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NO. 35549-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

RICARDO DIMAS, Appellant.

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

PAGE

TABLE OF AUTHORITIES ..... ii

I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT .....7

    A. Substantial evidence supported the court giving the first aggressor instruction where during an argument over a drug deal Dimas drew the first weapon after repeatedly being told to leave .....7

    B. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the State proved the absence of self-defense beyond a reasonable doubt. ....12

    C. Dimas waived any right to assert prosecutorial misconduct by failing to object during the prosecutor’s closing argument. ....13

    D. To the extent there was any prejudice caused by the prosecutor’s closing arguments, it was cured when the court gave curative instructions. ....18

    E. Dimas’ convictions for the lesser offenses in counts 2 and 5 should be vacated .....22

IV. CONCLUSION.....23

## TABLE OF AUTHORITIES

### Cases

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) .....	12
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984) .....	13
<i>State v. Anderson</i> , 144 Wn. App. 85, 180 P.3d 885 (2008).....	8,9,10
<i>State v. Arthur</i> , 42 Wn. App. 120, 708 P.2d 1230 (1985)), <i>review denied</i> , 113 Wn.2d 1014 (1989) .....	8
<i>State v. Bea</i> , 162 Wn. App. 570, 254 P.3d 948, <i>review. denied</i> , 173 Wn.2d 1003 (2011). .....	9
<i>State v. Birnel</i> , 89 Wn. App. 459, 949 P.2d 433 (1998), .....	11
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	18,20
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	13
<i>State v. Carver</i> , 113 Wn.2d 591, 781 P.2d 1308, 789 P.2d 306 (1989)....	13
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003) .....	18
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	18
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	22
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	12
<i>State v. Green</i> , 94 Wash. 2d 216, 616 P.2d 628 (1980).....	12
<i>State v. Hathaway</i> , 161 Wn. App. 634, 251 P.3d 253 (2011).....	8
<i>State v. Hawkins</i> , 89 Wash. 449, 154 P. 827 (1916).....	8
<i>State v. Hughes</i> , 106 Wash. 2d 176, 721 P.2d 902 (1986). .....	11
<i>State v. Jackson</i> , 62 Wn. App. 53, 813 P.2d 156 (1991) .....	12
<i>State v. LeFaber</i> , 128 Wn.2d 896, 913 P.2d 369 (1996) .....	13
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006) .....	17
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	22
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999), .....	8,10,13
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	14,17,19,21
<i>State v. Stith</i> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	18
<i>State v. Studd</i> , 137 Wn.2d 533, 549, 973 P.2d 1049 (1999).....	14
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254 (1980) .....	12

<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	18
<i>State v. Wasson</i> , 54 Wn. App. 156, 772 P.2d 1039 (1989).....	8,11
<i>State v. Wingate</i> , 155 Wn.2d 817, 122 P.3d 908 (2005).....	9
<i>State v. Womac</i> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	22
<i>United States v. Hiatt</i> , 581 F.2d 1199, 1204 (5th Cir. 1978)).....	21
<b>Jury Instructions</b>	
WPIC 16.04.....	9

## **I. ASSIGNMENTS OF ERROR**

### **A. Issues Presented by Assignments of Error**

1. Did substantial evidence support the court giving the first aggressor instruction where during an argument over a drug deal Dimas drew the first weapon after repeatedly being told to leave?
2. Viewing the evidence in the light most favorable to the State, could any rational trier of fact have found that the State proved the absence of self-defense beyond a reasonable doubt?
3. Did Dimas waive any right to assert prosecutorial misconduct by failing to object during the prosecutor's closing argument?
4. To the extent there was any prejudice caused by the prosecutor's closing arguments, was it cured when the court gave curative instructions?
5. Should Dimas's convictions for the lesser offenses in counts 2 and 5 be vacated?

