

No. 48529-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Rameiko Graves,**

Appellant.

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Kitsap County Superior Court Cause No. 15-1-00191-2

The Honorable Judge Jennifer Forbes

**Appellant's Opening Brief**

Skylar T. Brett  
Attorney for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The court's instructions violated Mr. Graves's Fourteenth Amendment right to due process.
2. The court erred by giving Instruction No. 6.
3. The court's instructions failed to make the self-defense standard manifestly clear to the average juror.

**ISSUE 1:** The use of force is lawful if the accused reasonably believes that s/he is about to be injured. Did the court's instructions fail to make this standard clear to the jury when the instructions also stated that Mr. Graves's belief that his conduct was lawful was not to be considered?

4. Prosecutorial misconduct deprived Mr. Graves of his Sixth and Fourteenth Amendment right to a fair trial.
5. The prosecutor committed misconduct by misstating the law of self-defense and encouraging the jury to ignore the court's instructions.
6. The prosecutor committed misconduct during cross-examination of Mr. Graves by repeatedly implying that Mr. Graves had a duty to retreat.
7. The prosecutor's misconduct was flagrant and ill-intentioned.

**ISSUE 2:** A person in a place s/he is legally entitled to be has no duty to retreat before acting in self-defense. Did the prosecutor commit misconduct by repeatedly implying during cross-examination of Mr. Graves, and explicitly arguing in closing, that his use of force was not lawful because he could have fled instead?

8. The trial court erred by giving Instruction No. 3.
9. The trial court's reasonable doubt instruction violated Mr. Graves's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
10. The trial court's reasonable doubt instruction violated Mr. Graves's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21, 22.

11. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
12. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

**ISSUE 3:** A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Graves's constitutional right to a jury trial?

13. The court exceeded its sentencing authority by ordering Mr. Graves to undergo a substance abuse evaluation, which was not crime-related.
14. The court exceeded its sentencing authority by ordering Mr. Graves to abstain from alcohol, drugs, marijuana, and from entering bars, which were not crime-related prohibitions.
15. The court exceeded its sentencing authority by ordering Mr. Graves to undergo urinalysis and breath tests, which were not crime-related prohibitions.

**ISSUE 4:** A sentencing court may only order an offender to undergo a substance abuse evaluation or to comply with drug- and alcohol-related prohibitions if it finds that chemical dependency contributed to the offense. Did the court exceed its statutory authority by ordering Mr. Graves to comply with numerous drug- and alcohol-related sentencing conditions and prohibitions when there was no evidence that he had an addiction problem or that drug or alcohol use contributed to the crime?

**ISSUE 5:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Graves is indigent?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Jeffrey Waldroop got home from work and mixed himself a cocktail of vodka and orange juice. RP 71.<sup>1</sup> It was a nice day out, so he decided to do some exercises in the yard of his apartment complex. RP 71.

Waldroop grabbed his Katana (a large sword) and went outside. RP 71-72. He imitated martial artists he had seen in online videos, waving the sword around and practicing different stances. RP 72.

At one point, Waldroop approached his neighbor, Misty Torres, and told her that the sword could kill her. RP 103. He said the sword was “razor sharp.” RP 103.

He continued mixing cocktails, drinking almost half of a bottle of vodka. RP 99. He went in and out of his apartment for several hours, drinking and practicing his moves with his sword while in the yard. RP 78.

Waldroop became a “ninja” in his mind. RP 108. He took on a “guard-dog state of mind.” RP 110.

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<sup>1</sup> Unless otherwise noted, citations to the Report of Proceedings are from the chronologically-numbered volumes spanning 11/3/15 through 11/6/15, transcribed by Barbara Brace.

Rameiko Graves was visiting Torres, who was a family friend. RP 244. At one point, Waldroop knocked on the door of Torres's apartment. RP 252. When Torres's boyfriend, Alex Bedford, answered, Waldroop was standing at the door in a fighting stance. The sword was on Waldroop's back and he had both hands on the handle. RP 252-253.

Later, Mr. Graves and Bedford were standing in the parking lot by Torres's car. RP 258. Mr. Graves was attempting to make a repair to the car's radio. RP 244.

Waldroop watched Mr. Graves and Bedford because he thought they looked suspicious. RP 80-82. He snuck up on them and peeked at them around a corner. RP 81.

