

COA NO. 39420-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

AQUARIUS WALKER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right against self-incrimination.
2. The trial court erred in giving a first aggressor instruction to the jury. CP 171 (Instruction 25).
3. The trial court erred in giving a jury instruction that misstated the law on defense of another. CP 192 (Instruction 46).
4. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.
5. Appellant received ineffective assistance of counsel.
6. Cumulative error violated appellant's constitutional due process right to a fair trial.
7. Appellant's convictions for first degree murder and second degree murder violate double jeopardy.

Issues Pertaining to Assignments of Error

1. Appellant was entitled to defense of another instructions without his testimony. Where the court wrongly conditioned appellant's right to present his defense on the waiver of his right not to testify, did the court commit reversible error in violating appellant constitutional right against self-incrimination?

2. Aggressor instructions are disfavored in Washington and should only be used where there is evidence the defendant's intentional act initiated the violence. The evidence showed appellant did no intentional act reasonably likely to provoke someone to attack his friend. Was it reversible error to give an aggressor instruction?

3. Jury instructions inconsistently stated the requisite level of harm appellant needed to reasonably apprehend before use of force to defend his friend could be considered lawful in relation to the assault counts. Is reversal required because the instructions did not make the legal standard manifestly apparent and eased the State's burden of disproving appellant's defense of another claim?

4. Is reversal required based on prosecutorial misconduct where the prosecutor (1) misstated the law on defense of another; (2) improperly commented on appellant's constitutional right to present a complete defense ; and (3) made improper arguments that diminished the beyond a reasonable doubt standard, undermined the presumption of innocence, shifted the burden of proof, and misled the jury as to its proper role in determining whether the State had proven guilt beyond a reasonable doubt?

5. Appellant was charged and convicted of both first degree murder and second degree felony murder for the death of a single victim. Do appellant's convictions for both crimes violate double jeopardy?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Aquarius Walker with the following offenses: (1) first degree murder by deliberate indifference while armed with a firearm, causing the death of Tavarrus Moss (count I); (2) second degree felony murder while armed with a firearm, causing the death of Tavarrus Moss (count II); (3) first degree assault against Henri Moss while armed with a firearm (count III); (4) first degree assault against Rooney Key while armed with a firearm (count IV); and (5) second degree unlawful possession of a firearm. CP 126-28. A jury returned guilty verdicts on all counts and returned special firearm verdicts. CP 206-217. The court imposed a total sentence of 652 months. CP 237. This appeal follows. CP 244.

2. Trial

Walker and Tavarrus (Scoot) Moss were good friends, and had been since childhood. 1RP¹ 1104, 3409-14, 3422-23. One night in July 2006,

¹ The verbatim report of proceedings are referenced as follows: **1RP** (24 consecutively paginated volumes) - 3/24/09 (vol. I); 4/1/0-9, 4/6/09 (vol. II.); 4/7/09 (vol. III); 4/13/09 (vol. IV); 4/14/09 (vol. V); 4/15/09 (vol. VI); 4/16/09 (vol. VII); 4/20/09 (vol. VIII); 4/21/09 (vol. IX); 4/22/09 (vol. X); 4/23/09 (vol. XI); 4/30/09 (vol. XII); 5/4/09 (vol. XIII); 5/5/09 (vol. XIV); 5/6/09 (vol. XV); 5/7/09 (vol. XVI); 5/8/09 (vol. XVII); 5/11/09 (vol. XVIII); 5/12/09 (vol. XIX); 5/13/09 (vol. XX); 5/14/09 (vol. XXI); 5/26/09 (vol. XXII); 5/27/09 (vol. XXIII); 5/28/09 (vol. XXIV); **2RP** - 6/1/09 (vol. XXV); **3RP** - 6/2/09 (vol. XXVI); **4RP** - 6/12/09 (vol. XXVII); **5RP** (four consecutively paginated volumes) - 3/17/09, 3/18/09,

Walker and Scoot, along with Scoot's brother Henri (Mario) Moss and Scoot's girlfriend Jennelle Dart, went to the Brickyard bar. 1RP 539, 1043-48. Eyewitness accounts of what happened that night agreed in some respects and differed in others.

