

FILED
Court of Appeals
Division III
State of Washington
4/12/2018 8:00 AM
No. 35549-7-III

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

STATE OF WASHINGTON, Respondent

v.

RICARDO DIMAS, Appellant

THE HONORABLE JUDGE MICHAEL G. MCCARTHY

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

THE HONORABLE JUDGE MICHAEL MCCARTHY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court committed prejudicial error by providing a “first aggressor” jury instruction that the facts did not legally support.
- B. The State failed to prove beyond a reasonable doubt that Mr. Dimas did not act in lawful self-defense.
- C. The prosecutor committed prejudicial misconduct by misstating the facts and the law during closing arguments.
- D. The trial court violated Dimas’s double jeopardy protections when it failed to vacate the second-degree murder conviction in count 2 and unlawful possession of a firearm in count 5.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court err in providing a first aggressor jury instruction where no evidence supported the theory that Mr. Dimas took action that was reasonably likely to provoke a belligerent response?
- B. Did the state disprove beyond a reasonable doubt that Mr. Dimas acted in self-defense when he fired a weapon within 2 seconds of the victim swinging an ax at him?

- C. Did the prosecutor commit misconduct by misstating the facts and law during closing argument?
- D. Is a verdict of guilty still a conviction for double jeopardy purposes if it is included in the judgment and sentence, even if the defendant is not sentenced on the counts?

II. STATEMENT OF FACTS

On the evening of January 22, 2016, Ricardo Dimas (“Dimas”) and a friend were finishing work for the day. They were remodeling Dimas’s mother’s home. RP 309. As they walked out to the car, a friend of Dimas, Tabatha Bevins (“Bevins”) and her girlfriend, Christina Coronado (“Coronado”), and Christina Sampson-Jones (“Sampson-Jones”) arrived at the house. Bevins told Dimas that Coronado needed heroin. RP 311.

Earlier that evening, Bevins and Coronado met with Leticia Diaz (“Diaz”) in a local store parking lot to give her some clothing. RP 71-72,123. Diaz was homeless and asked for a ride to the home of Anna Hargett (“Hargett”). RP 122. Hargett was the aunt of Diaz’s girlfriend, April Jackson (“Jackson”). RP 62.

Bevins agreed to take her to Hargett’s home. RP 146. The reason they went to Hargett’s home was for Coronado to purchase drugs from Hargett. RP 72. Bevins, Diaz, Coronado, and

Sampson-Jones entered Hargett's home. Exh. 2¹. The home consisted of a garage space set up like a studio apartment. RP 65. There was one man door to enter and leave the garage, which opened into an alleyway. RP 68. The garage occupants shared a bathroom with the main house. RP 99.

The owner of the main home, Lisa Donaldson, had set up a video surveillance system that pointed directly at the garage man door. RP 100. Ms. Donaldson testified they lived in a bad neighborhood and were concerned because Hargett's niece, Jackson, was there and the owners could not tell what she was doing. They were uncomfortable with the activities that were happening in the alleyway. RP 100.

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

She returned fifteen minutes later. RP 127. Coronado and Bevins paid her the \$100. RP 76-77, 148,170,208. Coronado tested the drug and said the heroin was not good. She wanted her

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

money back. RP 77, 128,170, 208. Hargett texted the seller who refused to return the money. 129,209. Diaz told them it was not "like K-Mart or Walmart," and they could not get a refund. RP 76. But, wanting to keep the peace between the parties, she offered to repay the \$100 to Coronado and Bevins, within a few days. RP 77-78,129. After a heated argument Sampson-Jones, Bevins, and Coronado left at 9:07 p.m. RP 78-79,129-130, 171.

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

The women drove the several blocks to Dimas's mother's home, where Dimas was getting ready to leave. RP 150,171. Dimas lived in a different part of town, but always carried a gun when he went to his mother's neighborhood because it was a violent area of town. RP 313.

