer Cheryl Gumm, RP 887-99, Kabili Silver, RP 901-41, 965-1034, Investigator Christopher Bowl, RP 1035-42, Jenelle Dart, RP 1042-66, 1075-1153, Channa Carsey, RP 1153-84, 1192-1262, 1865-1915, Officer Richard Barnard, RP 1438-66, Bryana Poulin, RP 1466-71, Norbort Wade, RP 1471-93, Officer Michael Wiley, RP 1495-1515, Sergeant Andrew Suver, RP 1515-40, Officer Russell Martin, RP 1541-61, Officer Nicholas McClelland, RP 1561-90, Officer Jeremy Vahle, RP 1596-1605, Forensic Scientist Terry Franklin, RP 1612-1744, 1753-89, Detective Les Bunton, RP 1790-1865, 1915-30, 2024-68, Officer David Crommes, RP 1952-2024, and Sergeant Anders Estes, RP 2068-2115, 2121-62, 2185-93.

The parties stipulated that the defendant had been previously convicted of conspiracy to deliver a controlled substance, RP 1605-06, and on April 30, 2009, the State rested. RP 2193.

The defense then moved to dismiss for failure to preserve potentially exculpatory evidence and that motion was denied. RP 2194-

2212; CP 107-112. The defense moved to dismiss counts II through IV for insufficient evidence and that motion was denied as well. RP 2213-20.

The defense then called Sergeant Estes, RP 2221-58 and Bob Crow, RP 2259-93, 2435-2444, 3179-3259, 3313-29.

On May 4, 2009, the defense moved to dismiss for judicial misconduct and that motion was denied. RP 2296-2314; CP 113-25. The defense then called Henri Moss, RP 2330-47, Detective Les Bunton, RP 2350-56, Officer Richard Barnard, RP 2357-59, Detective Bryan Johnson, RP 2360-85, Andrea Miller, RP 2385-2404, Sergeant Suver, RP 2404-27, and Francis Sesepasar, RP 2444-2527, 2565-70.

In the eighth week of trial, after the State had rested, defense counsel raised an issue regarding the defendant's competency to stand trial. RP 2536-65, RP 2627-32, 2714-47. This issue had never been raised previously, RP 2538-65, and was subsequently resolved without a competency evaluation after testimony was taken from Penny Hobson, a jail mental health evaluator who had spoken with the defendant. RP 2714-47.

The defense then called Kimberly Miller, RP 2570-2621, before moving for a mistrial on May 6, 2009, but that motion was denied. RP 2632-38.

The defense thereafter called Kay Sweeney, RP 2645-2713, 2748-2810, and Timothy Nole, RP 2810-2822, 2830-87. After Nole's testimony, the defense again moved for a mistrial and its motion was again denied. RP 2891-98.

The defense subsequently called Janelle Dart, RP 2899-2912. The defense attorney moved for a sidebar conference, which was held, and then moved for a mistrial based upon the notion that this resulted in a closed courtroom. RP 2928-2934. That motion for mistrial was also denied. RP 2933.

The defense then called Rooney Key, RP 2998-3060, Lita Kuaea, RP 3064-74, Faulene Main, RP 3074-80, Vi Diamond, RP 3111-32, Kimberlee Marshall, RP 3132-3169, Tessa Savage, RP 3286-95, Chief Bret Farrar, RP 3295-3313, and the defendant, RP 3404-3554, 3573-87, 3592-3681, 3689-3806. During the defendant's testimony, the defense again moved for a mistrial and this motion was denied. RP 3587-91.

After the defendant's testimony, on May 27, 2009, the defense rested. RP 3806.

The court considered the parties' proposed jury instructions the following day. RP 3819-94.

On June 1, 2009, the trial court instructed the jury and the parties gave closing arguments. 06/01/2009 RP 2, 3-59, 59-119; 06/02/2009 RP 2-25; CP 144-205.

On June 3, 2009, the jury returned verdicts of guilty of first-degree murder, as charged in count I, guilty of second-degree murder as charged in count II, guilty of first-degree assault as charged in count III, guilty of first-degree assault as charged in count IV, and guilty of second-degree unlawful possession of a firearm, as charged in count V. CP 206, 209, 211, 214, 215. The jury also returned special verdicts finding that the defendant was armed with a firearm at the time of the commission of the crimes of which he was convicted in counts I through IV. CP 208, 210, 213, 216.

On June 12, 2009, the defendant was sentenced to a total of 652 months of total confinement on counts I, III, IV, and V, 24 to 48 months of community custody on counts I, III, and IV, and payment of legal financial obligations. 06/12/2009 RP 56-57; CP 231-42. The jury's verdict of guilty pertaining to count II, second-degree murder, was not reduced to judgment. The defendant's judgment and sentence makes no reference to this count. *See* CP 231-42; 06/12/2009 RP 24-25.

The defendant filed a timely notice of appeal during the July 12, 2009 sentencing hearing. 06/12/2009 RP 58-59; CP 244.

## 2. Facts

On July 28, 2009, Catherine Moore had three children, Bryant, Tavarrus, and Henri Moss. RP 227-28. At 2:00 in the morning on July 29, 2006, she was awoken by her eldest son Bryant beating on her window. RP 229. Bryant told her that Tavarrus and Henri had been shot. RP 229. Moore found her way to Tacoma General Hospital where Tavarrus had been taken. RP 229-31. When she arrived at the hospital, she was informed that Tavarrus' wounds were fatal. RP 231. Tavarrus was declared dead at 3:57 p.m. that same day. RP 232-33.

Henri Moss testified that on the evening of July 28, 2006, he, his brother, Tavarrus, his brother's girlfriend, Janelle, and the defendant went to a bar called the Brickyard. RP 539-547. While there, Henri did not drink. RP 550.

Moss testified that a fight had erupted outside the bar and patrons inside were encouraged to leave. RP 552. The defendant left first, followed by the Moss brothers and Jenelle. RP 552-53. According to Henri when he, Tavarrus, and Jenelle exited the bar, people of apparent Samoan descent came up to them, wanting to fight them. RP 553-54, 630, 2337. These people said something to the effect of "You guys are the bitch-ass niggers that was with him," in apparent reference to the defendant. RP 561. Tavarrus Moss was with Henri at the time, but Henri

did not know where the defendant was. RP 553-54. Henri became involved in a physical altercation with these people when he heard Janelle screaming to him that “they’re jumping on your brother over there.” RP 561-62. Henri was able to break away from the people with whom he was engaged and find his brother, Tavarrus, who was being “jumped” by at least three people. RP 563-64. Tavarrus was on his feet, but had his hands over his head. RP 565, 630. The others were hitting him. RP 565, 631. Henri Moss never saw anyone pick Tavarrus up and smash him into a car. RP 632-33, 660. Henri pulled off one of his brother’s attackers, RP 566, started a fight with the second one, and the third backed away. RP 675. When asked if he needed a gun to accomplish this, Henri Moss responded, no. RP 675-76. The defendant, however, was not helping and was no where to be seen. RP 567, 570.

During the fight that ensued, Henri Moss did not hear the defendant yell anything, but he did hear two gunshots. RP 570. He then noticed Tavarrus Moss on the ground, tried to get him up, and found that he had been shot. RP 571-72. Henri saw a hole in his brother’s forehead. RP 572. He tried to help him and yelled for help. RP 573-74. The defendant did not render any assistance. RP 574. Henri Moss did not see the Samoans chasing the defendant or forcing him away at this time. *Id.*

Henri Moss was, himself, shot through the leg and transported to Madigan Army Medical Center. RP 3117-19. Henri Moss testified that he lost consciousness and woke up in the hospital. RP 578-79. He had a bandage on his left thigh. RP 580. He described the injury as consisting of a “hole” in his leg with bruising, the “entrance wound” of which was in the middle of the back of his leg. RP 586-87.

Rooney Key, who is known as “Junior,” was at the Brickyard bar with his wife, Ina, and other friends, including Rob, Jakob, and “AZ.” RP 3001-04, 3034. When he left the bar, he found Jakob arguing outside with a woman who looked like a man. RP 3009-10. There were African-American men watching this argument, who started shouting. RP 3013. Key testified that a “scuffle” then broke out involving these men on the one side and Jakob, Rob, and himself on the other. RP 3013-14. Key was punched by the men and punched them back. RP 3015. During the fight, Key picked up a man and “hit” him against a car one time. RP 3019. Key heard more than two gunshots and realized that he had been shot in his right arm. RP 3024-25. He then ran behind a dumpster, laid down, and kept pressure on his wound. RP 3026. When medical aid arrived, Key was transported to Madigan Army Medical Center. RP 3028. Key’s arm was broken and he was later admitted to Harborview for surgery. RP 3048, 3030. Key testified that neither he nor anyone in his party was

armed with a firearm at the time of the altercation. RP 3032-33. In fact, no one involved in the fight ever displayed or used a weapon of any sort. RP 3040-43. Key did not recall seeing the defendant. RP 3045.

Channa Carsey went to the Brickyard bar with her friend, “Ena,” and a group of Ena’s friends, including “Junior.” RP 1156-59. When Carsey left the bar she saw Tavarrus and Henri Moss arguing with one of the members of her group, a man named Jakob. RP 1169-73. This argument resolved without violence. RP 1174. Carsey stated that the men “kind of, shook hands” and were “dispersing,” when the defendant fired a gun twice in the air. RP 1174, 1213. Carsey ran and hid behind an SUV. RP 1174-77. She then saw Junior, whom she identified in court as Rooney Key, moving towards the defendant. RP 1177. Carsey then hid again and heard four more shots, after which she saw Junior holding his arm. RP 1180, 1195. She then found Tavarrus on the ground without a pulse. RP 1196.

Kabili Silver worked as security at the Brickyard Bar and Grill on July 29, 2006. RP 902-05. His niece, Kimberly Miller, was there that night and became briefly engaged in an argument with a man named Jakob outside the bar. RP 912-14; 2583, 2593. Silver was observing this when he heard Tavarrus Moss “woofing,” or trying to “stir something up.” RP 915. Silver approached him and calmed him down. RP 916. Silver’s

attention was then drawn to the defendant, who was standing with both hands in his coat pocket against a side wall. RP 917-19. Silver told the defendant to “get out of here,” and as an inducement to do so, told him “[t]he cops are on the way.” RP 919. The defendant then pulled out a pistol and fired two to three shots in the air. RP 920. No one was coming towards him in a threatening manner at the time. RP 921.

About the same time the shots were fired, Silver noticed a man named Junior, who he identified as “one of the Samoan guys,” exchanging words with Tavarrus. RP 921-22, 975. Silver started to walk to their location when Tavarrus punched Junior in the chin and kicked him “in the crotch.” RP 922-24, 996, 1027, 1033. Junior had not previously made any physical attack on Tavarrus. RP 924, 1027. Silver got to them and tried to separate Junior and Tavarrus. RP 924-25. Another person also tried to assist. RP 925. There was a lot of pulling and the participants wound up on the ground. RP 925-26. Junior then began to slam Tavarrus against a car door. RP 926. According to Silver, by the time he stood up, Henri Moss had arrived. RP 926. Silver testified that he took Henri Moss to the ground to separate him from the altercation and then “twisted” Junior. RP 928. It was at this time that four “shots rang out again.” RP 928. Tavarrus was shot in the head, causing his head to hit the car door, before he fell to the ground and “laid there.” RP 928. Junior was then

shot. RP 929. Silver later learned that Henri was shot as well. RP 929-30. None of the four involved –Junior, Tavarrus, Henri, or Silver– displayed a weapon. RP 932.