Waldroop went inside and told his brother that some people were "messing with him." RP 158.

Waldroop went back outside and continued watching Mr. Graves and Bedford with his sword over his shoulder. RP 256.

Eventually, Waldroop's brother came outside and tried to take the sword away. RP 261. After a small struggle, the brother got the sword and led Waldroop toward their apartment. RP 261.

But Waldroop grabbed the sword back and ran toward Mr. Graves with the sword held over his head. RP 264.

Mr. Graves had the knife he used to work on cars, and used it to stab Waldroop when he came within arm's reach. RP 2570258, 265. Waldroop refused to drop the sword until Mr. Graves had stabbed him nine times. RP 258-259.

The state charged Mr. Graves with first degree assault. CP 14-15.

At trial, a doctor testified that Waldroop's blood-alcohol level was .287 (more than three times the legal limit for driving) when he got to the hospital. RP 237, 239.

Waldroop's brother testified that he knew his brother had been drinking because of his behavioral changes. RP 169. He said that he forced Waldroop to give him the sword and then he dropped it on the ground. RP 161, 175. He said that Waldroop then picked up the sword's scabbard (not the sword itself) and started twirling it in circles above his head immediately before the stabbing. RP 162-163.

Mr. Graves also testified. He explained that Waldroop did not seem dangerous at first. RP 254. But Waldroop's demeanor changed at some point in the evening. RP 256. He started staring at Mr. Graves and Bedford as they worked on the car. RP 256.

Right before Waldroop's brother came out to try to get the sword, Waldroop told Mr. Graves that "this has happened before." RP 259.

Mr. Graves testified that he feared for his life when Waldroop charged toward him with the sword.<sup>2</sup> RP 264-265.

On cross-examination, the prosecutor pointed out repeatedly that Mr. Graves could have left the apartment complex or stayed inside if he was intimidated by Waldroop's actions during the evening. RP 275-276, 278-281.

During closing argument, the stated claimed that Mr. Graves's use of force was not reasonable because he could have retreated from the situation before Waldroop came at him:

Ladies and gentlemen, his force was not reasonable to effect any lawful purpose and no [sic] reasonable alternative to the use of force appeared to exist. Well, ladies and gentlemen, there were plenty of alternatives. When he was getting this bone-chilling death stare from [Waldroop], he could have went [sic] inside. He could have walked away at any point, but he didn't...  
RP 353.<sup>3</sup>

The court gave Mr. Graves's proposed jury instruction on self-defense. CP 41-44. But the court also gave this instruction, proposed by the state:

It is not a defense to a criminal charge that the defendant believed his or her conduct was lawful. Ignorance of the law is no excuse for criminal conduct.  
CP 33.

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<sup>2</sup> Waldroop's brother testified that Waldroop was already on the ground when Mr. Graves walked away briefly, and then came back and stabbed him several more times. RP 186.

<sup>3</sup> See also RP 342, 351.

The court's instruction on the state's burden of proof informed the jury that they were convinced of Mr. Graves's guilt beyond a reasonable doubt if, after considering all of the evidence, they had "an abiding belief in the truth of the charge." CP 30.

The jury found Mr. Graves guilty. CP 48.

The court ordered Mr. Graves to do a substance abuse evaluation and all recommended treatment as a condition of his sentence. CP 66. The court also ordered Mr. Graves to abstain from use or possession of alcohol, marijuana, and controlled substances; to refrain from entering any bar or place where alcohol is "the chief item of sale;" and to submit to urinalysis and breath tests at his own expense. CP 66.

This timely appeal follows. CP 72.

## **ARGUMENT**

### **I. THE COURT'S INSTRUCTIONS VIOLATED MR. GRAVES'S RIGHT TO DUE PROCESS BY FAILING TO MAKE THE SELF-DEFENSE STANDARD MANIFESTLY CLEAR.**

Mr. Graves admitted to stabbing Waldroop, so his defense and due process depended upon the jury's proper application of the self-defense standard.

In order to convict Mr. Graves, the state was required to prove beyond a reasonable doubt that he acted with unlawful force. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). His use of force

was lawful if he reasonably believed that he was going to be injured. *State v. George*, 161 Wash. App. 86, 96, 249 P.3d 202, 207 (2011).