## **II. STATEMENT OF THE CASE**

The appellant, Ricardo Dimas, was charged by amended information with two counts of second degree murder, first degree assault, first degree unlawful possession of a firearm, and second degree unlawful possession of a firearm. CP 49-51. A jury convicted him of the first three counts. CP 378. The jury also found that he was armed with a firearm at the time he committed first degree assault. CP 143. He was convicted of the firearm charges by a trial to the

court. CP 379. He was sentenced to a total term of 576 months. CP 381, 9/8/17 RP 59.<sup>1</sup>

His convictions were based on the following facts:

In 2016, Anna Hargett lived in Yakima with her boyfriend, Richard Shoemaker. RP 25. They rented an apartment on Roosevelt Avenue from Lisa Donaldson and Ronald Sutton. RP 98. Ms. Hargett let her niece, April Jackson, and Ms. Jackson's girlfriend, Leticia Diaz, stay with her two to three times a month. RP 63, 65. On January 22, 2016, Ms. Hargett asked them to spend the night. RP 70.

On that day, Ms. Diaz met up with a friend she had known for 15 years, Tabatha Bevins. RP 70-1, 122. Ms. Bevins, who also goes by "Giggles," was with two females, both named Christina. RP 74, 124, 218. Ms. Bevins's girlfriend, Christina Coronado, also known as "Happy," was looking for "black," which is heroin. RP 71, 76, 121, 126, 207, 219. Ms. Diaz took the three females to Ms. Hargett's residence, where they got high on methamphetamine. RP 72-3, 126. Ms. Diaz asked Ms. Hargett about getting heroin. RP 126. Ms. Hargett made some phone calls and left the residence for 15 minutes. RP 127. When she got back, she exchanged the heroin for \$100 cash from Ms. Coronado. RP 127. Ms. Coronado tried the heroin and said it was not a good quality. RP 128, 170, 208. She asked for her money back. RP 77, 91, 128, 170, 209. Ms. Hargett said

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<sup>1</sup> The sentencing was transcribed separately from the trial and will be referenced by the sentencing date, "9/8/17 RP."

she would try to get the money back. RP 170. She texted someone and relayed that the seller said “no” to the refund request. RP 129, 209, 225. Ms. Diaz offered to get the \$100 back to Ms. Bevins on the first of the month. RP 92, 129. As Ms. Bevins’s group left, she warned, “it’s not over yet, Little Bit. We’ll be back.” RP 78, 129, Ex. 2 9:08:27.

The three went to see Ms. Bevin’s best friend, Dimas, who was two alleys away. RP 129, 150-1. Ms. Bevins told Dimas about the transaction. RP 134. He told her, “it’s not right, that that’s his hood and it’s not going to go down like that.” RP 135. Dimas suggested they go back to Ms. Hargett’s and they agreed to go back. RP 130-1. Dimas drove his car and took a male called “Flex” with him.<sup>2</sup> RP 131-2. The three females drove separately. RP 131. Ms. Coronado was extremely upset and “dope sick.” RP 131.

About 27 minutes later they arrived back at Ms. Hargett’s residence. Ex. 2 9:36:54. Ms. Bevins knocked on the door. Ex. 2 9:36:54 at 5 seconds. They were screaming for Ms. Diaz. RP 228. Ms. Bevins waited and then knocked on the door again. Ex. 2 9:36:54 at 27 seconds. Ms. Diaz exited the residence to talk to Ms. Bevins and told those inside not to open the door. RP 80, 92, Ex. 2 9:36:46 at 0 seconds. There were two males outside, including Dimas who is also known as “Cheeto.” RP 81. Ms. Bevins told Ms. Diaz, “you did me wrong.” RP 81. Dimas also told Ms. Diaz, “you did my best friend dirty.” RP 81. Ms. Diaz tried to talk to Ms. Bevins. RP 83. Ms. Bevins wanted Ms.

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<sup>2</sup> “Flex” died prior to the trial.

Hargett to come outside and Ms. Diaz told her that she was not coming out. RP 133. Dimas also told Ms. Diaz to have Ms. Hargett come outside and talk. RP 152. The argument got loud and there was screaming. RP 210.

Ms. Jackson opened the door and pulled Ms. Diaz back inside. RP 83, 93, 231, Ex. 2 9:38:39 at 1 second. Dimas had a gun out at this point and down by his side. Ex. 2 9:38:39 at 0-1 second. Ms. Diaz stood behind Ms. Jackson and Ms. Hargett stood behind Ms. Jackson. RP 93, 95. At that point Ms. Diaz heard someone say, "Shoot the bitch." RP 84. Both Ms. Hargett and Ms. Jackson told Dimas to "get the fuck out of here." RP 85, 219. They told them several times to leave and that they did not want them to be there anymore. RP 211, 219. Dimas started moving closer towards them and Ms. Hargett told him to "get the fuck out of here." RP 86, Ex. 2 9:38:39 at 18 seconds. Ms. Jackson was scared and banged on the side of the landlord's house, trying to get help from him. RP 86, 220, Ex. 2 9:38:39 at 20 seconds. Dimas had his gun out next to his side. Ex. 2 9:38:39 at 20 seconds.