Silver then called 911. RP 932. He saw the defendant turn and run away. RP 932-38. The defendant did not stop to check on the Moss brothers. RP 933. No one was chasing the defendant. RP 933.

Francis Sesepasar, who knew the defendant from school and “hung out” with him, RP 2446-47, was working at the Bourbon Street bar next door when he saw an argument break out and then watched the defendant fire a handgun into the air. RP 2454-64. He then saw Tavarrus Moss run and a large Samoan man catch up to him and throw him against a parked vehicle. RP 2464-68. Sesepasar then saw Silver pull off the one who was attacking Tavarrus and another African-American pull off another Samoan to fight him. RP 2469-72. Sesepasar started towards Tavarrus, but a few more shots were fired, and one hit Tavarrus in the head. RP 2472-74. The other African-American man who tried to help Tavarrus had been shot as well. RP 2475. The defendant ran to the north after firing the shots, RP 2497, and never came back. RP 2507.

Timothy Nole was also working as a bouncer at the Bourbon Street when he witnessed a verbal argument between Tavarrus Moss and other people in the parking lot. RP 2812-21. Nole described Tavarrus Moss as

angry and aggressive at the time and testified that Silver had to restrain him. RP 2861. No one was hitting Moss and no one was running towards him. RP 2874-75. As Nole was walking over towards the argument, he heard shots fired, and ducked “underneath a couple of cars.” RP 2821. Nole did not see any physical altercation before the shooting started. RP 2876. Nole described the shots as coming from two different guns. RP 2833. Nole stated that he saw a Samoan man with a gun, but never saw him fire that gun or point it at anyone. RP 2864-66. Nole went back inside the bar and called 911. RP 2835. When he went back outside, he found Tavarrus Moss on the ground, bleeding from his head. RP 2837.

Lakewood Police Officer Nicholas McClelland was across the street dealing with a man who had passed out from intoxication, when he heard the gunshots and a faint sound of screaming coming from the area of the Bourbon Street and Brickyard bars. RP 1563-66. McClelland got into his car, advised Lakewood Police communications of what he had heard, and drove towards the sound. RP 1565-66; RP 314-15. As he did so, he heard a few more gunshots. RP 1566. All of the shots sounded the same. RP 1566.

Officer Bernard arrived at the scene and saw three men by a car, one laying face down, one on his back, and the third in a crouched position. RP 1445-46. Officers McClelland and Bernard ordered the men

to get on the ground, but the man in the crouched position did not respond. RP 1448. The man who was on his back, whom Bernard identified as Henri Moss, was yelling that his brother was hurt and that he was shot. RP 1448. Officers attempted to take the man crouched at the back of the car to the ground, when Henri Moss began pulling at them. RP 1450-53. Bernard testified that Henri pulled at Bernard's gun belt, demanding that officers help him, and that he and Officer McClelland ultimately had to hold him to the ground until paramedics arrived and took control of him. RP 1452-53. By the time Officer Bernard had finished with Henri Moss, the man who was crouched by the vehicle was gone. RP 1454. Officer Bernard testified that the defendant looked "very similar" to the crouching man, except that the crouching man did not have a mustache. RP 1456.

Lakewood Police Investigator Jeffery Martin also responded and arrived at The Bourbon Street bar in Lakewood, Washington to find a chaotic scene with a large number of people running west to east, milling about, and screaming. RP 323-24, 408. Officers ordered patrons to lay down on the ground for their safety. RP 326. Martin was diverted to the eastern portion of the parking lot where a group of individuals of apparent Samoan descent were huddled over a man, who was lying down, holding his arm. RP 327. The man had been shot in the upper arm, and Martin saw blood on his "upper torso region." RP 327-28.

Martin then saw a second man, identified as Tavarrus Moss, who was face down and motionless with a large amount of blood surrounding him. RP 334, 346. Fire department personnel arrived and began “life-saving efforts.” *Id.* Martin also saw Henri Moss, also known as “Mario,” frantic, hopping on one leg, and saying that his brother had been shot or his brother had been killed. RP 336.

Martin later spoke to Janelle Dart, who was hysterical and crying throughout his contact with her. RP 341. Dart stated that she had witnessed the entire incident and identified the shooter as “Aquarius.” RP 346, 396-97. Dart testified that she had arrived at the bar with the defendant, Henri, and Tavarrus Moss. RP 346. Once inside the bar, Henri was walking and was, in her words, “shoulder checked or bumped” by a Samoan man. RP 346. Dart said that this man was among a group of Samoan men who had beaten up Henri Moss approximately one year before. RP 346. This group was kicked out of the bar sometime after the man bumped Henri and began congregating in front of the bar. *Id.* They were trying to pick fights with anyone they could. RP 347. When Dart’s group left the bar, the men began to taunt Henri, saying, “You’re the bitch ass punk that me beat down last year, or something to that effect.” RP 347. Henri then became angry, took off his jacket, and “a fight ensued” between Henri and one or more of the Samoan men. Tavarrus then joined

the fight, which became “more violent.” RP 347. One of the Samoan men grabbed Tavarrus and threw him against a parked car. *Id.* The defendant then ran to his vehicle, obtained a handgun, activated “a laser,” and apparently fired shots towards the group involved in the fight. RP 348-49. Dart saw “Tavarrus go down and a couple or more of the Samoan males run away.” RP 348. One of the Samoan men was wounded in the arm. *Id.* The defendant did nothing to help the Moss brothers other than to shoot into the group of which they were a part. RP 348-49. When the police began to arrive, the defendant ran north through the parking lot.

Jenelle Dart testified that she was Tavarrus Moss’s girlfriend and that she had met both Tavarrus and the defendant in school. RP 1043-45. She, Tavarrus Moss, Henri Moss, and the defendant went to the Brickyard bar in the defendant’s SUV at about 12:05 a.m. RP 1047-48. While there, Tavarrus Moss had one drink and his brother had one to two. RP 1051-52.

When they left the bar, there were big, tall “guys,” of apparent Samoan descent, yelling at them in a threatening manner. RP 1056-57. A physical fight began soon thereafter. RP 1058-59. Dart stated that Henri Moss was engaged in a fight with two of the men, RP 1059, when one of the others grabbed Tavarrus by the shirt and started to slam him into a parked car. RP 1062. The defendant, although he was standing next to Tavarrus, did nothing to help him. RP 1063-65. Dart screamed, “Mario,

help him; help him,” and Henri Moss ran over to help Tavarrus. RP 1083-84.

Dart then heard and saw the defendant shoot “three times in the air” and saw him shoot “three times, like in the crowd.” RP 1079. There was a pause between the first set of shots into the air and the second into the crowd, but the defendant never said anything. RP 1080. The defendant seemed to have a laser sight on the handgun. RP 1081. After the defendant finished shooting, he ran. RP 1082.

Dart indicated that she then saw a bullet hole in the head of Tavarrus Moss. RP 1088. Tavarrus fell to the ground where he stood and did not move again. RP 1088-89.

The defendant was detained a short distance away and Dart was transported to the scene of his detention, where she identified him as Aquarius, the man who fired the shots into the crowd. RP 349-52, 408, 1151.

Lakewood Police Officer Andrew Gildehaus and partner Jeremy Vahle responded to the 911 call at the Brickyard on July 29, 2006. RP 759. Officer Gildehaus was asked to provide scene security and to identify potential witnesses. RP 780. He took the names and contact information of people he encountered, in conjunction with Officer Olsen,

but could not find anyone who provided any useful information. RP 781, 788-89.

Officer Olsen also responded to the shooting scene, drew a diagram of the parking lot, writing down which vehicles were parked where and then, with the assistance of Officer Gildehaus, “matched IDs with cars.” RP 802-05. Olsen wrote down a list of names and contact information of those people she was able to contact at the scene. RP 805. No one to whom she spoke had information regarding the shootings. RP 806-07.

Sergeant Andrew Suver arrived and assumed control of the crime scene. RP 1519, 2405-06. The defendant was last seen running north and Suver assigned Officer Russell Martin, a canine handler to try to find him. RP 1521-22. Officer Butts, who was training Officer Olsen, arrived in the same car with her at 1:49 a.m., RP 829, and was asked to “run with the canine,” meaning he was asked to assist in the search for suspects with Officer Martin. RP 819-25. Sergeant Suver gave Officers Michael Wiley and Nicholas McClelland the same assignment. RP 1499-1500; RP 1577.

Officer Martin’s canine, Bo, led them from the scene of the shooting to a tire store. RP 1547-50. Bo then began to circle around a truck parked in the parking lot. RP 1552. Officer Wiley also noticed the truck because its windows were “fogged up,” as though someone were

inside. RP 827; RP 1500-01. This vehicle was found 20 to 25 minutes after the officer's arrival at the scene at a tire business. RP 829, 1036-37. Officer Wiley then found the defendant hiding face down behind the seats inside of that vehicle and ordered him to show them his hands and exit the vehicle. RP 837-41, 859; RP 1501-06. The defendant was sweating heavily at the time. RP 1508.

The defendant was arrested, Officer McClelland read him the *Miranda* warnings, and the defendant acknowledged understanding them. RP 842; RP 1509; RP 1577-79. The defendant was asked why he was hiding in the truck and said that he heard the gunshots and took off running. RP 842. The defendant denied having a gun. RP 842-43. Officer Butts did not remember the defendant ever saying that he was defending himself. RP 843.

Officer Vahle transported the defendant to jail and booked his outer clothing, including a black coat, as evidence. RP 1601-02.

Officer Christopher Bowl assisted in the defendant's arrest and booked the defendant's personal items, including a Nokia cell phone, some "money," a stereo face, and some keys into property. RP 1036-37.

Henri Moss and Rooney Key were transported to Madigan Army Medical Center and Detective Parr attempted to contact them there. RP 687-88. However, Moss was unconscious and Key was in surgery at the

time. RP 688-89. Parr then contacted hospital staff to secure their clothing and personal items. RP 691-92. He searched, unsuccessfully, for the gun used, RP 695-99, and requested security camera footage from a nearby business. RP 699-701.

Lakewood Police Detective Bryan Johnson was the crime scene detective at the Brickyard shooting. RP 246-49. Johnson prepared an aerial photograph of the scene of the shooting, a crime scene diagram, over 300 photographs and video of the scene itself, a PowerPoint presentation depicting the route of the canine track, and a PowerPoint presentation depicting the crime scene, all of which were admitted at trial. RP 250-304, 1270-74. Johnson collected six shell casings from the scene, which were tested by the Washington State Patrol Crime Laboratory and admitted into evidence at trial. RP 1311-19.

Joshua Caron, a member of the Lakewood Police Explorer Unit, was called out to help search for the firearm used in the shooting. RP 861-66. He found that gun in an area behind a tire store between two stacks of tires. RP 867-70. Caron notified his commander, who notified the supervising police officer. RP 870-71, 893. Caron did not touch the gun. RP 870, 893-94. The officers took photographs of the gun in place before recovering it. RP 871. The gun was a black Glock handgun with a laser sight. RP 871. It was loaded with a round in the chamber, cocked, and

ready to be fired. RP 878-79; RP 1332-34. Detective Johnson recovered this pistol at the scene and found two unfired cartridges inside. RP 1334.