Bevins told Dimas, her friend of many years, that Coronado was sick, they had tried to buy heroin for her, and it wasn't good. RP 307,311. Dimas's friend, Andreas, who had been helping him remodel, said he knew Diaz and she would "make it right." RP 312-

313. Bevins said Dimas did not sound aggressive but told her this was a neighborhood where everyone knew each other; it was his neighborhood. RP 151. She said it did not sound like he intended to threaten or bully anyone. RP 151.

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

At 9:36 p.m. Bevins approached the door and knocked twice. (Exh.2 at 9:36:54 and 7 seconds); RP 134,152. Twenty seconds later she knocked a second time. Exh. 2. Dimas stood off to one side. Exh. 2. Diaz answered the door at 9:37:46. Bevins asked her to "make it right." RP 133,152. Diaz testified Dimas said, "You want to rip off my best friend? You want to do her fucking dirty?" RP 83. However, the surveillance tape does not show Dimas talking to Diaz, but rather, with Bevins. Exh., 2 9:37:46 at 27-28 seconds.

Diaz and Bevins argued, and Jackson opened the door to get Diaz back inside at 9:38:39 and 7 seconds; RP 211. Jackson joined in the argument and turned to Dimas and said, "Who in the --

- are you?" RP 211. She said Dimas just stood there, not saying anything. RP 236,239.

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

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

Bevins heard Hargett say she was "going to take care of these mother fuckers and to get the fuck out of here." RP 136. She saw Dimas back up as Hargett raised and cocked the ax. Bevins was afraid of Hargett because she did not know what she was going to do. RP 156-57. She heard Dimas tell Hargett to back up, or he would "go off on her," but Hargett continued to move

forward. RP 137,158. Bevins saw Hargett swing the ax. RP 137.

Jackson did not see the ax until it was in midair. RP 240.

Dimas testified that as the arguing escalated between the women, he saw Hargett come to the door, and heard someone say, “She has an ax.” RP 320. As Jackson came toward him and pounded on the wall, he moved back, and put his hand on his gun². RP 321.

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

Within two seconds of Hargett’s attack, Dimas raised his weapon and fired toward Hargett. (Exh. 2: 9:38:39 at 24 seconds). The bullet went through both Hargett and Diaz. RP 216. From the time Dimas arrived at the alleyway with everyone until the time Hargett was shot was about two minutes and five seconds. Exh. 2. Hargett died about 30 minutes later. CP 5. Diaz was treated for a gunshot wound to the neck. RP 87.

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

Dimas was arrested, and Yakima County Prosecutors charged him by amended information with (1) murder in the second degree; (2) Felony Murder second degree; (3) First-degree assault; (4) First-degree unlawful possession of a firearm; and (5) Second-degree unlawful possession of a firearm. Firearm enhancements were added to counts 1, 2, and 3. CP 50-51. The matter proceeded to a jury trial on the first three counts and a bench trial for counts four and five. CP 91,376-377.

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

The court reasoned:

THE COURT: Okay. Well, the evidence is perhaps mixed on the issue of whether there was a trespass. There certainly is evidence that would suggest that Mr. Dimas and the other people in his company were repeatedly told to leave. Those directives were not followed.

The argument got more and more heated. I think that was Mr. Dimas' testimony, louder and louder. Then things started happening.

So, I think that there is some evidence in this case that would suggest that Mr. Dimas and the people, that he was the person who started the fight as it were. Consequently, I think, the aggressor instruction is appropriately given in this instance.

RP 372-73.

The court gave Jury Instruction No. 18:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill, 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 is not available as a defense.

CP 132.

The court gave Jury Instruction No. 5:

It is a defense to a charge of Second Degree Murder in Count One that the homicide was lawful as defined in this instruction. Homicide is lawful when committed in the defense of the slayer when:

Count One that the

1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;

2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

3) the slayer employed 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 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 119.

Jury Instruction No. 13:

In regard to the charges of Second Degree Felony Murder and First Degree Assault, the use of force is lawful as defined in this instruction.

The use of, attempt to use or offer to use force upon or toward the person of another is lawful when used, attempted or offered by a person who reasonably believes that he 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, or offering to use 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 and prior to the incident.

CP 127.