At that point, Ms. Hargett raised an ax and said "leave, please leave, to get out of there." RP 215, 240, 242, Ex. 2 9:38:39 at 22 seconds. Dimas stepped back. RP 56, Ex. 2 9:38:39 at 23 seconds. She then lowered the ax down to the ground. Ex. 2 9:38:39 at 23 seconds. While the ax was lowered, Dimas fired a shot at Ms. Hargett. RP 87, 240-1, Ex. 2 9:38:39 at 23-4 seconds. The bullet went through Ms. Hargett's upper chest and hit Ms. Diaz in the neck. RP 87.

Dimas and the rest of his group fled the scene. RP 215, Ex. 2 9:38:39 at 25-8 seconds.

Upon being struck, Ms. Diaz fell forward. RP 96. Ms. Hargett told her niece that Ms. Diaz was shot. RP 216. She handed Ms. Jackson a phone and towel and told her to call 911. RP 216. Ms. Jackson called 911 and officers and paramedics responded. RP 35, 38. When the officers got there, there were two females lying on the floor. RP 50. Ms. Diaz survived the gun shot but suffered a mild stroke. RP 88. Ms. Hargett died from the gunshot wound. RP 51, 109-111. Officers searched the crime scene and located a bullet casing on the ground. RP 38. From the landlord's surveillance video,<sup>3</sup> YPD officers were able to identify Dimas and started searching for him. RP 43-4, 117.

Dimas later told Ms. Bevins he "fucked up." RP 138. She asked him why he did it and he said, "it was because it was his hood." RP 141, 143. Ms. Bevins and Ms. Coronado fled to Moses Lake and then to Idaho where they were eventually caught. RP 138-9, 286-7.

Dimas was eventually found on February 10, 2016. RP 245. He was wearing a wig at the time of his arrest. RP 253. Officer Pepper of the Violent Crimes Task Force, asked him to stop and he ran. RP 248. When caught he said he would not go to prison. RP 249.

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<sup>3</sup> The surveillance system has a motion sensor and records in 28-second increments. After 28 seconds, it pauses and starts recording again. There is a small delay between clips. RP 100-2.

Dimas testified at trial. On direct examination, he testified that he told his best friend, Ms. Bevins, to go back over to Ms. Hargett's to talk to them. RP 344. He went also and took a 9 mm pistol that was clipped to his belt. RP 333-4. He testified that Ms. Bevins asked for her money back and Ms. Diaz said "no." RP 216-7. He testified, "At one point I looked over told Leticia, just figure it out. Make it right." RP 317. He said that was all he said to her. RP 317. He said they started getting louder. RP 317. He testified that Ms. Jackson came out and "...she started yelling and says, you know, who the fuck are you? I was like, it doesn't matter, nobody. I don't know, you know." RP 318. He testified that Ms. Jackson asked Ms. Bevins, "why the fuck did you bring all these people to my aunt's house?" RP 318. He said the arguing got louder and they started cussing, yelling and screaming at each other. RP 318-9. He testified that he heard someone say, "she has an ax." RP 320.

He testified that Ms. Jackson came towards him, so he backed up, and pulled his gun out, "assessing the situation." RP 320-1. At this point, he had only heard that there was an ax, but didn't see it. RP 320-2. He said that he kept his gun to his side. RP 322. He said next Ms. Jackson came fast towards him, moved to the side, and slapped the wall, saying "Ron, Ron" or "Run, Run." RP 322. He said then Ms. Haggert told him, "get out of here mother fucker." RP 322. He testified, "She comes at me and kind of try to – I don't know. I mean, it's kind of a blur after that, you know." RP 323. He said that he fell and then

shot one shot. RP 323. He testified that he, "...was able to get away in the alley..." RP 323.