Officers checked each of the vehicles in the parking lot for bullet damage, but only found bullet strikes to a Toyota Camry and a Plymouth Breeze. RP 1361-62. One gunshot victim was located at the driver's door of the Plymouth and a second by the rear of the Plymouth. RP 1296. The Toyota was located behind the Plymouth and the bullet damage to the Toyota appeared to have been caused by the same bullet that traveled through the Plymouth. RP 1302. The bullet was removed from the Toyota by Lakes Body Shop and turned over to Lakewood Police Department Property and Evidence Supervisor Norbort Wade, who "placed it into evidence" at the Lakewood Police Department. RP 1467-69, 1472-76.

Dr. John Howard, who was the Pierce County Chief Medical Examiner at the time of the shooting, RP 415, performed an autopsy on Tavarrus Moss on July 31, 2006. RP 417. Howard identified a gunshot-entrance wound in the left forehead area of Tavarrus and indicated that the bullet remained lodged inside Tavarrus's head. RP 425. The bullet fractured his skull, "went through the left side of the brain, continued backward to the right side of the brain, struck the skull on the right side, passed through the bone of the skull, and came to rest just beneath the skin

on the right side behind the right ear.” RP 429-30. Dr. Howard concluded that the death of Tavarrus Moss was “caused by a gunshot wound of the head,” RP 435 and that nothing else contributed to his death. RP 436. Howard classified the death of Moss as a homicide. RP 439-40. He removed the fatal bullet from the body of Moss and ultimately delivered it to law enforcement. RP 440-44. Aside from the fatal gunshot wound, Dr. Howard found only an abrasion, or scrape of the skin surface, on Moss’s forehead and abrasions on his hands. RP 445-50. Howard classified these as “minor injuries.” RP 445-50. When asked if he found any evidence that Moss had suffered a severe beating prior to being shot, Howard testified that he only found the injuries previously described and stated, “I would not classify that as a beating.” RP 452. Howard testified that Tavarrus Moss’s injuries were inconsistent with being thrown repeatedly into the side of a car. RP 520.

Terry Franklin, a forensic scientist with the firearms section of the Washington State Patrol Crime Laboratory, testified that he was given a Glock, model 27, .40-caliber pistol, six fired cartridge cases, and one fired bullet for analysis. RP 1670. Although the pistol was operational and did not malfunction, RP 1676-77, its laser sight did not work properly. RP 1680-89; RP 2697-2705. Franklin compared test-fired cartridge cases to those fired cartridge cases found at the scene and found that all six of the

fired cartridge cases found at the scene were fired from the Glock, model 27 recovered by Detective Johnson. RP 1692-94. Franklin also examined the bullet recovered from the head of Tavarrus Moss, but given the type of rifling found on that bullet, did not have the capability of matching that bullet to any gun. RP 1786. However, he did note that this bullet was consistent with having been fired by the Glock recovered by Johnson. RP 1787.

Sergeant Estes interviewed the defendant on July 29, 2006 and Officer Crommes observed. RP 1954; 1RP 2072. The defendant was informed of his “constitutional rights” prior to that interview. RP 1956, 2074-75, 2081-82. The defendant stated that he went to the Brickyard bar with Tavarrus and Henri Moss where a fight broke out between an African-American woman and some people of apparent Samoan descent. RP 1960, 2076-77. The defendant indicated that Henri and Tavarrus became involved in that fight. RP 1960, 2076-77. The defendant stated that he heard some shots and then ran to the back of the bar, until he found a vehicle and hid inside of it. RP 1960. The defendant was then found by police. RP 1961. The defendant spoke in a “calm, matter of fact” fashion, RP 1963; RP 2080, until he was informed that Tavarrus Moss would likely die, at which point he became depressed and cried. RP 2082.

The defendant initiated a subsequent conversation with Sgt. Estes and Officer Crommes, in which he stated that, after the fight broke out, he retrieved a Glock .40-caliber pistol with a laser sight and fired some warning shots to try to disburse the crowd. RP 1965-55, RP 2089-90. The defendant stated that he then aimed the pistol at the legs of a Samoan man who was fighting Tavarrus and “fired some rounds.” RP 1966. The defendant indicated that he fired six shots in all. RP 2086. The defendant said that he then ran from the scene without checking to see if he had hit anyone. RP 1966-67. The defendant never said that he was threatened or in danger prior to firing the shots, RP 2012, and never stated that there was another person shooting or even holding a firearm. RP 2156-59. The defendant’s tape-recorded statement was admitted and played for the jury. RP 2097-2099.

At trial, the defendant testified that although he had previously been convicted of conspiracy to possess a controlled substance with intent to deliver and had not had his right to possess a firearm restored, he acquired a firearm for protection from his girlfriend’s former lover. RP 3432-3444; RP 3610. He got the gun “off the street” from a friend and kept it under the seat of his Ford Explorer. RP 3445. The defendant identified the Glock recovered by Detective Johnson as his gun, RP 3448-49, and admitted that he fired it repeatedly on July 29, 2006. RP 3617.

The defendant also admitted that he was guilty of unlawful possession of a firearm. RP 3617.

On July 28, 2006, the defendant received a call from Tavarrus Moss, indicating that he wanted to go out to get a drink. RP 3431. The defendant subsequently drove Tavarrus Moss, Henri Moss, and Jenelle Dart to the Brickyard bar. 3450-53. The defendant testified that he drank cognac while at the bar. RP 3455. The defendant stated that he was the first in his group to leave the bar that night and that he waited for the others in the parking lot. RP 3460-61. As he was waiting, two women came out of the bar and were confronted by six or seven Samoan men, who encircled them. RP 3463-65. The two groups began to yell at each other and pull each other's clothes. RP 3465. The defendant stated that he then decided to go to his vehicle and grab his gun. RP 3473. The defendant placed the gun in his pocket, walked over to the Samoan men, and asked them, "Can't you guys tell these are women?" RP 3474-76. The defendant claimed that the Samoan men then turned their attention to him. RP 3476, 3480. He claimed that the Samoans told him, "We'll knock anybody out of here." RP 3485. The defendant said that they approached him and that he tried to back up to his vehicle. RP 3483. They did not exchange further words, but the defendant pulled his gun and pointed it at the ground. RP 3485-86, 3492-94. He stated that they

continued to come towards him, so he slid the slide of the gun back. RP 3495. The defendant testified that the men still continued to walk towards him so he fired the gun two or three times into the air. RP 3497-98. The defendant testified that the men continued to walk towards him, so he moved more quickly away from them. RP 3503-04. He claimed that this is when they turned around. He stated that he did not leave the parking lot himself, but just stood there. RP 3508. The defendant claimed that he then saw Tavarrus by himself in a stall from where his vehicle was parked. RP 3508. The defendant claimed that one of the Samoan men then hit Tavarrus in the face, causing Tavarrus to fall. RP 3509. He stated that this man then picked Tavarrus up and started slamming him against a car. RP 3510. The defendant testified that, after the man slammed Tavarrus against the car the second time, he fired at the man. RP 3511. The defendant said that the man did not stop, so he aimed at “anywhere, to me, that wasn’t a vital part of his body” and fired again. RP 3512. The defendant claimed that the man still did not stop and said that he then fired at him a third time. RP 3512. The defendant testified that Henri Moss then ran in to help Tavarrus and that he stopped firing. RP 3513. The defendant claimed that he then heard another gunshot, saw a group of men running towards him, and then ran away. RP 3514-20, 3677. The defendant testified that he ran until he found a truck in which he hid. RP

3522-23. The defendant claimed that he did not know if he hit anyone with his gunfire. RP 3523, 3549-51. He stated that if he had accidentally killed “a Samoan,” “it wasn’t on purpose.” RP 3550. The defendant testified that he was not sure if he killed Tavarrus Moss, and agreed that he never went and checked after he fired the shots. RP 3620-27, 3674. During his testimony, the defendant never admitted that he shot anyone, and ultimately called the shooting “an accident.” RP 3659-61, 3669-70, 3722-23, 3776, 3804-05.

The defendant admitted that he had a cell phone capable of calling 911 in his vehicle during the incident, RP 3703-04, but testified that he did not use it to call for the police before firing shots. RP 3789-90. The defendant admitted that he did not even call for help before shooting. RP 3789.

The defendant did not yell at the Samoan to stop beating Tavarrus and did not try to push him away. RP 3789.

The defendant stated that he was five feet, nine to ten inches tall and approximately 200 pounds at the time of the incident and that he would not have been afraid to engage in a fistfight to protect a close friend. RP 3608-09. In fact, he admitted that one option for him in trying to defend Tavarrus Moss would have been to join the fist fight, as Henri Moss had done. RP 3678, 3779.

The defendant testified that he decided to fire the gun instead. RP 3679, 3790. He testified that he was the first person to display a gun and the first person to fire a gun at the scene. RP 3641. He agreed that no one else had displayed anything that could be considered a weapon. RP 3642. The defendant did not see any blood on Tavarrus or hear him yell for help before he fired his gun. RP 3664-65. The defendant nevertheless testified that he fired to save Tavarrus. RP 3790.

The defendant admitted that his version of events had changed three to four times on direct examination and that the versions of events he presented in direct differed from those which he gave the police. RP 3607. He admitted that he initially lied to the police, RP 3701, and that he lied to them again when he was transported to the station. RP 3709-10. The defendant stated that he lies when he is scared and that being nervous is no different from being scared. RP 3711. The defendant stated that he was “very” nervous while testifying. RP 3405.

C. ARGUMENT.

1. THE RECORD SHOWS THAT DEFENDANT MADE THE DECISION TO TESTIFY AT TRIAL AFTER BEING PROPERLY INFORMED THAT JURY INSTRUCTIONS HAVE TO BE SUPPORTED BY EVIDENCE.

“To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). In determining whether the defendant has produced sufficient evidence to obtain justifiable homicide instructions, “[t]he trial judge must determine whether the defendant produced any evidence to support his claimed good faith belief *that deadly force was necessary* and that this belief, viewed objectively, was reasonable.” *State v. Walker*. 136 Wn.2d 767, 773, 966 P.2d 883 (1998)(emphasis added); *State v. Janes*, 121 Wn.2d, 220, 238, 850 P.2d 495 (1993)(citing *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984)). “Accordingly, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant,” and deadly force may only be used if the defendant reasonably believes he or she or the person that he or she is defending is threatened with death or “great personal injury.” *Walden*, 131 Wn.2d 469. If either of these elements is not supported by the evidence, a justifiable homicide theory is not available to

the defendant and the defendant cannot present the theory to a jury. *Id.* A defendant who is a first aggressor is entitled to an instruction on self-defense only if he or she has withdrawn from combat in such a way as to have clearly apprised his or adversary that he or she was desisting, or intending to desist, from aggressive action. *State v. Brown*, 3 Wn. App. 401, 404, 476 P.2d 124 (1970). Once the defendant produces some evidence, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

In determining whether the evidence supports a particular jury instruction, an appellate court must view the evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 445-56, 6 P.3d 1150 (2000).