Jury Instruction No. 14:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 128

Jury Instruction No. 15:

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

CP 129

Jury Instruction No. 16:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 130.

During closing argument, the prosecutor stated:

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

RP 397.(Emphasis added).

Defense counsel objected, and the court told the jury, "There was a misstatement of the law there. The burden of proof is on the state, including the burden to prove that the act was not lawful." RP 397-98.

The prosecutor went on:

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

RP 398-99.

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

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

RP 399.

The prosecutor stated:

I'm going to direct your attention to No. 18 now. No person by any intentional act reasonably likely to provoke a belligerent response can create a necessity for acting in self-defense and thereupon kill, 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 the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Now, reading this instruction clearly, obviously any of these other defenses of self-defense are not available if you find beyond a reasonable doubt that Mr. Dimas was the one who

provoked the attack. The evidence has been shown on the screen a number of times. People are telling Mr. Dimas to leave emphatically. People are cussing at each other. They don't want him or any of those people to be there.

In response, you can see he brings out his firearm. He makes no effort to leave. Would it be reasonable to believe that that would provoke a violent response from a homeowner that's telling you to leave? The state's contention is that it is.

RP 400-401. (Emphasis added).

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

RP 403-404. (Emphasis added).

Mr. Dimas was convicted on all counts. CP 38-42; 376-77.

At sentencing, defense counsel asked the court to dismiss one of the second-degree murder convictions and one of the unlawful possession of the firearm counts. (9/8/17 RP 40). The court

declined to vacate and instead ruled the counts would merge.

(9/8/17 RP 58). Dimas makes this timely appeal. 387-396.

III. ARGUMENT

A. The Court Committed Prejudicial Error By Providing A First Aggressor Instruction Which The Facts Did Not Legally Support.

Under Washington law, an individual may use deadly force in self-defense if he reasonably believes another is intending to commit a felony or do some great personal injury to him, and the danger is imminent. RCW 9A.16.050. The right to use deadly force in that circumstance is founded upon the existence of a necessity.

State v. Wilson, 26 Wn.2d 468, 480, 174 P.2d 553 (1946).

One who uses such force does not have to be in actual danger, but “[t]he evidence must establish (1) a confrontation or conflict, (2) not instigated or provoked by the defendant, (3) which would induce a reasonable person, *considering all the facts and circumstances known to the defendant*, to believe that there was imminent danger of great bodily harm about to be inflicted.”

State v. Janes, 121 Wn.2d 220, 240, 850 P.2d 495 (1993)(internal citation omitted); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)(parens and emphasis added).

Here, the surveillance videos and witness testimony established there was a conflict, which erupted into violence when Hargett stepped toward Mr. Dimas and raised her ax. The question on review is whether the trial court committed prejudicial error when it gave the jury a “first aggressor” instruction, thereby nullifying Mr. Dimas’s legitimate right to self-defense.

First aggressor instructions are not favored, and courts are cautioned to use care in giving them. *State v. Kidd*, 57 Wn.App. 95, 100, 786 P.2d 847 (1990). “Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such an instruction.” *Riley*, 137 Wn.2d at 909, 910 n.2..

Whether the state produced sufficient evidence to justify a first aggressor instruction is a question of law and review is *de novo*.” *State v. Bea*, 162 Wn.App. 570, 577, 254 P.3d 948 (2011).

To justify a first aggressor instruction, the State must produce credible evidence from which a jury could reasonably determine the defendant (1) intentionally provoked the fight, or (2) conflicting evidence as to whether he provoked the fight, or (3) the evidence shows he made the first move by drawing a weapon. *State v. Anderson*, 144 Wn.App. 85,89, 180 P.3d 885 (2008).

1) Mr. Dimas Did Not Intentionally Provoke A Belligerent Response From Hargett.

To qualify for a first aggressor instruction, the defendant's initial provoking act must not only be intentional, but it must be one that would *reasonably provoke a belligerent response* from the victim, and it must be related to the eventual assault on which the self-defense claim rests. *State v. Wasson*, 54 Wn.App. 156,159, 772 P.2d 1039 (1989).