He met up with Ms. Bevins who asked, "what did you do best friend?" RP 325. He replied, "I don't know. I fucked up. I don't know. I mean, what the fuck was that about?" RP 325. Ms. Bevins drove off and left him. RP 325. His attorney asked him if he fucked up and he replied, "Well, yeah, I mean, you mean now what do I think about it?" RP 325. His attorney answered, "yeah." RP 325. Dimas testified, "Yeah, I mean, I'm sitting here for 18 months you know, 18 months wondering why I took somebody's life, you know why I'd be forced or put into that position to take somebody's life." RP 325.

On cross-examination, Dimas testified that nobody asked him to leave prior to him having the gun out of his holster. RP 337. He said that when the person with the ax came out and raised the ax, he was told, "get the fuck out of here." RP 337. When asked about the gun on cross examination, he said that he got rid of it and did not know exactly where it was at. RP 346.

After the trial testimony, the jury was instructed on the law, including a self-defense instruction and a first aggressor instruction. CP 127, 132. The jury found Dimas guilty, CP 378, and Dimas appealed.

### **III. ARGUMENT**

- A. Substantial evidence supported the court giving the first aggressor instruction where during an argument over a drug deal Dimas drew the first weapon after repeatedly being told to leave.**

Jury instructions are proper if “substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law.” *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011). If a party proposes an instruction that properly states the law and is supported by the evidence, it is reversible error to refuse to give the proposed instruction. *Id.*

A first aggressor instruction may be issued in circumstances where “(1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant’s conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon.” *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). To meet this obligation, the State need only produce some evidence that Dimas was the aggressor to meet its burden of production. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).

The provoking act must be intentional and one that a “jury could reasonably assume would provoke a belligerent response by the victim.” *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (quoting *State v. Arthur*, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985)), *review denied*, 113 Wn.2d 1014 (1989)). The unlawful act constituting the provocation need not be the actual striking of a first blow. *State v. Hawkins*, 89 Wash. 449, 154 P. 827 (1916). A trespass may support the giving of an aggressor instruction as the owner of property may

lawfully use reasonable force to expel a malicious trespasser. *State v. Bea*, 162 Wn. App. 570, 578, 254 P.3d 948, *rev. denied*, 173 Wn.2d 1003 (2011).

Whether sufficient evidence justifies an initial aggressor instruction is a question of law reviewed de novo. *Id.* at 577. Courts review the evidence supporting a first aggressor instruction in the light most favorable to the State. *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

Here, the first aggressor instruction provided by the trial court mirrored WPIC 16.04. It stated:

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 (emphasis added), WPIC 16.04.

To begin with, the first aggressor instruction may be issued in circumstances where the jury can reasonably determine from the evidence that the defendant provoked the fight. *Anderson*, 144 Wn. App. at 89. Here, the facts were sufficient for a jury to reasonably determine that Dimas provoked the fight. He and four other individuals went to the victim's residence over a drug deal. RP 81, 134-5, Ex. 2. It was his idea to go there. RP 130-1. He went armed with a 9 mm handgun. RP 333-4, Ex. 2. Once there, he was told to leave repeatedly but he refused to do so. RP 85, 85, 211, 219. During the argument, he or

someone else in his group said, “shoot the bitch.” RP 84. He was the first to pull out a weapon, his 9 mm pistol. Ex 2 9:38:39 at 0-1 second, RP 320-1, 334. Because the facts were sufficient for a jury to reasonably determine that he provoked the fight, the trial court did not error in giving the first aggressor instruction.

Second, an aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant’s conduct precipitated a fight. *Riley*, 137 Wn.2d at 910. At the least, this standard has been met. Dimas argued that he was not told to leave prior to him having his gun out. RP 337. The State presented evidence that he was told repeatedly to leave, refused, and then drew a weapon. RP 85-6, 211, 219, 320-1, Ex 2 9:38:39 at 0-1 second. As such, an aggressor instruction was appropriate, and the trial court did not error.

Third, a first aggressor instruction may be issued in circumstances where the evidence shows that the defendant made the first move by drawing a weapon.” *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). Here, before any ax was displayed, Dimas made the first move by drawing his firearm. This is clear from the surveillance video. Ex. 2 9:38:39 at 0-1 seconds. Dimas himself testified that he “kind of pulled the gun out assessing the situation.” RP 321. He stated, “Well, they said they had an ax. You know I kind of just pulled my gun out and put it to the side.” RP 322. At this point, he made the first move by drawing a weapon. As such, the trial court did not error in giving the instruction.