But the court instructed the jury that Mr. Graves's subjective belief was irrelevant to his defense: "It is not a defense to a criminal charge that the defendant believed his or her conduct was lawful..." CP 33.

The instructions informed the jury that Mr. Graves's perception of whether he was lawfully defending himself was inapposite, while it was actually central to the jury's determination. The court's instructions violated Mr. Graves's right to due process by failing to make the self-defense standard manifestly clear to the jury. *McCreven*, 170 Wn. App. at 462.

When there is some evidence showing the lawful use of force, the state must disprove self-defense beyond a reasonable doubt. *McCreven*, 170 Wn. App. at 462. Jury instructions impermissibly lowering the state's burden in a self-defense case violate the constitutional right to due process.<sup>4</sup> *Id.*; U.S. Const. Amend. XIV. The court's instructions must make the state's burden of disproving self-defense manifestly apparent to the average juror. *Id.*

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<sup>4</sup> Jury instructions that lower the state's burden of proof in violation of due process constitute manifest error affecting a constitutional right and may be raised for the first time on appeal. If, however, the court determines that these specific issues were not preserved, they nonetheless constitute manifest error affecting a constitutional right. RAP 2.5(a)(3); *McCreven*, 170 Wn. App. at 462.

The self-defense standard includes a subjective component. *George*, 161 Wash. App. at 96. To prove that an accused person acted with unlawful force, the state must disprove, *inter alia*, that s/he subjectively believed that s/he was about to be harmed. *Id.*

But Instruction 6 in Mr. Graves's case told the jury just the opposite. CP 33. The instruction informed the jury that Mr. Graves's belief that his conduct was lawful was not relevant to whether he was guilty of assault.<sup>5</sup> CP 33.

Jury instructions that are internally inconsistent are ambiguous and fail to make the self-defense standard manifestly clear to the jury. *State v. Irons*, 101 Wash. App. 544, 553, 4 P.3d 174, 179 (2000).

At best, the court's instructions conflicted with one another regarding whether Mr. Graves's subjective fear was relevant to the jury's determination of whether he had acted in self-defense.<sup>6</sup>

The jury at Mr. Graves's trial was explicitly told that they should not consider his subjective belief in reaching a verdict. CP 33. The self-defense standard was not made manifestly clear.

When inconsistent jury instructions effectuate a misstatement of the law, they are presumed to have misled the jury and prejudiced the

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<sup>5</sup> The court's instruction was not a pattern jury instruction. *See* WPICs.

<sup>6</sup> Instruction 14 informed the jury, *inter alia*, that force is lawful when used by a person who "reasonably believes that he is about to be injured." CP 41.

accused. *Id.* at 559. Reversal is required unless the state can prove that the error was harmless beyond a reasonable doubt. *Id.*

The state cannot meet that burden here. The jury's proper application of the self-defense standard was central to Mr. Graves receiving a fair trial.

The court's instructions violated Mr. Graves's right to due process by failing to make the state's burden of disproving self-defense manifestly clear to the average juror. *McCreven*, 170 Wn. App. at 462. Mr. Graves's conviction must be reversed.

## **II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. GRAVES OF A FAIR TRIAL.**

Torres had invited Mr. Graves to her home. RP 244. He had a legal right to be in the apartment complex and to fix her car for her. He was also legally entitled to use force if necessary to defend himself, even if he could have retreated instead.<sup>7</sup> *State v. Redmond*, 150 Wash. 2d 489, 493, 78 P.3d 1001, 1003 (2003).

Still, the prosecutor asked him repeatedly about how he could have just gone back inside the apartment when Waldroop was waving his sword

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<sup>7</sup> The public policy reasoning behind this rule is strong: if people were legally required to flee indoors any time someone was acting erratically or threateningly outside, the daily activities of law-abiding citizens would be significantly restrained by others acting unlawfully.

around outside. RP 275-276, 278-281. The state also explicitly argued to the jury that Mr. Graves's use of force was not lawful because he had the option of retreating. RP 342, 351, 353.

The prosecutor committed misconduct by misstating the law to the jury.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

A prosecutor commits misconduct by misstating the law or encouraging the jury to misapply the law. *State v. Walker*, 164 Wash. App. 724, 736, 265 P.3d 191, 198 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wash. 2d 1022, 295 P.3d 728 (2012).