The State's theory was that Dimas provoked Hargett into swinging the ax at him because he was a "malicious trespasser." This theory of the facts does not stand up to scrutiny and does not support a first aggressor instruction.

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

Mr. Dimas was not a "malicious trespasser." In *State v. Bland* and *State v. Bea*, the statutory definition of "malicious trespasser" is illustrated. *State v. Bland*, 128 Wn.App. 511, 116

P.3d 428 (2005); *Bea*, 162 Wn.App. at 570. Bland was an elderly man who invited Brenda Moore into his home after she called him from jail and asked if she could stay with him. Late at night, Moore entered Bland's bedroom, cursed at him and poked him with her finger. The situation escalated resulting in Bland chasing Moore around his house with his gun. Moore was able to go into a bedroom and call the police. On review, the Court held the jury could conclude that Bland used a reasonable means available to him at the time to expel Moore. The Court further stated **the use of deadly force was *not* justified to expel a *nonviolent* trespasser.** *Id.* at 517. (Emphasis added).

Similarly, in *Bea*, the defendant and his girlfriend attended a party at a friend's home. *Bea*, 162 Wn.App. at 573. At some point, the two argued in the bathroom, and the owner told them to leave. *Bea* refused and held the bathroom door shut. The owner and other friends forced the door open, and *Bea* and the owner commenced fighting. *Bea* contended the owner punched him in the face, which started the altercation. *Id.* at 573-74. As *Bea* was leaving, he grabbed a kitchen knife, stabbed the owner five times, and then ran away. The trial court gave a first aggressor instruction, and on review, the Court held the instruction was properly given:

Mr. Bea was not entitled to invoke the defense of self-defense if he provoked (owner) by initiating a fight once the bathroom door was forced open. Nor was Mr. Bea entitled to invoke the defense of self-defense if **he provoked a reasonable use of force by (owner) after refusing to leave the home as requested, blocking entry to the bathroom, and wreaking damage behind the closed door.** As explained in *Riley*, to invoke self-defense, the force defended against must be an unlawful force. 137 Wash.2d at 911, 976 P.2d 624. An owner of property may lawfully use reasonable force to expel a *malicious trespasser*. RCW 9A.16.020; *State v. Bland*, 128 Wash.App. 511, 513 n. 1, 116 P.3d 428 (2005). The first aggressor instruction was needed for the State to argue that these acts could negate Mr. Bea's theory of self-defense.

162 Wn.App. at 577-78. (Emphasis added).

Mr. Dimas's presence outside the door was not as a "malicious trespasser." He did not knock on the door³. He never entered the garage. He stood off to one side. He did not argue with Diaz. (Exh. 2 9:37:46). He did not argue with Jackson and barely responded when she asked who he was. (Exh.2 9:38:39 at 15 seconds). As Diaz, Hargett, and Bevins escalated the conflict, he stepped to the side and away from Jackson as she approached him.

³ Bevins knocked on the door two different times, twenty seconds apart. The video shows she did not pound on the door either time. Exh.2 9:36:54 at 6 seconds and again 20 seconds later.

Mr. Dimas stood in the same place outside when Hargett stepped forward *toward him*. He told her to back up. She yelled “get the fuck out” and raised the ax to swing it at him. RP 337, (Exh. 2 9:38:39 at 22 seconds). Dimas immediately stumbled backward, held his hand up defensively, and within two seconds fired the weapon in response to her ax attack. (Exh.2 9:38:39 at 22-24 seconds). The evidence for a “malicious trespass” that provoked the ax attack is absent. If he could even conceivably be considered a trespasser, he was a ***nonviolent*** trespasser.

2) There Was No Conflicting Evidence

The court’s reason for the first aggressor instruction is not supported by the facts. The court noted the evidence was “mixed” as to *whether there even was a trespass*, and the arguing “got more heated.” The court then concluded that Mr. Dimas “started the fight.” RP 372.