Each party “is entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory.” *State v. Hughes*, 106 Wash. 2d 176, 191, 721 P.2d 902, 910 (1986). In light of the self-defense instruction given, the absence of an aggressor instruction would have allowed the defendant to argue self-defense and the State would have no instruction supporting its theory. As explained above, there was credible evidence to support the State’s theory that Dimas provoked the need to act in self-defense and that Dimas made the first move by drawing a weapon. At the least, conflicting evidence existed as to whether Dimas’ conduct precipitated or provoked the fight.

Dimas’ argument relies on two cases, *State v. Birnel*, 89 Wn. App. 459, 949 P.2d 433 (1998), and *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989), that are factually distinguishable from his case. In *Birnel*, the defendant found drugs in his ex-wife’s purse and confronted her about it without displaying a weapon. The State argued that he should have known she would be upset about searching through her purse. Here, the defendant was not only engaged in a confrontation, but he refused to leave after being told to multiple times by more than one person. He was also the first person to draw a weapon, his 9 mm pistol, during the confrontation.

In *Wasson*, the defendant never initiated any act until the final assault. That is distinguishable from the case here where Dimas refused to leave during the confrontation and drew a weapon. Dimas argues that he was not the first one to draw a weapon, but this is contrary to the State’s testimony and the video,

evidence that must be viewed in the light most favorable to the State. In sum, the aggressor instruction was correct in form and supported by the evidence.

Accordingly, the trial court did not err as a matter of law.

**B. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the State proved the absence of self-defense beyond a reasonable doubt.**

In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. *Id.* Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. *State v. Jackson*, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991). This court defers to the fact finder on issues of witness credibility and the persuasiveness of the evidence. *State v. Camarillo*, 115

Wn.2d 60, 794 P.2d 850 (1990); *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

When a defendant raises the issue of self-defense, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-19, 683 P.2d 1069 (1984). The focus is whether the State presented sufficient evidence to prove beyond a reasonable doubt that Dimas did not reasonably believe he was in danger of imminent harm. *See State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). Further, a jury is free to reject a claim of self-defense if they find the defendant to be the initial aggressor. *Riley*, 137 Wn.2d at 909.

When viewed in the light most favorable to the State, the same evidence that supports the giving of the aggressor instruction supports a finding by the jury that Dimas was the first aggressor and not entitled to assert self-defense. Dimas' argument rests solely on his version of the events. However, the State's version supports a finding that Dimas was the initial aggressor. Although the State's version conflicted with Dimas' version of the events, the conflict was for the jury to resolve. Here, the jury chose not to believe Dimas' version of the events, and the State's evidence was sufficient to overcome Dimas' claim of self-defense.

**C. Dimas waived any right to assert prosecutorial misconduct by failing to object during the prosecutor's closing argument.**

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill

intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Here, Dimas has not met this high burden.

#### Jury Instruction Number 16

For the first time on appeal, Dimas argues that the prosecutor misstated the law with respect to the jury instruction number 16. In Washington, there is no duty to retreat when a person is assaulted *in a place where he has a right to be*. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999) (emphasis added). Here, based on the standard WPIC, the court gave the following “no duty to retreat” instruction:

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 (emphasis added).

In the case at hand, the prosecutor made arguments about the “duty to retreat” but did not misstate the law. When discussing the surveillance video, the prosecutor asked the jury, “At what point should Mr. Dimas have left?” This was not a statement of the law. It was argument. The context was as follows:

Was Mr. Dimas acting in self-defense? 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?

You heard him testify. He thought in his head maybe I should just leave, yet he didn't. He had the opportunity and he stated there instead.

RP 395. There was no objection to this argument. *Id.* Nonetheless, nothing in this part of the prosecutor's closing argument misstated the law. The prosecutor merely argued that Dimas was not in a place where he had a right to be. In arguing this, the prosecutor could rely on the fact that Dimas was told to leave repeatedly and refused to do so even though he had the opportunity to do so. RP 85-6, 211, 219. The prosecutor was arguing jury instruction 16 and made an argument based on the evidence. He was not making any statements about the law. In sum, not only has Dimas failed to show misconduct, he has failed to show that the remark was so "flagrant and ill intentioned" that it caused enduring and resulting prejudice that a curative instruction could not have remedied.