In the present case, it was clear prior to the start of the defense case that the defendant hoped to present a justifiable homicide defense. *See e.g.*, RP 14-15. Although the defendant argues that the trial court violated his constitutional right against self-incrimination by “effectively” forcing him to testify as a prerequisite to being able to present a justifiable homicide defense, Brief of Appellant, p. 18-38, he is mistaken. Far from forcing him to re-take the stand as a condition to obtaining justifiable

homicide instructions, the court simply and properly advised the defendant of the likely consequences of failing to re-take the stand after testifying on direct examination.

On May 14, 2009, the defendant chose to testify. RP 3404-3554. He was the last witness to testify in this trial, *see* RP 3304-3806, and the parties had actually stipulated as to the testimony of two other witnesses, who were originally scheduled to testify before him but were unavailable, to expedite the start of his testimony. RP 3262, 3374-75. The defendant testified on direct examination that day, but the court had to recess for the afternoon before he could complete direct examination. RP 3554. Due to scheduling conflicts, *see e.g.*, RP 3266-72, 3282-84, the court did not reconvene this matter until May 26, 2009. RP 3560.

On May 26, 2009, the defense attorney, who had been having tense relations with her client, *see e.g.*, CP 133-43, RP 3560, opened with the following remark:

Good morning, Your honor. I want to thank you for giving me the time to spend with my client that was necessary this morning. My client has not decided whether or not to retake the witness stand. I have informed him that if he does not retake the witness stand, the Court will strike his testimony and ***that we would not – we would highly, likely not receive a self-defense instruction or defense of other's [sic] instruction in the jury instructions.***

It is not clear to me at this time whether or not Mr. Walker is going to do that. I think he wants some good

advice from the Court. I told him that you don't --are not in the position to give legal advice to either party, but I think he wants some advice.

RP 3560(emphasis added). This statement reveals that defense counsel properly informed defendant of the immediate consequences of his decision not to re-take the stand: his testimony would be stricken. This is a correct statement of the law. *See e.g., State v. Olsen*, 30 Wn. App. 298, 633 P.2d 927 (1981); *Rutger v. Walken*, 19 Wn.2d 681, 143 P.2d 866 (1943); *United States v. Gary*, 74 F.3d 304, 308-09 (1<sup>st</sup> Cir. 1996); *United States v. Doddington*, 822 F.2d 818, 822 (8<sup>th</sup> Cir. 1987). *See also* Brief of Appellant, p. 28 (stating that the defendant does not challenge the court's subsequent ruling that it would strike the defendant's testimony if he chose not to retake the stand).

Defense counsel also advised defendant of the likely consequence of this course of action: he would not have sufficient evidence to support the giving of justifiable homicide instructions. Due to the breakdown in trust between the defendant and his attorney, *see e.g., CP 133-43, RP 3560*, it is clear that defense counsel was seeking some confirmation of the accuracy of these legal principles from the court.

It was in this context that the court stated:

And you're still undergoing direct questioning by Ms. Corey. Ms. Corey is correct that if your defense is defense of others or self-defense, you have to take the stand

and you have to testify. If you choose at this time to decline to take the stand, then I will be instructing the jury that they are to disregard all of your testimony because of the fact that the prosecutor will not be getting a chance to cross examine you, and you're not going to have a self-defense or defense of others instruction.

RP 3563. Although the defendant now seeks to characterize this statement as one forcing him “to choose between his constitutional right to present the only viable defense he had and his constitutional right not to testify,” Brief of Appellant, p. 29, it is simply a proper advisement of the likely consequences of failing to re-take the stand after testifying on direct examination.

Given the record before the court at the time this statement was made, were the defendant’s testimony to have been stricken, there would have been no evidence to support the defendant’s “claimed good faith belief that deadly force was necessary” or “that this belief, viewed objectively, was reasonable.” *Walker*. 136 Wn.2d at 773. As a result, there would have been no basis upon which the court could have given justifiable homicide instructions. In this context, the court was entirely correct in stating that, in the absence of the defendant’s testimony, he was “not going to have a self-defense or defense of others instruction.” RP 3563.

The defendant was the last witness to testify in this trial. *See* RP 3304-3806. None of the evidence presented prior to his testimony “support[ed] his claimed good faith belief that deadly force was necessary or that this belief, viewed objectively, was reasonable.” *Walker*, 136 Wn. 2d at 773. *See* RP 1-3304. Of the witnesses who testified, only eight were actually present at the scene when the defendant fired the shots at issue: Henri Moss, Francis Sesepasar, Kabili Silver, Janelle Dart, Channa Carsey, Kimberly Mille, Timothy Nole, and Rooney Key. Not one of them and none of the other witnesses gave testimony indicating that the defendant reasonably believed he or Tavarrus Moss, the person he claimed to be defending, were threatened with death or great personal injury by Rooney Key, as was necessary to procure justifiable homicide instructions.

*Henri Moss* testified that once he left the bar, he found his brother, Tavarrus being “jumped” by at least three people. RP 563-64. Tavarrus was on his feet, but had his hands over his head while the others were hitting him with their fists. RP 565, 630-31. Henri Moss never saw anyone pick Tavarrus up and smash him into a car. RP 632-33, 660. However, when he saw his brother engaged in the fistfight, he pulled off one of his brother’s attackers, RP 566, started a fight with the second one, and the third backed away. RP 675. When asked if he needed a gun to

accomplish this, Henri Moss responded, no. RP 675-76. Only after he had intervened and removed his brother's attackers did he hear two gunshots. RP 570. He then noticed that Tavarrus Moss had been shot in the forehead. RP 571-72. He tried to help him and yelled for help. RP 573-74. The defendant did not help. RP 574. Henri Moss never saw the Samoans chasing the defendant or forcing him away. *Id.* Henri Moss had also been shot through the leg. RP 3117-19.

*Francis Sesepasar*, was working at the Bourbon Street bar next door when he saw an argument break out and then watched the defendant fire a handgun into the air. RP 2454-64. He then saw Tavarrus Moss run and a large Samoan man catch up to him and throw him against a parked vehicle. RP 2464-68. Sesepasar then saw Silver pull off the one who was attacking Tavarrus and another African-American pulled off another Samoan to fight him. RP 2469-72. Sesepasar went over to Tavarrus, but a few more shots were fired, and one hit Tavarrus in the head. RP 2472-74. The other African-American man who tried to help Tavarrus had been shot as well. RP 2475. The defendant ran to the north after firing the shots, RP 2497, and never came back. RP 2507.

*Kabili Silver* worked as security at the Brickyard Bar and Grill on July 29, 2006. RP 902-05. His niece, Kimberly Miller, was three that night and became briefly engaged in an argument with a man named Jakob

outside the bar. RP 912-14; 2583, 2593. Silver was observing this when he heard Tavarrus Moss “woofing,” or trying to “stir something up.” RP 915. Silver approached Tavarrus and calmed him down. RP 916. Silver’s attention was then drawn to the defendant, who was standing with both hands in his coat pocket against a side wall. RP 917-19. The defendant then pulled out a pistol and fired two to three shots in the air. RP 920. No one was coming towards him in a threatening manner at the time. RP 921. “Seconds” after or before the defendant fired these shots, Silver noticed a man named Junior, who he identified as “one of the Samoan guys,” exchanging words with Tavarrus. RP 921-22, 975. Silver started to walk to their location when Tavarrus punched Junior in the chin and kicked him “in the crotch.” RP 922-24, 996, 1027, 1033. Junior had not previously made any physical attack on Tavarrus. RP 924, 1027. Silver got to them and tried to separate Junior and Tavarrus. RP 924-25. Another person also tried to assist. RP 925. There was a lot of pulling and the participants wound up on the ground. RP 925-26. Junior then slammed Tavarrus against a car door. RP 926. According to Silver, by the time he stood up, Henri Moss had arrived. RP 926. Silver testified that he took Henri Moss to the ground to separate him from the altercation and then “twisted” Junior. RP 928. It was at this time that four “shots rang out again.” RP 928. Tavarrus was shot in the head, causing his head to hit the car door,

before he fell to the ground and “laid there.” RP 928. Junior was then shot. RP 929. Silver later learned that Henri was shot as well. RP 929-30. None of the four involved –Junior, Tavarrus, Henri, or Silver– displayed a weapon. RP 932. Silver then called 911. RP 932. He saw the defendant turn and run away. RP 932-38. The defendant did not stop to check on the Moss brothers. RP 933. No one was chasing the defendant. RP 933.

*Rooney Key* testified that when he left the bar, he found Jakob arguing outside with a woman who looked like a man. RP 3009-10. There were African-American men watching this argument, who started shouting. RP 3013. Key testified that a “scuffle” then broke out involving these men on the one side and Jakob, Rob, and himself on the other. RP 3013-14. Key was punched by the men and punched them back. RP 3015. During the fight, Key picked up a man and “hit” him against a car one time. RP 3019. Key heard more than two gunshots and realized that he had been shot in his right arm. RP 3024-25. Key testified that neither he nor anyone in his party was armed with a firearm at the time of the altercation. RP 3032-33. In fact, no one involved in the fight ever displayed or used a weapon of any sort. RP 3040-43. Key did not recall seeing the defendant. RP 3045.

*Timothy Nole* was also working as a bouncer at the Bourbon Street when he witnessed a verbal argument between Tavarrus Moss and other people in the parking lot. RP 2812-21. Nole described Tavarrus Moss as angry and aggressive at the time and testified that Silver had to restrain him. RP 2861. No one was hitting Moss and no one was running towards him. RP 2874-75. As Nole was walking over towards the argument, he heard shots fired, and ducked “underneath a couple of cars.” RP 2821. Nole did not see any physical altercation before the shooting started. RP 2876.

*Channa Carsey* testified that she saw Tavarrus and Henri Moss arguing with one of the members of her group, a man named “Jacob.” RP 1169-73. This argument resolved without violence. RP 1174. Carsey stated that the men “kind of, shook hands” and were “dispersing,” when the defendant fired a gun twice in the air. RP 1174, 1213. Carsey ran and hid behind an SUV. RP 1174-77. She then saw Junior, whom she identified in court as Rooney Key, moving towards the defendant. RP 1177. Carsey then hid again and heard four more shots, after which she saw Junior holding his arm. RP 1180, 1195. She then found Tavarrus on the ground without a pulse. RP 1196.

*Jenelle Dart* testified that when she, Henri and Tavarrus Moss they left the bar, there were big, tall “guys,” of apparent Samoan decent, yelling

at them in a threatening manner. RP 1056-57. The group of men then ran towards Henri Moss and Henri Moss towards them and a physical fight began. RP 1058-59. Dart stated that Henri Moss was engaged in a fight with two of the men, RP 1059, when one of the others grabbed Tavarrus by the shirt and started to slam him into a parked car. RP 1062. The defendant, although he was standing next to Tavarrus, did nothing to help him. RP 1063-65. Dart screamed, "Mario, help him; help him," and Henri Moss ran over to help Tavarrus. RP 1083-84. Dart then heard and saw the defendant shoot "three times in the air" and saw him shoot "three times, like in the crowd." RP 1079. There was a pause between the first set of shots into the air and the second into the crowd, but the defendant never said anything. RP 1080. After the defendant finished shooting, he ran. RP 1082. Dart indicated that she then saw a bullet hole in the head of Tavarrus Moss. RP 1088. Tavarrus fell to the ground where he stood and did not move again. RP 1088-89.