At the outset, the standard is not a “trespass,” it had to be a “malicious trespass” for Hargett to have any justification to act as she did. Standing outside of the garage door was not an act that would reasonably provoke the belligerent response of Hargett assaulting him with an ax. The evidence does not support the

court's conclusion that Mr. Dimas "was the person who started the fight."

In *Birnel*, the defendant was staying the night at his ex-wife's home. *Birnel*, 89 Wn.App. at 462-63. He went through his ex-wife's purse after suspecting she was using methamphetamine and found the drugs. He determined to confront her and waited at the top of the stairs. *Id.* at 463. An argument ensued about her spending, the drugs, and the search of her purse. *Id.* His wife grabbed a large knife, and as he arose from the floor, she attacked him. During the struggle for the knife, his wife was fatally stabbed. *Id.* at 463-64. Birnel claimed self-defense. The State alleged that *he acted out of rage, and should have known she would be upset about his search of her purse, and requested a first aggressor instruction.* *Id.* at 472-73.

On review, the Court held the evidence did not support a first aggressor instruction. It found that when Birnel waited at the top of the stairs for his wife, it was ***not an inherently aggressive posture for a confrontation.*** *Id.* at 473. It reasoned that ***even if he knew that his wife disliked it when he would search her purse, a juror could not reasonably assume this act and***

questions about how she spent her money would provoke even a meth abuser to attack with a knife. Id. at 473.

The Court found the instruction deprived Birnel of his self-defense claim, which was constitutional in nature and could not be deemed harmless unless it was harmless beyond a reasonable doubt. *Id.* at 473. The Court reasoned “Considering the importance the State assigned to this issue at trial, we cannot assume the error was harmless beyond a reasonable doubt. Consequently, we reverse and remand for a retrial excluding the aggressor instruction.” *Id.* at 474.

During trial and closing argument, the State emphasized the idea that as a trespasser, Mr. Dimas could have simply walked away and avoided provoking a belligerent response from Hargett.⁴ Testimony at trial was that Hargett had joined the other women in smoking meth at her home less than an hour earlier. RP 126.

The jury was encouraged to unreasonably assume that Mr. Dimas’s presence outside the door, even of a meth user, was sufficient to provoke Hargett to attack him with an ax. Giving the first aggressor instruction on this basis was not harmless error.

⁴ The State never addressed the reality that Hargett could have avoided the conflict by closing her door.

In *Wasson*, the Court similarly held the defendant had not “acted intentionally to provoke an assault” from the victim, and the first aggressor instruction had been improperly given. 54 Wn.App. at 159. There, the victim intervened as the defendant and a third person were resolving an altercation. The victim first attacked the third person and then came at Wasson in a threatening manner. *Id.* at 158. The defendant fired his weapon at the victim and claimed self-defense. *Id.* The State argued the fight between Wasson and the third party was sufficient to provoke the victim’s response. The Court considered that even if there was evidence of an unlawful act by Wasson, such as a breach of the peace, there was no evidence Wasson had acted intentionally to provoke an assault by the victim. *Id.* at 160. The evidence instead showed that Wasson never initiated any act until the final assault. *Id.* The Court ruled that instructing the jury that Wasson’s actions could eliminate his right to self-defense, invalidated his right to act to defend himself. *Id.* at 160.

Similarly, this was a verbal argument between the women: Diaz argued with Bevins for 28 seconds, and Jackson argued with Bevins for about 22 seconds. The surveillance video shows Mr. Dimas was an observer, standing to the side, not involved in the

yelling and arguing. Hargett appeared to address the group for less than 10 seconds. She emerged angry, armed with an ax, told them to “get the fuck out” and stepped toward Mr. Dimas. He told her to “back off.” Less than two seconds later Hargett raised the ax.

Under Washington law, words alone do not constitute sufficient provocation to warrant a first aggressor instruction. *Riley*, 137 Wn.2d at 910-11. If words alone were sufficient to justify the use of force, the "victim" could respond to words with force and the speaker could not after that lawfully defend himself. *Id.* at 911-12. Mr. Dimas's presence and admonition to Hargett to "back off" was not sufficiently provocative to warrant the aggressor instruction.

3) Mr. Dimas Did Not Draw A Weapon First.