#### Jury Instruction Number 5

The prosecutor also discussed jury instruction number 5 during closing arguments. RP 402-3. This was the instruction regarding the defense that the homicide was lawful. RP 402. In discussing the instruction, the prosecutor went through the entire jury instruction, including the third prong, that "the slayer employed such force and means as a reasonably prudent person would use under the same or similar circumstances 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." RP 403-3, CP 119. The prosecutor then stated, "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. There was no objection by the defense to this argument.

For the first time on appeal, Dimas argues that the prosecutor committed misconduct. Again, this was not a misstatement of the law or the evidence. It was argument. It was part of the State's theory that Dimas was the first aggressor and therefore, not entitled to assert self-defense. And because there was no objection at trial, Dimas must also show that the argument was so "flagrant and ill intentioned" that it caused enduring and resulting prejudice that a curative instruction could not have remedied. In this case, he has not met his burden.

#### Jury Instruction Number 18

Dimas also argues for the first time that the prosecutor misstated the facts when discussing jury instruction 18, the first aggressor instruction. RP 400-401. The State argued that Dimas provoked the attack. RP 400. The prosecutor pointed out that in response to people telling Dimas to leave, he brought out a firearm. RP 401. Specifically, the prosecutor stated, "In response, you can see he brings out his firearm. He makes no effort to leave." *Id.* There was no objection to this statement. *Id.* This was not a misstatement of the evidence. There was ample testimony that Dimas was told to leave. RP 85-6, 211, 219. The video evidence clearly showed him bringing out a firearm and he admitting to doing so. Ex 2 9:38:39 at 0-1 seconds, RP 320-1.

After stating the facts, the prosecutor posed a question to the jury. His question was, “Would it be reasonable to believe that that would provoke a violent response from a homeowner that’s telling you to leave? The [S]tate’s contention is that it is.” RP 401. There was no objection made by the defense at this point. *Id.* The prosecutor’s question was merely argument, not a statement as to what the evidence is, so it is not a misstatement of any fact. The prosecutor was entitled to argue that Dimas provoked a belligerent response because the evidence supported it. The homeowner displayed an ax after Dimas refuse to leave and displayed a firearm. RP 85-6, 211, 219, 320-1, Ex 2. This was supported by testimony and the surveillance video. *Id.* As such, the prosecutor’s argument that Dimas provoked a belligerent response from Ms. Hargett was a reasonable inference from the evidence and in no way misstated the facts.

In sum, because Dimas did not object to these statements during the trial, he has waived any issues on appeal. Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In fact, the absence of an objection by defense counsel “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. McKenzie*, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted). Here, Dimas has not met his high burden.

**D. To the extent there was any prejudice caused by the prosecutor’s closing arguments, it was cured when the court gave curative instructions.**

In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Dimas must show that the prosecutor’s conduct was improper and prejudiced his right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996)). However, prosecutorial misconduct can be cured. For example, an objection and appropriate instruction can cure prejudice caused by a prosecutor’s cross-examination. *State v. Stith*, 71 Wn. App. 14, 20, 856 P.2d 415 (1993). Even flagrant misconduct can be cured. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) (citing *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (“prosecutor’s conduct was certainly flagrant,” but given the context of the total argument, issues, evidence, and jury instructions, any error was cured)).

In this case, the prosecutor mistakenly argued that Dimas had to prove he was using the amount of force that was necessary to protect himself. RP 397. The defense objected. RP 397. But the jury was then instructed by the court. RP 397-8. After the objection, the court stated, “You need to rephrase that, Mr. White. He doesn’t have to prove anything.” RP 397. The prosecutor

apologized. RP 397. Dimas's trial attorney stated, "I would ask the jury, your Honor, not to consider that." RP 397. The court then instructed 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 398. The prosecutor told the court he would work off the jury instructions so that he does not misguide anybody on the jury. RP 398. The prosecutor then read jury instructions 13 and 14 to the jury, the self-defense instruction and the instruction defining "necessary." RP 398.