The *defendant*, in his statement to police, stated that, after the fight broke out, he retrieved a Glock .40-caliber pistol and fired some warning shots to try to disburse the crowd. RP 1965-55, RP 2089-90. The defendant stated that he then aimed the pistol at the legs of a Samoan man who was fighting Tavarrus and "fired some rounds" RP 1966. The defendant indicated that he fired six shots in all. RP 2086. The defendant

said that he then ran from the scene without checking to see if he had hit anyone. RP 1966-67. The defendant never said that he was threatened or in danger prior to firing the shots, RP 2012, and never stated that there was another person shooting or even holding a firearm. RP 2156-59.

Aside from the fatal gunshot wound, *Dr. Howard* found only an abrasion, or scrape of the skin surface, on Tavarrus Moss's forehead and abrasions on his hands. RP 445-50. Howard classified these as "minor injuries." RP 445-50. When asked if he found any evidence that Moss had suffered a severe beating prior to being shot, Howard testified that he only found the injuries previously described and stated, "I would not classify that as a beating." RP 452. Howard testified that Tavarrus Moss's injuries were inconsistent with being thrown repeatedly into the side of a car. RP 520.

Thus, none of the witnesses who were present at the scene "produced any evidence to support [the defendant's] claimed good faith belief that deadly force was necessary" or "that this belief, viewed objectively, was reasonable." *Walker*. 136 Wn.2d at 773. Because deadly force may only be used if the defendant reasonably believed the person he was defending is threatened with death or "great personal injury," *Walden*, 131 Wn.2d 469, and not one witness suggested that Key did anything other than punch or push Tavarrus Moss, the defendant could not

have been justified in shooting Key. The defendant's statements to the police did not provide any contrary evidence and the testimony of Dr. Howard undercut the notion that deadly force was necessary to defend Moss. Because neither the subjective nor objective element of justifiable homicide was supported by the evidence without the defendant's testimony, self-defense, and defense-of-other instructions could not have been properly given in the absence of that testimony. Therefore, the court's statement, far from forcing the defendant to re-take the stand as a condition to obtaining justifiable homicide instructions, simply and properly advised the defendant of the likely consequences of failing to re-take the stand after testifying on direct examination. Therefore, although the defendant argues that the trial court violated his constitutional right against self-incrimination, he is mistaken and the defendant's convictions should be affirmed.

Indeed, at no time did the court tell the defendant that he was compelled to testify. The defendant cites the following exchange as evidence to the contrary:

THE COURT: All right. Now, obviously, I assume if there's going to be an affirmative self-defense argument, he would need to take the stand.

MS. COREY: It's a defense of others, and I guess we'll see if he has to take the stand.

RP 15. *See* Brief of Appellant, p. 19. The defendant, however, fails to include the very next line in this exchange:

THE COURT: All right.

RP 15. The fact that the court agreed that the defendant may not have to testify regardless of the nature of his defense deeply undercuts the notion that it tried to force the defendant to testify to be able to assert that defense.

The defendant also cites comments that the court made after his trial was completed as evidence that the court forced him to testify, but given that these comments were made after he had already testified, they could have played no role in forcing him to do so.

Not only did the court not force the defendant to testify, it repeatedly told him that he did not have to testify. On March 23, 2009, the trial court told the defendant that he had “the right to remain silent during the trial in chief.” 03/23/09 RP 167. The trial court later stated that “the Defense has no obligation to do anything in the case.” RP 296. Near the beginning of the defense case in chief, the Court told the defense

Obviously, the Defense has to do nothing. I mean, it’s the State’s obligation to prove guilt or innocence, guilt in this case beyond a reasonable doubt; so the defendant does not have an obligation to do anything.

RP 2285. The defendant knew this and wrote in a subsequent motion that “it’s the prosecutions [sic] duty to prove beyond a reasonable doubt that the defendant did not act in self defense.” CP 136 (emphasis in original; citations omitted).

Nevertheless, the defendant chose to testify. Indeed, prior to even taking the stand, his trial counsel noted, “I mean, obviously, it’s no secret my client is going to have to testify. RP 3262. The defense attorney went on to note that “I do believe that, you know, my client’s testimony is, probably, the most important part of his case; and I want to make sure that it goes as well as possible for him.” RP 3383. The defendant was not forced to testify, he chose to, and apparently, he chose to do so long before the court told him that, if he failed to re-take the stand, he was “not going to have a self-defense or defense of others instruction.” RP 3563.

Although the defendant seeks to frame this statement as a violation of his constitutional right against self-incrimination, it was simply a proper advisement of the likely consequences of failing to re-take the stand after testifying on direct examination. Therefore, the defendant’s convictions should be affirmed.

2. THE TRIAL COURT PROPERLY GAVE A FIRST AGGRESSOR INSTRUCTION.

Jury instructions are appropriate where they “permit each party to argue his theory of the case and properly inform the jury of the applicable law.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court’s instructions depends on whether the trial court’s decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court’s decision is reviewable only for abuse of discretion if based on a factual dispute. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court’s decision based upon a ruling of law is reviewed de novo. *Id.*

Generally, self-defense cannot be invoked by a defendant who is the first aggressor and whose acts result in an altercation unless he or she first withdraws. *State v. Riley*, 137 Wn.2d at 909; *State v. Brown*, 3 Wn. App. 401, 402, 476 P.2d 124 (1970). A first aggressor instruction is appropriate when there is some credible evidence from which a jury can reasonably determine that the defendant engaged in conduct that precipitated the fight and “provoked the need to act in self-defense.” *Riley*, 137 Wn.2d at 909. The trial court may give an aggressor instruction despite conflicting evidence about whether the defendant’s conduct precipitated the fight. *Id.* at 910 (*citing State v. Davis*, 119 Wn.2d 657,

666, 835 P.2d 1039 (1992)). To determine whether there is sufficient evidence to support giving the instruction, a court views the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. *Riley*, 137 Wn.2d at 910, citing *State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987).

In the present case, the trial court gave a first aggressor instruction, as instruction number 25:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense of another and thereupon kill or use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

CP 144-205. This instruction was identical to WPIC 16.04. 11

Washington Practice 241 (2008).

There was credible evidence from which a jury could have reasonably determined that the defendant engaged in conduct that precipitated the fight and provoked the need to act in self-defense and/or defense of others.

Specifically, the defendant himself testified that he left the bar before Tavarrus or Henri Moss, and that when he did so, he saw two women being confronted by six or seven Samoan men. RP 3460-61, 3463-65. The two groups began to yell at each other and pull each other's clothes, but there were no acts of violence exchanged between them. RP 3465. The defendant nevertheless testified that he went to his vehicle and grabbed his gun, RP 3473, despite also having access to a cell phone capable of calling 911. RP1036-37, 3703-04. The defendant placed the gun in his pocket, walked over to the Samoan men, and asked them, "Can't you guys tell these are women?" RP 3474-76. The defendant claimed that the Samoan men then turned their attention to him. RP 3476, 3480. He claimed that the Samoans told him, "We'll knock anybody out of here." RP 3485. The defendant said that as they approached him, they did not exchange further words, but he pulled his gun and pointed it at the ground. RP 3485-86, 3492-94. He stated that they continued to come towards him, so he cocked the gun. RP 3495. The defendant claimed that the men still continued to walk towards him and that he then fired the gun two or three times into the air RP 3497-98.

Henri Moss testified that, when he and his brother, Tavarrus exited the bar, people of apparent Samoan decent came up to them and wanted to fight them. RP 553-54, 630, 2337. These people said something to the

effect of “[y]ou guys are the bitch-ass niggers that was with him,” in apparent reference to the defendant. RP 561. Henri then became involved in a physical altercation with these people.

Silver noticed a man named Junior, who he identified as “one of the Samoan guys,” exchanging words with Tavarrus. RP 921-22, 975. Silver started to walk to their location when Tavarrus Moss punched Junior in the chin and kicked him “in the crotch.” RP 922-24, 996, 1027, 1033. Junior had not previously made any physical attack on Tavarrus. RP 924, 1027. Henri, alerted by Dart’s screams, then saw Tavarrus being “jumped” by at least three people. RP 563-64.

The defendant testified that when he then saw one of the Samoan men then hit Tavarrus in the face, causing Tavarrus to fall. RP 3509. He stated that this man then picked Tavarrus up and started slamming him against a car. RP 3510. The defendant stated that, after the man slammed Tavarrus against the car the second time, he fired at the man. RP 3511. . . . Tavarrus was shot in the head, causing his head to hit the car door, before he fell to the ground dead. RP 928. The defendant said that the man did not stop, so he aimed at “anywhere, to me, that wasn’t a vital part of his body” and fired again. RP 3512. Key was shot. RP 929.

Key testified that neither he nor anyone in his party was armed with a firearm at the time of the altercation. RP 3032-33. Silver also

stated that none of the four involved –Junior, Tavarrus, Henri, or Silver– displayed a weapon. RP 932.

Thus, viewing the evidence in the light most favorable to the State, *Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000), there was certainly credible evidence from which a jury could decide that the defendant made the first move by drawing a weapon, and this alone, would support the giving of an aggressor instruction. *Riley*, 137 Wn.2d at 910, citing *State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987).

Moreover, a jury could have reasonably determined that the defendant, by walking over to the group of Samoan men with a loaded gun, drawing that gun, and firing it multiple times before the men had committed any acts of violence whatsoever, was conduct that precipitated the fight and provoked the need to act in self-defense. Given that the defendant was accompanied, and apparently recognizably so, by Tavarrus Moss, the jury could have also reasonably determined that this conduct provoked the need to act in defense of Moss.

Indeed, viewing the evidence in the light most favorable to the State, there was some credible evidence from which a jury could have reasonably determined that the defendant engaged in conduct that precipitated the fight and provoked the need to act in self-defense and/or defense of others. Therefore, the first aggressor instruction was properly given and the trial court should be affirmed. See *Riley*, 137 Wn.2d at 909.

3. THE COURT'S INSTRUCTIONS REGARDING  
DEFENSE OF ANOTHER SHOULD BE  
AFFIRMED BECAUSE THEY WERE PROPER.

Jury instructions are appropriate where they “permit each party to argue his theory of the case and properly inform the jury of the applicable law.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court’s instructions depends on whether the trial court’s decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). The trial court’s decision based upon a ruling of law is reviewed de novo. *Id.*

In the present case, the trial court gave, as its instruction number 44, a defense of other instruction pertaining to the assault counts:

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The *use of force* upon or toward the person of another is lawful when used by someone lawfully aiding a person who he reasonably believes is *about to be injured*, in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was

not lawful. 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 144-205 (emphasis added). This instruction was based on WPIC

17.02. 11 Washington Practice 253 (2008).

The court also gave the following instruction as instruction number 45, which was based on WPIC 17.04. 11 Washington Practice 262 (2008).

A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual *danger of injury*, although it afterwards might develop that the person was mistaken as to the extent of danger. Actual danger is not necessary for the use of force to be lawful.

CP 144-205 (emphasis added).

Finally, the court's instruction number 46 read as follows:

A person cannot *use deadly force* to defend another person from a simple battery unless the person using force subjectively believes the person being battered is likely to suffer *great personal injury*, and you as a jury find the person's belief objectively reasonable based on all of the facts and circumstances known to the person using deadly force at the time of and prior to its use.

CP 144-205 (emphasis added).