The third justification for a “first aggressor” instruction is evidence showing he made the first move by drawing a weapon. *Anderson*, 144 Wn.App. at 89.

In *Riley*, the defendant claimed he joked about the victim’s gang. The victim was insulted and said he was going to shoot Riley. *State v. Riley*, 137 Wn.2d at 904. Although Riley believed the victim had a gun, Riley drew his weapon first and shot the victim. On review, the Court found the aggressor instruction was properly given to the jury. *Id.* at 909. The aggressor instruction was not

given because Riley made comments about the gang, it was based on the evidence that Riley was the first person to draw a gun, which was the first act of violence beyond mere words. *Id.*

The evidence is incontrovertible that Mr. Dimas had a gun. The evidence is also incontrovertible that he did NOT raise it, show it, point it, or threaten with it. Rather, it was Hargett who aggressively and threateningly raised the ax before Mr. Dimas defended himself.

Neither the evidence nor the applicable law support giving the first aggressor instruction. This is especially true given the direction from the Supreme Court that such an instruction should be used only sparingly. It was error for the court to give a first aggressor instruction that is not supported by the evidence. The instruction was prejudicial because it nullified Mr. Dimas's claim of self-defense, effectively and improperly removing it from the jury's consideration. *State v. Douglas*, 128 Wn.App. 555, 563, 116 P.3d 1012 (2005).

To prove a constitutional error "harmless", the State bears the burden of showing that any reasonable fact-finder would have reached the same result absent the error "and where the untainted evidence is so overwhelming it *necessarily* leads to a finding of

guilt. Where the error is not harmless, the defendant is entitled to a new trial. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Here, the prejudicial instructional error requires reversal. *State v. Townsend*, 142 Wn.2d 838, 848, 15 P.3d 145 (2001).

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

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

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal. *Baeza*, 100 Wn.2d at 488.

Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. *State v. Acosta*, 101

Wn.2d 612, 615-6, 683 P.2d 1069 (1984). (abrogated on other grounds by *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989)).

A homicide is lawful when an individual reasonably believes that (1) another intended to inflict death or great personal injury to him, (2) it was an imminent danger, and (3) he used the force and means a reasonably prudent person would use under the same or similar conditions, taking into account all the facts and circumstances as they appeared at the time of and prior to the incident. RCW 9A.16.050. A self-defense claim is rooted in the right of every citizen to reasonably defend himself against an unwarranted attack. *Janes*, 121 Wn.2d at 237.

An imminent threat of great bodily harm does not actually have to be present to support a claim of self-defense, so long as a reasonable person in the defendant's circumstance could have believed that such a threat was present. *State v. George*, 161 Wn.App. 86, 249 P.3d 202 (2011).

The State did not disprove self-defense in this matter. The testimonial evidence at trial was clear that Hargett stepped toward Mr. Dimas with a raised ax. It was reasonable for him to believe he was going to suffer great personal injury. The attack happened in seconds, and Mr. Dimas stumbled backward and raised his hand in

a defensive manner. The danger of being hit by the ax was imminent.

Evidence of self-defense must be assessed from the viewpoint of a reasonably prudent person, *knowing all the defendant knows and seeing all the defendant sees.*” See *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). Mr. Dimas knew the neighborhood was a violent one. He knew Hargett sold drugs. He knew the women had used methamphetamine about an hour earlier. He knew the situation had escalated from a loud argument to one that was suddenly unpredictable and violent. He warned Hargett to back off. Instead, she stepped forward and raised the ax toward him.

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

At trial, the State emphasized the idea that Mr. Dimas had no right to be outside the door in the alleyway area. As argued above, Mr. Dimas was not a trespasser. The State did not produce evidence to establish that the man door did not open out directly into the alley or that the area where Mr. Dimas stood was her property. Further, it borders on inconceivable to imagine that if the group had continued to argue from 24 inches away where the cars were parked, that Mr. Dimas could only lawfully protect himself from an ax attack from that position.