A misstatement of the law by a prosecutor is "a serious irregularity having the grave potential to mislead the jury." *Id.*

A person who is in a place where s/he is legally allowed to be has no duty to retreat before acting in self-defense. *Redmond*, 150 Wash. 2d at 493. But the prosecutor at Mr. Graves's trial asked him repeatedly why he did not simply walk away from Waldroop if he felt threatened. RP 275-276, 278-281.

During closing, the prosecutor argued at length that the state had proved that Mr. Graves did not use lawful force because he had a reasonable alternative to defending himself: he could have walked away. RP 341-342, 351, 353.

But Mr. Graves's actions were lawful if they met the self-defense standard, even if he could have avoided the need for force by retreating. *Redmond*, 150 Wash. 2d at 493. The prosecutor's argument misstated the law. *Id.*

Mr. Graves was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704. He admitted to stabbing Waldroop. RP 257-258, 265. He could have avoided the entire interaction by going back inside the apartment and staying there once he saw Waldroop waving his sword around outside. But he was not legally required to do so.

The prosecutor's argument – though a misstatement of the law – likely made logical sense to the jury. Accordingly, the jury could have relied on that argument to convict Mr. Graves even if the state failed to

prove that his use of force was unlawful under the correct legal standard. There is a substantial likelihood that the prosecutor's misstatement of the law affected the outcome of Mr. Graves's trial. *Id.*

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

The cumulative effect of repetitive prosecutorial misconduct can be so pervasive that no instruction can erase its combined effect. *Walker*, 164 Wn. App. at 737. The misconduct here was flagrant and ill-intentioned and could not have been cured.

The idea that Mr. Graves could have avoided the use of force by retreating from Waldroop was a primary concept of the prosecutor's theory of the case. The theme was repeated throughout the prosecutor's cross-examination of Mr. Graves and closing argument. RP 275-276, 278-281, 342, 351, 353. The cumulative effect of the repetitive improper arguments could not have been cured with an instruction. *Id.*

Additionally, the interplay of the lack of a duty to retreat and the requirement that a person acting in self-defense use only necessary force is a complicated legal fiction likely to elude a jury even in the best of circumstances. The prosecutor's improper arguments in Mr. Graves's

case placed the state's thumb on the scale toward a misunderstanding that lowered the state's burden to prove that Mr. Graves had acted with unlawful force. The prosecutor's argument was flagrant and ill-intentioned and could not have been cured by an instruction.

The prosecutor committed flagrant and ill-intentioned misconduct by misstating the law and encouraging the jury to convict Mr. Graves because he could have retreated instead of acting in self-defense. *Walker*, 164 Wash. App. at 736; *Redmond*, 150 Wash. 2d at 493. Mr. Graves's conviction must be reversed. *Id.*

**III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. GRAVES'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH," RATHER THAN ON WHETHER THE STATE HAD MET ITS BURDEN OF PROOF.**

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 22.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757

(citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 22.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 22. Jurors were obligated to follow the instruction.

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014). This court should not follow Division I.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I’s position.

In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called

*Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.<sup>8</sup> *Id.*

The *Fedorov* court also relied on *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant favored the “truth of the charge” language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.*, at 656.<sup>9</sup> The *Pirtle* court was not asked to rule on the constitutionality of the “truth of the charge” provision.

Neither *Bennett* nor *Pirtle* should control this case. Division II should not follow Division I’s decisions in *Kinzle* and *Fedorov*.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

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<sup>8</sup> The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

<sup>9</sup> The challenged language in *Pirtle* read as follows: “If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction “invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit.” *Id.*, at 656.

Improper instruction on the reasonable doubt standard is structural error.<sup>10</sup> *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Graves his constitutional right to a jury trial.

Mr. Graves’s conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

**IV. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. GRAVES TO UNDERGO A SUBSTANCE ABUSE EVALUATION AND TO COMPLY WITH NUMEROUS DRUG- AND ALCOHOL-RELATED SENTENCING PROHIBITIONS AS A CONDITION OF HIS SENTENCE WHEN THERE WAS NO EVIDENCE THAT THE ALLEGED CRIME INVOLVED SUBSTANCE ABUSE.**

There was no evidence that Mr. Graves had any chemical dependency issues or was intoxicated at the time of the incident.