The defendant argues that instruction 46 was improper because it was inconsistent with instructions 44 and 45. Brief of Appellant, p. 49-54. Specifically, he argues that, "under Instruction 44 and 45, Walker could lawfully defend [Moss] if he was subject to apparent 'injury,' but under

Instruction 46, Walker could use force only if [Moss] was confronted with ‘great personal injury.’” Brief of Appellant, p. 49-54. The defendant is mistaken.

Instruction 46 does not state that the defendant could not “use force” if Moss was subject to only apparent injury. Rather, it states that he could not use “*deadly force*” if Moss was subject to only apparent injury.

Instruction 46 states, correctly, that the defendant could only use deadly force if the defendant reasonably believed that Moss was subject to “great personal injury.” CP 144-205. This is an accurate statement of the law. The degree of force used in self-defense or defense of others “is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant,” and, as a result, “[d]eadly force may only be used in self-defense if the defendant reasonably believes he or she [or the person that he or she is defending] is threatened with death or ‘great personal injury.’” *Walden*, 131 Wn.2d at 474. “Simple assault or an ordinary battery cannot justify taking a human life.” *State v. Walker*, 136 Wn.2d 767, at 774, 966 P.2d 883 (1998).

Because Instruction 46 is not inconsistent with instructions 44 or 45 and because it “properly informed the jury of the applicable law,” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999), it was a proper instruction and the defendant’s convictions should be affirmed.

4. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT AND THAT THE UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221, 226 (2006)(quoting *State v. Brown*, 157 Wn.2d 44, 561, 134 P.3d 221 (1997)); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613,661, 790 P.2d 610(1990)(*emphasis in original*).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v.*

*Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006)(quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962)(before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.”). Hence, a reviewing court must first evaluate whether the prosecutor’s comments were improper. *Anderson*, 153 Wn. App. at 427.

“A prosecutor’s improper comments are prejudicial ‘only where ‘there is a substantial likelihood the misconduct affected the jury’s verdict.’” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)(quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546); *Fisher*, 165 Wn.2d at 747. “A reviewing court does not assess ‘[t]he prejudicial effect of a prosecutor’s improper comments... by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561). “[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

“The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009). “It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Although the defendant now seeks to raise five alleged instances of misconduct, he objected to only the fifth of these in the trial below.

*Compare* Brief of Appellant, p. 55-69 and 06/02/2009 RP 21-22.

Therefore, defendant cannot raise the first four of these instances unless the alleged misconduct at issue was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. McKenzie*, 157 Wn.2d at 52. None of these first four instances rise to this level.

First, the defendant argues that the deputy prosecutor committed misconduct in making the following argument:

If you find the defendant not guilty in this case, you have to say, “I had a reasonable doubt.” When someone says, “What was your reasonable doubt?” You tell them.

06/01/2009 RP 54; Brief of Appellant, p. 57-59. Appellant's trial counsel did not object to this. See 06/01/2009 1-120. Therefore, the issue is waived on appeal "unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice." *Anderson*, 153 Wn. App. At 428.

This Court in *Anderson* found the following prosecutor's statement to be improper: "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." *Anderson*, 153 Wn. App. at 431. Although Appellant argues that the prosecutor here "made this same argument," he is mistaken.

There is a material difference between the language found to be improper in *Anderson* and that used here. In *Anderson*, the prosecutor stated "to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." *Anderson*, 153 Wn. App. at 431. Such language effectively tells the jury that it must find a reason to find the defendant not guilty, and hence, that the defendant is presumed guilty.

The same cannot be said of the language used in the present case. Here, the prosecutor stated, "[w]hen someone says, 'What was your reasonable doubt?' You tell them." 06/01/2009 RP 54. This is not the

same as arguing to the jury that it must find a reason to find the defendant not guilty. Indeed, it amounts to no more than a restatement of the court's instruction that "[a] reasonable doubt is one for which a reason exists." See CP 144-205. This is particularly evident given the court's instruction to the jury that it is to "disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions" and the prosecutor's earlier admonition to the jury to do the same. 06/01/2009 RP 7 ("Disregard any statement I make that is not supported by the facts or by the law that the judge gave you"). As a result, this comment cannot be viewed as "flagrant" or "ill-intentioned" and, therefore, cannot form the basis for reversal here, where defense counsel did not object to it at trial. Therefore, the defendant's convictions should be affirmed.

However, even assuming that the comment here is arguably equivalent to that analyzed in *Anderson*, the defendant's convictions should be affirmed. Although *Anderson* found the comment at issue there to be improper, it found that this comment, even in combination with other improper comments, was not so flagrant or ill intentioned that an instruction could not have cured the prejudice. Specifically, the Court noted that such a comment undermined the presumption of innocence because it implied that the jury must "find a reason" to find the defendant not guilty. *Anderson*, 153 Wn. App. at 431. However, it also found that

“[t]he trial court’s instructions regarding the presumption of innocence minimized any negative impact on the jury” and that the jury is presumed to follow the trial court’s instructions. *Anderson*, 153 Wn. App. at 432. The Court therefore found that the comment was not “so flagrant or ill intentioned that an instruction could not have cured the prejudice” and affirmed the appellant’s conviction. *Id.* at 432, 421.

In the present case, the trial court gave the following instruction, based on WPIC 4.01, regarding the presumption of innocence:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such a consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 144-205. *See* 11 Washington Practice 85 (2008). Therefore, as in *Anderson*, the trial court’s instructions regarding the presumption of

innocence minimized any negative impact on the jury and the jury must be presumed to follow the trial court's instructions.

Moreover, the context of the total argument in which this comment was made reinforces the importance of the presumption of innocence and proof beyond a reasonable doubt and therefore, militates against any impropriety. Specifically, just before the challenged comment, the prosecutor stated the following:

The last thing I want to talk about today is the concept of beyond a reasonable doubt. I told you earlier it's the highest burden of proof we hold any party to in a court of law. It's a burden that the State accepts, and it's a burden that the State has met and exceeded in this particular case.

06/01/2009 RP 53-54. The prosecutor then went on to quote from the court's instruction regarding reasonable doubt. 06/01/2009 RP 54.

The trial court also instructed the jury that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyer's statements are not evidence. The evidence is the testimony and the exhibits. *The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*

CP 146(emphasis added). At the outset of his comments, the prosecutor reminded the jury of this instruction:

I want you to hold me to an exacting standard today. I want you to follow what the Court told you and I want to remind

you of that, and that is this: Disregard any statement I make that is not supported by the facts or by the law that the judge gave you.

06/01/2009 RP 7. Given this statement, the context of the allegedly improper comment, and the court's instructions, this Court should find, as it did in *Anderson*, that the prosecutor's comment was not "flagrant or ill intentioned." The prosecutor was not trying to mislead the jury into using a lesser standard of proof. Therefore, Appellant's convictions should be affirmed.

It is true that, in *State v. Venegas*, this Court recently reversed convictions of a defendant where the prosecutor stated that "in order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is' –blank," *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010), but *Venegas* is distinguishable from the case at bar for at least four reasons.

First, the prosecutor's comments in *Venegas* were materially different from that at issue here. In *Venegas*, the prosecutor stated "[i]n order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is' –blank." *Venegas*, 155 Wn. App. at 523. Such language effectively tells the jury that it must find a reason to find the defendant not guilty, and hence, that the defendant is presumed guilty.

The language used in the present case was significantly different. Here, the prosecutor stated, “[w]hen someone says, ‘What was your reasonable doubt?’ You tell them.” 06/01/2009 RP 54. This is not the same as arguing to the jury that it must find a reason to find the defendant not guilty. Indeed, as noted above, it amounts to no more than a restatement of the court’s instruction that “[a] reasonable doubt is one for which a reason exists.” *See* CP 144-205.

Second, the comments in *Venegas* occurred more than once and were much more invidious to the presumption of innocence than the comment at issue here. The prosecutor in *Venegas* did not stop with the argument quoted above, but went on to state that

the presumption of innocence... erodes each and every time you hear evidence that the defendant is guilty.... Every single time that evidence is presented that the defendant is guilty as charged, then that presumption erodes little by little, bit by bit, and at the conclusion of all of the evidence, including the defendant’s witnesses and the defendant, herself, and that presumption no longer exists, then that’s when the State has proven the case beyond a reasonable doubt.

*Venegas*, 155 Wn. App. at 524. As the Court in *Venegas* noted, this is a clear misstatement of the law because “[t]he presumption of innocence continues ‘throughout the entire trial’ and may only be overcome, if at all, during the jury’s deliberations.” *Id.* The Court in *Venegas* noted the importance of these later comments in its decision, stating, “[t]he

prosecutor committed flagrant misconduct *by repeatedly attacking Venegas's presumption of innocence with improper arguments that had no basis in law.*" *Id.* At 525(emphasis added).

The same cannot be said of the prosecutor here. The prosecutor made no comments of the sort found in *Venegas* and no clear misstatements of the law. Indeed, the prosecutor only mentioned the presumption of innocence once and only to say that the defendant "is presumed innocent." 06/02/2009 RP 9. The prosecutor concluded his closing argument by asking the jury to return guilty verdicts only because "the evidence, the facts, and the law establishes guilt beyond a reasonable doubt." 06/01/2009 RP 59. Such comments cannot be construed as "repeatedly attacking" the presumption of innocence or as attacking it at all. They, therefore, cannot be construed as flagrant or ill-intentioned, and as a result, the defendant's convictions should be affirmed.

Third, although the Court in *Venegas* did find the statement "to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is' –blank" to be flagrant and ill-intentioned, *Venegas*, 155 Wn. App. at 523, fn 16, it did so in apparent *obiter dictum*. *See Id.* At 526. This phrase was *obiter dictum* because the Court's reversal in *Venegas* was not based on prosecutorial misconduct, but on cumulative error. Indeed, the Court only characterized the

prosecutor's comment as flagrant and ill-intentioned in a footnote and did not base its decision to reverse on this footnote. Rather, the Court held "that the accumulation of errors discussed above," including the improper exclusion of expert testimony and improper admission of ER 404(b) evidence, was "of sufficient magnitude that reversal is necessary." *Venegas*, 155 Wn. App. at 526. As a result, *Venegas* is distinguishable from the instant case and the defendant's convictions should be affirmed.

Fourth, although the Court in *Venegas* may have found the comment at issue there to be flagrant and ill-intentioned, such a comment cannot, as a matter of law, always be so. Indeed, as the case law has consistently recognized, a reviewing court cannot assess a prosecutor's comments "in isolation," but must examine them "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Yates*, 161 Wn.2d 714, 774(quoting *Brown*, 132 Wn.2d at 561); *Anderson*, 153 Wn. App. at 428-29. Because the context varies, so must the characterization of the comments found therein. The Court in *Venegas* seemed to indicate that the prosecutor who uttered the comments there at issue ignored the Court's earlier admonition in *Anderson*, and that, as a result, her comment was "flagrant" and "ill-intentioned." *Venegas*, 155 Wn. App. at 523-24. Specifically, the Court noted that it had recently pronounced similar

remarks by a deputy Pierce County prosecutor to be improper, and then stated, “[w]e reiterate that prosecutors who continue to employ an improper 'fill-in-the-blank' argument needlessly risk reversal of their convictions.” *Venegas*, 155 Wn. App. at 524.