Diaz testified she never told the group to leave. RP 85. Jackson argued with the group and testified she probably told them to leave a couple of times. RP 212. Mr. Dimas testified that Hargett was the only one who told them to leave. RP 337. Within seconds she raised the ax. Under the law, Mr. Dimas was justified in defending himself.

Where the reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is prohibited, and dismissal is the remedy. *Id.*

C. The Prosecutor Committed Prejudicial Misconduct By Misstating The Facts And The Law During Closing Arguments.

Prosecutorial misconduct may deprive the defendant of his state and federal constitutional due process rights to a fair trial.

State v. Suarez-Bravo, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); U.S. Const. Amend.5; U.S. Const. Amend.6; Art. I § 22.

Reversal is required in this case because of the prosecutor's prejudicial misconduct in misstating the evidence and the law to the jury. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

Where the prosecutor's remarks are both prejudicial and improper, misconduct has been established. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). No attorney is permitted to misstate the evidence. *State v. Warren*, 165 Wn.2d 17,28, 195 P.3d 940 (2008).

The State bears the burden of proving every element of the crimes charged beyond a reasonable doubt. A defendant has no obligation to produce any evidence of his innocence. *State v. Fleming*, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996). With one exception, (missing witness), it is improper even to imply that the defense has a duty to present evidence. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009).

In the context of a self-defense claim, the prosecution bears the burden of disproving self-defense, once the defendant has made a sufficient showing to be entitled to a self-defense claim. *Acosta*, 101 Wn.2d at 615-16. Here, the trial court found that Mr. Dimas had made the necessary showing, as the court allowed the jury to be instructed on self-defense.

In closing argument, the prosecutor misstated the law regarding the burden of proof, and duty to retreat. RP 397-399, 400, 404. The prosecutor told the jury that even if it did not believe Mr. Dimas was the primary aggressor, “**he still needs to prove that he was using the amount of force that was necessary to protect himself.**” RP 397. This was a gross misstatement of the law. Once Mr. Dimas met his burden of proving sufficient evidence for the claim of self-defense, negating intent, the burden shifted to the state to disprove the claim. *Acosta*, 101 Wn.2d at 617.

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

The prosecutor further misstated the law when he added:

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

RP 398-99.

Defense counsel objected, citing there was no duty to retreat. The court noted that counsel's remarks were argument, not evidence.

In addressing the self-defense claim, the prosecutor again raised the duty to retreat issue:

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

RP 404.

In discussing the escalation of the arguing, the prosecutor said, "If you look to the video, we can see a heated argument. It's described by all the eyewitnesses as something that's escalating.

At what point should Mr. Dimas have left?"

The objectionable remarks were part of the State's theory that Mr. Dimas was a "malicious trespasser," justifying Hargett's use of the ax and negating Mr. Dimas's right to defend himself. The prosecutor's statement to the jury advanced a theory that when Mr. Dimas stood outside a door while the women argued and Hargett eventually came outside to say, "get the fuck out," amounted to Mr. Dimas having no right to be there previously. It was less than 5 seconds between Hargett telling the group to leave and her swinging the ax. "Flight, however reasonable an alternative to violence, is not required." *State v. Williams*, 81 Wn.App. 739, 743-44, 916 P.2d 445 (1996). The prosecutor may not misstate the law and thereby mislead the jury. *State v. Gotcher*, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988).

The prosecutor misstated the evidence when he said:

People are telling Mr. Dimas to leave emphatically. People are cussing at each other. They don't want him or any of those people to be there.

In response, you can see he brings out his firearm. He makes no effort to leave. Would it be reasonable to believe that that would provoke a violent response from a homeowner that's telling you to leave? The state's contention is that it is.

The State presented no evidence that Hargett ever saw the firearm. Counsel has latitude in closing argument to draw

and express reasonable inferences from the evidence, but may not mislead the jury by misstating the evidence. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Whether Mr. Dimas was justified in defending himself was the issue at trial. By misstating the facts, the prosecutor created the inference that Hargett's assault was provoked by Mr. Dimas's weapon. This was patently untrue.