Furthermore, the jury was instructed in jury instruction 5 that "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. And in jury instruction 2, the jury was told that "The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt." CP 116. Courts generally presume jurors follow instructions to disregard improper evidence. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). The defense bears the burden of showing that the comment was so prejudicial that the curative instruction was ineffective. Here, Dimas has not met that burden. To the extent that there was any prejudice caused by the prosecutor's misstatement, it was remedied when the court instructed the jury who has the burden of proof, the prosecutor reading the

actual jury instructions to the jury, and the court's instructions to the jury establishing that the State had the burden of proof.

At another point in the State's closing argument, the defense also objected when the prosecutor stated:

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 398-9. At this point, the prosecutor was arguing that the force used by Dimas was not necessary. He was not making any statements about the law. The defense objected, arguing that there is no duty to retreat. RP 399. The court instructed the jury:

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.

CP 399. Although the court gave a curative instruction, there was really no need for the court to do so because the prosecutor did not misstate the evidence or the law.

A prosecutor's closing argument is reviewed in the context of the total argument, the issues in the case, the evidence, and the jury instructions.

*Boehning*, 127 Wn. App. at 519. "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *Id.* In addition, "[T]he prosecutor, as an advocate, is

entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87 (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir. 1978)). It is not misconduct for a prosecutor to argue merely that the evidence does not support the defense theory. *Id.*

Whether Dimas was “in a place where that person has a right to be” was an issue at trial and something both parties could address in closing arguments. As explained in the jury instructions, “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.” CP 130 (emphasis added). The prosecutor was permitted to argue that Dimas was not in a place where he was entitled to be and the defense was permitted to argue that he was in a place where he was entitled to be. The purpose of closing arguments is to argue how the facts do or do not support the jury instructions. Here, arguing that Dimas was not in a place he had a right to be was a permissible argument based on the evidence. As indicated by Dimas in his opening brief, the remarks were part of the State’s theory that Mr. Dimas was a malicious trespasser, justifying the victim’s use of the ax and negating Dima’s self-defense claim. Appellant’s Brief at 32. In sum, the prosecutor’s statement that Dimas could have left was not misconduct. Even assuming for sake of argument that it was misconduct, the court gave a curative instruction to the jury which cured any prejudice that might have been caused.

**E. Dimas’ convictions for the lesser offenses in counts 2 and 5 should be vacated.**

The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) (citing *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)). However, as explained in *State v. Womac*,

...“where the jury returns a verdict of guilty on each alternative charge, the court 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.” The Court of Appeals reasoned since the verdict for first degree assault was not reduced to judgment, it “does not subject the appellants to any future jeopardy.” The court also mentioned that if the jury’s verdict on assault *was in fact reduced to judgment*, “the trial court should enter an order vacating the assault judgment.”

160 Wn.2d 643, 659-60, 160 P.3d 40 (2007) (citations omitted).

In this case, Dimas was convicted on all counts. Count 1 and 2 were both for second degree murder. CP 49, 50, 138, 140. Counts 4 and 5 were both for first degree unlawful possession of a firearm. CP 50, 51, 379. At sentencing, the court held that counts 1 and 2 merged into count 1 and that counts 4 and 5 merged into count 4. 9/18/17 RP 58. The judgment and sentence initially had language vacating counts 2 and 5 but the court struck that language. CP 378. In addition, next to “Count 1 Second Degree Murder” the court added “and 2.” CP 378. Next to “Count 4 First Degree Unlawful Possession of a Firearm,” the court

added “and 5” but then struck through that language. CP 378. Based on *Womac*, the State agrees that counts 2 and 5 should be vacated.

#### **IV. CONCLUSION**

In sum, when viewing the evidence in the light most favorable to the State, there was substantial evidence to support the court giving an aggressor instruction. In addition, any rational trier of fact could have found that the State proved the absence of self-defense beyond a reasonable doubt. For most of Dima’s misconduct claims, he failed to object at trial and therefore, waived any objection. For the few objections that were made at trial, to the extent that there was any prejudice, it was cured by a curative instruction to the jury. As such, Dimas’ convictions should be affirmed and counts 2 and 5 should be vacated.

Respectfully submitted this 10th day of September, 2018,

s/Tamara A. Hanlon  
TAMARA A. HANLON WSBA 28345  
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on September 10, 2018, via the portal, I emailed a copy of BRIEF OF RESPONDENT to Marie J. Trombley.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of September, 2018 at Yakima, Washington.

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