The same can not be said of the deputy prosecutor in the present case. Indeed the prosecutor here made his comments before the court’s initial iteration in *Anderson* was even published. Although *Anderson* was published December 8, 2009, *Anderson*, 153 Wn. App. at 417, the prosecutor's argument was made on June 1, 2009, 06/01/2009 RP 54, over six months before. It would have been impossible for him to ignore *Anderson* by continuing “to employ an improper ‘fill-in-the-blank’ argument,” because, at the time he made his argument, neither *Anderson* nor any other decision had even considered such an argument, much less ruled it improper. As a result, the prosecutor’s comment here could not have been flagrant or ill-intentioned and, certainly not so flagrant and ill-intentioned as to warrant reversal. Indeed, as has been noted, the prosecutor made quite clear that he expected the jury to hold him to “an exacting standard” and “[d]isregard any statement [he] ma[d]e that [wa]s not supported by the facts or by the law that the judge gave you.” 06/01/2009 RP 7. He made it clear to the jury that he wanted it to return guilty verdicts not because any blank had not been filled in, but because

“the evidence, the facts, and the law establishes guilty beyond a reasonable doubt.” 06/01/2009 RP 59.

Thus, *Venegas* is distinguishable from the present case. The comment at issue here, even if it could be considered improper, cannot be considered flagrant or ill-intentioned. Therefore, the issue should be considered waived and the defendant’s convictions affirmed.

The second instance of alleged misconduct that defendant seeks to raise for the first time on appeal is that the prosecutor diminished the burden of proof beyond a reasonable doubt through the following comments:

“Beyond a reasonable doubt” is another of those phrases that I’m willing to bet not a single one of you have used in the last couple of years when you were talking to your friends, but it is a common standard that you apply every day. Anyone here ever had surgery? Anybody here ever left their child with a babysitter? You know what? When you leave your child with a babysitter, especially for the very first time, and you think to yourself, “Will the babysitter eat me out of house and home? Will the boyfriend or girlfriend come over? Will they watch TV and ignore the cries for help? Will they put the kid in the tub and not pay enough attention? Will they eat me out of house and home?” On and on. Doubts. When you walk out the door, and your child’s with that babysitter, you’re convinced beyond a reasonable doubt.

06/21/2009 RP 55-56. See 06/CP 353; Brief of Appellant, p. 59-62.

Although Appellant argues that the prosecutor here made the “same argument” which was found to be improper in *Anderson*, there is a

significant difference between the argument employed here and that analyzed in *Anderson*.

In *Anderson*, the prosecutor stated:

“[B]eyond a reasonable doubt” is not a phrase you folks use in your daily lives. You don’t get up and say, “I’m convinced beyond a reasonable doubt that I’m going to have Cheerios for breakfast.” But it is a standard that you apply every single day.

*Anderson*, 153 Wn. App. at 424. The Court found this comment to be improper because, by comparing the certainty required to convict with that required to make “everyday decisions,” it “minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden.” *Id.* at 431.

In the present case, the prosecutor did not compare the reasonable doubt standard to “everyday” decisions, like deciding which cereal to eat for breakfast. Compare 06/21/2009 RP 55-56 with *Anderson*, 153 Wn. App. at 424. Rather, he analogized this standard to that employed in making such potentially life-changing or life-ending decisions as surgery and the care of one’s child. Moreover, the prosecutor only made this analogy after he read verbatim the court’s proper instruction defining reasonable doubt to the jury, 06/01/2009 RP 54, and only after he instructed the jury to disregard any statement that he made which was not supported by the court’s instructions. 06/01/2009 RP 7. Thus, the

prosecutor's comments are materially different from those found to be improper in *Anderson*. They are comments which elucidate rather than minimize the reasonable doubt standard. They are certainly not comments that are "flagrant" or "ill-intentioned," and hence, are not comments for which reversal is proper. Therefore, the defendant's convictions should be affirmed.

However, even assuming that the prosecutor's comments were sufficiently similar to those in *Anderson* as to be improper, reversal is not appropriate. *Anderson*, after finding the comments at issue there to be improper, held that they were not "so flagrant or ill intentioned that an instruction could not have cured the prejudice." *Anderson*, 153 Wn. App. at 432.

Here the Court properly instructed the jury on reasonable doubt and also instructed the jury to disregard any statement made by an attorney which was not supported by the law. *See* CP 144-205. The prosecutor, in the same closing argument in which the challenged comments appear, reiterated these same instructions, both reading verbatim from the reasonable doubt instruction, and demanding that the jury disregard any comment he made not supported by that instruction. 06/21/2009 RP 54; 7. Under these circumstances, as in *Anderson*, his comments could not have been so flagrant or ill intentioned that an instruction could not have cured

the prejudice.” Indeed, given that the prosecutor asked the jury to disregard any of his statements not supported by the law, any improper comments cannot be flagrant or ill-intentioned at all. Because the defense attorney did not object to these comments at the time of trial, the defendant’s convictions should be affirmed.

The third instance of alleged misconduct that defendant seeks to raise for the first time on appeal is found in the following language from the prosecutor’s closing argument:

Closing argument has both purpose and a goal. The purpose of closing argument is to take the evidence that you heard from the witness stand and was admitted in court and fit it into the law, which is the instructions that the court just read to you. The goal of closing argument is to point you toward a just verdict. You’ll note that that’s not just a verdict but it is a just verdict. The word “verdict” comes from a Latin word, “veredictum.” Veredictum means to declare the truth. And so by your verdict in this case, you folks, the 12 of you who will deliberate, will decide the truth of what happened to Mario Moss, to Tavares Moss, and Rooney Key on July 30<sup>th</sup> of 2006.

06/01/2009 RP 7-8. *See* Brief of Appellant, p. 62-63. Defendant also cites two accompanying PowerPoint slides and the following language:

So I talked to you at the very beginning about this – about declaring the truth as part of your role in returning a verdict. The truth is, the defendant is guilty of murder in the first degree, armed with a firearm; murder in the second degree, armed with a firearm; assault in the first degree, armed with a firearm; assault in the first degree, armed with a firearm; unlawful possession of a firearm in the second degree.

06/01/2009 RP 58. Lastly, Defendant complains of language used during rebuttal argument:

He committed murder in the first degree, murder in the second degree, assault in the first degree, and assault in the first degree, and unlawful possession of a firearm. That's a just verdict. That's the truth. Trials are a search for the truth. Your verdict will declare the truth, and I would ask you to declare in this case.

06/02/2009 RP 24-25.

However, Defendant's trial counsel did not object to any of these comments and thus, again the issue involved here is waived on appeal "unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice." *Anderson*, 153 Wn. App. at 428. In determining whether these comments meet this standard, they must be assessed, not in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Yates*, 161 Wn.2d at 774.

The Court in *Anderson* was faced with an allegation of prosecutorial misconduct involving comments which were virtually identical to those at issue here. *Anderson*, 153 Wn. App. at 429. This Court held that the prosecutor's repeated requests that the jury declare the truth were improper because the jury's duty is not to declare the truth of what happened, but to determine "whether the State has proved its

allegations against a defendant beyond a reasonable doubt.” *Id.* In *Anderson*, unlike here, the defense had objected to the comments at trial. *Anderson*, 153 Wn. App. at 423-24. Nevertheless, the Court found that when these comments were examined “in the context of jury instructions that clearly lay out the jury’s actual duties” and counsel’s other argument, the appellant in *Anderson* could not demonstrate that there was a substantial likelihood that this misconduct affected the verdict. *Id.* At 429. This Court therefore held that a new trial was not warranted and affirmed appellant’s conviction. *Id.*

In the present case, as in *Anderson*, there were jury instructions which properly laid out the jury’s actual duties. For example, there were instructions which made it quite clear that the State “has the burden of proving each element of each crime beyond a reasonable doubt” and that “if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.” CP 144-205. At no point do any of the court’s instructions mention that the jury is to declare the truth of what happened. *See* CP 144-205. Moreover, the court’s instruction no. 1, modeled on WPIC 1.02, informed the jury that the “law is contained in my instructions to you,” and that “[y]ou must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” CP

146(emphasis added). These are facts of which the prosecutor reminded the jury. Indeed, immediately before the language found at 06/01/2009 RP 7-8 of which Appellant now complains, the prosecutor stated the following:

I want you to hold me to an exacting standard today. I want you to follow what the Court told you and I want to remind you of that, and that is this: Disregard any statement I make that is not supported by the facts or by the law that the judge gave you.

06/01/2009 RP 7.

Again, this statement alone indicates that the prosecutor's subsequent comments could not be considered flagrant or ill intentioned. Because the defendant did not object to these comments below, any misconduct inherent in them must be considered waived on appeal and the defendant's convictions should be affirmed.

Moreover, when the prosecutor's comments are examined in the context of his entire argument and in the context of the jury instructions, which, here as in *Anderson*, "clearly lay out the jury's actual duties," the defendant here, as in *Anderson*, cannot even demonstrate that there was a substantial likelihood that this misconduct affected the verdict. Therefore, even were the State held to the higher standard, this court should, as it did in *Anderson*, affirm Appellant's convictions.

The defendant's fourth allegation of prosecutorial misconduct concerns the following language:

And in this particular case, I think there's one more defense, and that's this: This case drags out long enough, maybe you folks will forget everything you heard in the State's case and you won't be able to reach a verdict.

06/01/2009 RP 9. *See* CP 332.

The defendant never objected to this language at trial.

Nevertheless, the defendant now argues for the first time on appeal that this argument was an improper comment on his rights to trial and to present a defense. Brief of Appellant, p. 64-65. The defendant is mistaken.

While it is true that the defendant has a Sixth Amendment right to trial and to present a defense, he does not have a right to employ tactics which needlessly delay the trial. In this case, the defense, despite court orders to the contrary, repeatedly failed to advise the court or the State as to the witnesses it intended to call and failed to call witnesses in a timely manner. *See e.g.*, RP 3275-77, 3330-31; CP 131-32. The prosecutor's comment was not directed at the fact that the defendant chose to proceed to trial or to call witnesses, but at his delay in doing so, a delay which the jury itself had already questioned. *See Id.*

Even assuming that such comment was improper, given the prosecutor's earlier admonition to the jury to disregard any comments that he made that were not supported by the facts or by the law that the judge gave you," 06/21/2009 RP 7, and given his later request to decide the case only on "the evidence, the facts, and the law," 06/21/2009 RP 59, his comments cannot be considered "flagrant" or "ill-intentioned." Therefore, because the defendant failed to object to this comment, this issue should be considered waived and the defendant's convictions affirmed.

The defendant's fifth and final allegation of prosecutorial misconduct is that the prosecutor misstated the law by telling the jury that "the objective standard for defense of another boiled down to whether 'you would do it too.'" Brief of Appellant, p. 65-69.

The court gave the following justifiable homicide instruction, based on WPIC 16.03, the jury:

It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony in the presence of the slayer.

*The slayer may employ such force and means as a reasonably prudent person would use 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.*

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. 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 144-205 (instruction 23). The instruction itself, is based upon RCW 9A.16.050(2), 11 Washington Practice 240 (2008), which provides that “[h]omicide is also justifiable when committed either:… (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode in which he is.” “Evidence of self-defense is evaluated ‘from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.’” *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); *State v. Brightman*, 155 Wn.2d 506, 522-23, 122 P.3d 150 (2005).

This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.”