A prosecutor's closing argument is viewed in the context of the issues in the case, the evidence addressed in the argument and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are deemed prejudicial only when there is "a substantial likelihood the misconduct affected the jury's verdict." *Id.*

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

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

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

As quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. *Suarez-Bravo*, 72 Wn.App. at 367. That duty includes the requirement that prosecutors refrain from engaging in conduct at trial which is likely “to produce a wrongful conviction.” *State v. Clafin*, 38 Wn.App. 847,850, 690 P.2d 1186 (1984), *rev. denied*, 103 Wn.2d 1014 (1985). This Court should vacate Mr. Dimas’s convictions and remand for a new trial.

D. The Trial Court Violated Dimas's Double Jeopardy Protections When It Failed To Vacate The Second-Degree Murder Conviction In Count 2 and The Unlawful Possession of a Firearm in Count 5.

Mr. Dimas was convicted of second-degree murder on both counts 1 and count 2, relating to the same act against Hargett. He was also convicted of unlawful possession of a firearm in counts 4 and 5. At sentencing, defense counsel noted counts 2 and 5 should be dismissed. 9/8/17 RP 40. The court disagreed and stated it would "enter an order simply noting that Counts 1 and 2 and the – firearm enhancements are merged into Count 1 and that Counts 4 and 5 are merged into Count 4." 9/8/17 RP 41.

The trial court listed the convictions on the judgment and sentence but did not impose sentence on counts 2 and 5. Under § 3.2, the court put a line through the sentence: "Counts Vacated: Counts 2 and 5 are vacated on a separate court order." CP 378,380.

Under the Sentencing Reform Act, a conviction means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a guilty plea. RCW 9.94A.030(9). The Double Jeopardy Clauses of the state and federal constitutions protect a person from multiple punishments for

the same offense. Wash. Const. art. 1, §9; U.S. Const. Amend. 5; *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007).

In *Womac*, for offenses against a child, the defendant was charged with homicide by abuse, felony murder second degree (with a predicate offense of criminal mistreatment) and assault of a child in the first degree. *Id.* at 648. The jury convicted on all three charges. The trial court entered judgment on all the counts, but only imposed sentence on the first count. *Id.* The trial court left the remaining convictions, reasoning that double jeopardy did not require dismissal. *Id.*

On review, the Court noted that Womac committed a single offense against a single victim, but three convictions remained on his record. *Id.* at 650. The Court held the State may bring, and a jury may consider, multiple charges from the same criminal conduct in a single proceeding. However, the trial court may not enter multiple convictions for the same offense without violating double jeopardy protection. *Id.* 658. The Court remanded for vacation of two of the counts. *Id.* 664.

In situations where the defendant is found guilty on counts, which would implicate double jeopardy concerns, there is no violation if the sentencing court does not enter judgments on all the

counts. See *State v. Trujillo*, 112 Wn.App. 390, 411, 49 P.3d 935 (2002)(defendants were charged with first degree assault, and in the alternative, first degree attempted murder; because the verdict for first degree assault was not reduced to judgment it did not subject the appellant to any future jeopardy); See also *State v. Ward*, 125 Wn.App. 138, 144, 104 P.3d 61 (2005)(No double jeopardy violation because the judge entered judgment and sentenced the defendant on a second-degree murder charge, and did not include a first-degree manslaughter conviction in the judgment.)

Here, the trial court included the second-degree felony murder (count 2) and the unlawful possession of a firearm(count 5) on the judgment. CP 378-79. A guilty verdict is a conviction for double jeopardy purposes even where no sentence is imposed. The trial court's failure to vacate Count 2 and Count 5 violates double jeopardy. This matter must be remanded to the sentencing court with instructions to vacate the convictions.

IV. CONCLUSION

Based on the foregoing facts and authority, Mr. Dimas respectfully asks this Court to vacate his convictions and dismiss the second degree murder count; in the alternative, vacation of

convictions remand for a new trial; or in the alternative, vacation of the two counts.

Respectfully submitted this 12th day of April, 2018.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Ricardo Dimas, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on April 12, 2018 to:

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

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April 11, 2018 - 6:25 PM

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

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