Still, the court ordered him to complete a substance abuse evaluation and any recommended treatment as a condition of his sentence. CP 66. The court also required Mr. Graves to abstain from consumption or possession of alcohol, marijuana, or controlled substances; not to enter

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<sup>10</sup> RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

any bar or place where alcohol is the “chief item of sale;” and to submit to urinalysis and breath tests at his own expense. CP 66.

But the court only has the authority to order a substance abuse evaluation or “crime-related prohibitions” -- such as prohibitions on use or possession alcohol or drugs -- if it also finds that the accused has a chemical dependency problem that contributed to the offense RCW 9.94A.607(1).

The court exceeded its statutory authority by ordering Mr. Graves to complete a non-crime-related sentencing condition and to comply with non-crime-related prohibitions. *State v. Acrey*, 135 Wn. App. 938, 942, 146 P.3d 1215 (2006).

A court’s sentencing authority is limited by statute. *Id.* The legislature has authorized sentencing courts to impose only “crime-related” conditions. RCW 9.94A.505(9). This includes the power to order a person to undergo a chemical dependency evaluation only “[w]here the court finds that the offender has any chemical dependency that has contributed to his or her offense.” RCW 9.94A.607(1). The same requirement applies before the court may order a sentencing prohibition. RCW 9.94A.505(9).

An unlawful or erroneous sentence can be challenged for the first time on appeal. *In re Call*, 144 Wn.2d 315, 331, 28 P.3d 709 (2001).

Here, there was no evidence that Mr. Graves had any chemical dependency issues, much less that substance abuse contributed to his offense.<sup>11</sup> Accordingly, the court did not have the authority to order him to undergo a chemical dependency evaluation; to refrain from use of alcohol, drugs, or marijuana; not to enter any bars; or to undergo UA and breath tests. RCW 9.94A.607(1); RCW 9.94A.505(9).

The court exceeded its authority by ordering Mr. Graves to comply with non-crime-related sentencing conditions. RCW 9.94A.607(1); RCW 9.94A.505(9). Mr. Graves's case must be remanded for correction of the Judgment and Sentence to remove those conditions.

**V. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS ON MR. GRAVES, WHO IS INDIGENT.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

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<sup>11</sup> Bedford testified that Mr. Graves and the others at Torres's apartment had some beers during the day. RP 118. But no witness testified that Mr. Graves was intoxicated at any point, much less that he had a dependency on alcohol that contributed to the incident with Waldroop.

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).<sup>12</sup>

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wash.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Graves indigent at the end of the proceedings in superior court. CP 73-74. That status is unlikely to change, especially with the imposition of a lengthy prison term. Accordingly, the trial judge waived all non-mandatory legal financial obligations in Mr. Graves’s case. CP 67.

The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

### **CONCLUSION**

The court’s instructions violated due process by failing to make the self-defense standard manifestly clear to the jury. The prosecutor

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<sup>12</sup> Division II’s commissioner has indicated that Division II will follow *Sinclair*.

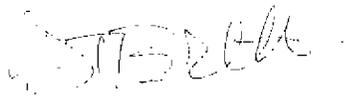
committed flagrant and ill-intentioned misconduct by encouraging the jury to convict Mr. Graves because he did not retreat, which he had no duty to do. The court's instruction on the state's burden violated Mr. Graves's right to a jury trial. Mr. Graves's conviction must be reversed.

In the alternative, the court exceeded its authority by ordering Mr. Graves to undergo a substance abuse evaluation and to comply with sentencing prohibitions, which were not crime-related. Mr. Graves's case must be remanded and those conditions of his sentence stricken.

If the state should substantially prevail on appeal, this court should decline to impose appellate costs on Mr. Graves, who is indigent.

Respectfully submitted on June 9, 2016,

**BACKLUND AND MISTRY**



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Rameiko Graves, DOC #387168  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

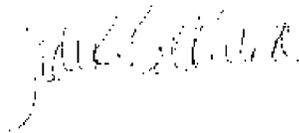
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney  
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 9, 2016.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

**BACKLUND & MISTRY**

**June 09, 2016 - 2:25 PM**

**Transmittal Letter**

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