*Walden*, 131 Wn. 2d at 474. Accordingly, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” *Id.*

During his closing argument, the deputy prosecutor began with a PowerPoint slide, which showed verbatim the court's proper instruction, numbered 23, regarding justifiable homicide. CP 345. While that slide was before the jury, the prosecutor stated:

Now, this third paragraph here, *the slayer may employ such force or means as a reasonably prudent person would use*, is the reason why I'm not going to spend a whole lot of time talking about justifiable homicide. But I want to talk to you about the two standards you have to apply. There is a subjective standard. Him. What was he thinking or at least what did he say he was thinking? You get to hear his side of the story. And an objective standard. And here's a phrase that I'm going to say that I want you to think in the back of your minds for the rest of the time you're in this case. But the objective standard is this. Was his opinion reasonable? Was his opinion reasonable? Not – and it amounts to, would you do the same thing? Our law of self-defense, our law of defense of others is based on necessity. Not convenience. Not if you want to. Necessity.

06/21/2009 RP 43(emphasis added). This defense did not object to any of this.

In rebuttal argument, the following argument and objection took place:

Your job is to determine the defendant's culpability. What you do in doing that is you say that as a jury of his peers, 12 fellow citizens of Pierce County and the State of Washington, his conduct is lawful, because we would have done the exact same thing if we had that same decision to make.

MS. COREY: Objection again.

MR. NEEB: Or it's not lawful.

MS. COREY: Misstatement of the law.

MR. NEEB: *It's the objective person standard*, Judge.  
*Reasonably prudent-*

THE COURT: I'll overrule the objection. This is closing argument.

MR. NEEB: You folks are each *a reasonably prudent person*. You, as a group of 12, determine the *reasonably prudent person's standard*. And that's, would you do it too if you knew what he knew? And so the question becomes, if you –the question becomes whether any one of you can say that firing shots under the circumstances in which the defendant shot isn't reckless.

06/02/2009 RP 21-22(emphasis added).

Although the defendant argues that these comments misstate the law because “[j]urors are supposed to assess Walker’s conduct against an objectively reasonable person standard, not their personal standards,” Brief of Appellant, p. 68, he is mistaken.

The deputy prosecutor, in his closing argument, began his discussion of self-defense by displaying for the jury the court’s proper self-defense instruction, based on WPIC 16.03, which clearly indicated that “[t]he slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer.” CP 144-205 (instruction 23); CP 345. The deputy prosecutor then read from that instruction that “the slayer may

employ such force or means as a reasonably prudent person would use.”

06/01/2009 RP 43. In fact, the prosecutor mentioned the reasonably prudent person standard at least four times before the jury, 06/01/2009 RP 43; 06/02/2009 RP 21-22, and ultimately told the jury that “[y]ou, as a group of 12, determine the reasonably prudent person’s standard.”

06/02/2009 RP 21-22. This is exactly what the Supreme Court in *Walden* held when it stated “the objective portion requires the jury to use this information *to determine what a reasonably prudent person similarly situated would have done.*” *Walden*, 131 Wn.2d at 474(emphasis added).

Because it is indeed, up to the jury to determine what a reasonably prudent person would have done, the prosecutor’s comment was an accurate statement of the law and not misconduct.

To the extent that the deputy prosecutor’s comments could be construed as inaccurate, they are unlikely to have affected the jury’s verdict. Again, the prosecutor made sure to both display the court’s proper instruction regarding self-defense and the reasonably prudent person standard and to read from that instruction to the jury. CP 345; 06/01/2009 RP 43. The prosecutor also told the jury at the outset to hold him “to an exacting standard” and “[d]isregard any statement [he] ma[de] that is not supported by the facts or by the law that the judge gave you.” 06/01/2009 RP 7. Given this, it is unlikely that any allegedly improper

comment made by the prosecutor regarding the reasonably prudent person standard would have affected the jury's verdict. It is much more likely, and indeed, must be assumed, that the jury simply followed the court's instructions as the court ordered and as the prosecutor asked it to do. *See State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). Therefore, any comments which were improper could not be considered prejudicial, *see Yates*, 161 Wn.2d at 774, and the defendant's convictions should be affirmed

5. THE DEFENDANT HAD EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL'S FAUILURE TO OBJECT AT POINTS DURING THE STATE'S CLOSING ARGUMENT CAN BE CHARACTERIZED AS A LEGITIMATE TACTICAL DECISION.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X)." *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

"Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation." *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001)(citing *State v.*

*Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124

Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001)(citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969). “To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

“In order to show that counsel was ineffective for failing to object to the remarks of the prosecutor, the defendant must show that the objection would have been sustained.” *State v. Johnson*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Moreover, “[c]ounsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions,” and “[o]nly in egregious circumstances, on testimony

central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.*

With respect to the second prong, "[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

*Cienfuegos*, 144 Wn.2d at 229.

The defendant here argues, with respect to the first four instances of alleged prosecutorial misconduct that he raised, that "[i]n the event this Court finds a proper objection or request for a curative instruction could have cured the prejudice resulting from any misconduct, then defense counsel was ineffective in failing to take such action." Brief of Appellant, p. 77-78. The defendant is mistaken.

As discussed above, the deputy prosecutor committed no misconduct whatsoever with respect to the first, second, and fourth issues raised by the defendant on appeal. As a result, no objection at trial would have been sustained and no curative instruction necessary. Because the defendant has not shown that an objection would have been sustained, he cannot show that counsel was ineffective for failing to object to these remarks of the prosecutor. *State v. Johnson*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Therefore, the defendant cannot show that trial

counsel's performance was deficient and his claim of ineffective assistance of counsel must fail.

With respect to the third issue raised by the defendant, the defendant, just one page before he sets forth his ineffective assistance of counsel claim, noted that “[a]n objection to the prosecutor’s argument that the jury should ‘declare the truth’ would have been done [sic] more harm than good.” Brief of Appellant, p. 76. The defendant goes on to state that “[b]y objecting, defense counsel would have confirmed the prosecutor’s implicit allegation that the defense does not want the jury to know the truth.” *Id.* In other words, the defendant admits that counsel’s decision not to object is, as the Court in *Johnson* noted, “firmly within the category of strategic or tactical decisions.” *Johnson*, 143 Wn. App. at 19. Because “legitimate trial strategy or tactics... cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel,” *Yarbrough*, 151 Wn. App. at 90, the defendant’s claim must fail and his convictions should be affirmed.

Lastly, it should be noted again that “[c]ompetency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001). In this case, the record below spanned thousands of pages of reported proceedings and the trial itself lasted eight weeks. *See e.g.*, RP 1-3894, 03/24/2009 RP 1-190, 03/25/2009 RP 191-

293, 03/26/2009 RP 296-406, 04/06/2009 RP 409-447, 06/01/2009 RP 2-120, 06/02/2009 RP 2-27, 06/12/2009 RP 2-61. The defendant has not complained of any alleged deficient performance other than a failure to object during portions of the prosecutor's argument on one day, June 1, 2009. Even were the court to find some deficiency in trial counsel's performance that day, such deficiency would not detract from counsel's sound performance throughout the other eight weeks of trial. As a result, the defendant has not shown "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Therefore, the defendant's claim of ineffective assistance of counsel must fail and his convictions should be affirmed.

6. THE DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THERE WAS NO ERROR COMMITTED AND THEREFORE, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE.

Under the cumulative error doctrine a court "may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her [or his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). The "cumulative error doctrine" is "limited to instances when there have been several trial errors that

standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn. 2d 910, 929, 10 P.3d 390 (2000). However, the doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.”

*Venegas*, 155 Wn. App. at 520.

As explained in the argument above, there was no error committed by the trial court in the present case. At most, it might be said that prosecutor’s comments in closing argument asking the jury declare the truth were improper. However, because these comments were made in the context of jury instructions and other argument that clearly laid out the jury’s actual duties, they were neither flagrant nor ill-intentioned and any argument regarding error inherent therein was, therefore, waived.

*Anderson* 153 Wn. App. at 429. Because there was no error, there can be no cumulative error. Therefore, the defendant’s argument fails and his convictions should be affirmed.

7. THE TRIAL COURT COMPLIED WITH DOUBLE JEOPARDY PROVISIONS BECAUSE THE DEFENDANT’S SECOND-DEGREE MURDER VERDICT WAS NOT REDUCED TO JUDGMENT AND NOT CONDITIONALLY VACATED.

“[A] defendant convicted of alternative charges may be judged and sentenced on one only.” *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002)(citing *State v. Gohl*, 109 Wn. App. 817, 824, 37 P.3d 293

(2001)). Thus, “[a] court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid.” *State v. Turner*, \_\_\_ P.3d \_\_\_ (2010)(WL 3259876).

As a result, “when faced with multiple convictions for the same conduct, courts ‘should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.’” *Id.* (quoting *Trujillo*, 112 Wn. App. at 411); *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). See *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005)(finding that there was no double jeopardy violation where the trial court entered judgment and sentenced the defendant on only the second-degree murder despite receiving verdicts of guilty to both second-degree murder and manslaughter). Double jeopardy protections do not require permanent, unconditional vacation of the verdict pertaining to the lesser offense, but that verdict cannot be conditionally vacated. *Turner*, \_\_\_ P.3d \_\_\_. That is, “a judgment and sentence must not include any reference to the vacated conviction –nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.” *Turner*, \_\_\_ P.3d \_\_\_ (2010).

In the present case, the jury did return verdicts of guilty to first-degree murder in count I and second-degree murder in count II. CP 206,

209. The trial court, however, did not reduce the defendant's second-degree murder verdict to judgment, did not sentence him for that verdict, and, indeed, did not include any information about it in the defendant's judgment and sentence. *See* CP 231-42. Because the court did not reduce "to judgment both the greater and the lesser of two convictions for the same offense" or "conditionally vacat[e] the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid," *State v. Turner*, \_\_P.3d\_\_ (2010)(WL 3259876), it did not violate the defendant's double jeopardy protections. Therefore, this Court should affirm the defendant's convictions.

D. CONCLUSION.

The defendant's convictions should be affirmed because the trial court did not violate the defendant's right against self-incrimination since it did not require him to testify as a condition to receiving justifiable homicide instructions, but properly informed him of the likely consequences of not retaking the stand after direct examination.

The trial court should be affirmed because it properly gave a first aggressor instruction and its instructions regarding defense of others were proper.

The defendant's convictions should be affirmed because the deputy prosecutor committed no prosecutorial misconduct or assuming he did, such misconduct was neither flagrant nor ill-intentioned nor likely to affect the jury's verdict.

The defendant had effective assistance of counsel because his trial counsel's failure to object can be characterized as a legitimate tactical decision and his convictions should, therefore, be affirmed.

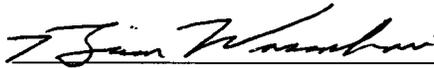
The defendant's convictions should be affirmed because there was no error committed and therefore, the cumulative error doctrine is inapplicable.

The trial court did not violate the defendant's double jeopardy rights because the second-degree murder verdict was not reduced to judgment and not conditionally vacated.

Therefore the defendant's convictions should be affirmed.

DATED: September 16, 2010.

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DIVISION III

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or  
ABC-LMI delivery to the attorney of record for the appellant and appellant  
c/o his attorney true and correct copies of the document to which this certificate  
is attached. This statement is certified to be true and correct under penalty of  
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,  
of the date below

9/10/16 [Signature]  
Date Signature