Dart's Testimony and Statement to Police

According to Dart, a "Samoan male" "shoulder checked" or bumped Mario² while inside the bar. 1RP 346. The same group of Samoan males had jumped Mario the year before and beaten him up. 1RP 346. After being kicked out of the bar, the Samoan group congregated outside near the door. 1RP 346. As people exited, the group tried to "pick fights with anybody that they could." 1RP 347, 397.

Dart and her companions left the bar together. 1RP 1054. A group of three to five Samoan men yelled at them in the parking lot. 1RP 1053, 1055-56. The men were all "big and tall" and shouted threats. 1RP 1056-57. One or more of the Samoan males began taunting Mario, saying something to the effect of "You're the bitch ass punk that we beat down last year." 1RP 347, 1114-15. Two or three Samoans started fighting with Mario. 1RP 347, 397, 1057-60, 1115-18, 1122. According to Dart, "We

3/19/09, 3/23/09, 3/26/09 (vol I.); 3/25/09 (vol. II); 3/26/09 (vol. III); 4/6/09 (vol. IV); **GRP** - 3/17/09.

² "Mario" was Henri Moss's nickname. 1RP 1044. "Scoot" was Tavarrus Moss's nickname. 1RP 541. This brief generally refers to Tavarrus Moss as "Scoot" and Henri Moss as "Mario."

didn't bother them. We didn't say nothing to them. We were just in the bar like everybody else, and they were waiting on us." 1RP 1089-90. Mario told his companions to stay put. 1RP 1059. Walker, Scoot and Dart backed away as the fight came closer. 1RP 1061, 1128.

One of the Samoan men that had been yelling at Mario then ran up, grabbed Scoot by his shirt from behind, dragged Scoot away and started slamming and throwing him into a parked car many times. 1RP 1061-62, 1092, 1133-36, 1141. Dart told police Scoot jumped into the fight and one of the Samoans grabbed Scoot and began throwing him violently up against a parked car. 1RP 347. The Samoan attacking Scoot was "really, really big." 1RP 1062-63. Scoot put up no resistance. 1RP 1141. Walker could see Scoot being attacked. 1RP 1136-38. Scoot was trying to fight back "but he couldn't" because of the size difference. 1RP 1065.

Dart told police Walker ran to his vehicle parked a short distance away, grabbed a semiautomatic handgun, and activated the laser sight. 1RP 347-48, 398. Walker shot a gun three times into the air. 1RP 1079. The fighting continued. 1RP 1147-48.

Mario ran to help Scoot after Walker fired into the air without effect. 1RP 1080, 1085. The Samoan threw Mario back. 1RP 1084, 1141-42. Two other Samoans then jumped on Mario. 1RP 1087. It was a chaotic scene. 1RP 1143.

After Walker fired into the air and no one stopped fighting, he "looked around and just started aiming and shooting." 1RP 1080. There were three people in the direction that Walker was shooting: Scoot, the Samoan, and bouncer Kabili Silver, who ran in to help Scoot. 1RP 1079, 1084-86. Mario and the Samoan he was fighting were a couple feet away. 1RP 1079, 1086-87. Dart saw Scoot get shot after the second shot into the crowd was fired. 1RP 1084-85, 1088. One of the Samoans was wounded in the arm. 1RP 348. Walker ran out of the parking lot. 1RP 348, 1082.

Mario's Testimony

Walker left the bar before Mario. 1RP 551. Mario heard one or two gunshots when leaving the bar. 1RP 617-18. He heard people in the bar saying "They're outside; They're outside, shooting; Let's go." 1RP 617.

When Mario and Scoot left the bar, a group of five or six Samoans yelled and came toward them in an aggressive manner, saying "You guys are the bitch-ass niggers that was with him and everything and calling us names and stuff." 1RP 560-61, 622. The Samoans were all at least six feet tall. 1RP 556-57, 621-22. They were circling and trying to box the Moss brothers in. 1RP 653. Mario engaged in a fistfight or shoving match with two people. 1RP 554, 559.

Dart yelled to Mario "they're jumping on your brother over there." 1RP 562, 629. Scoot was being punched by four or five Samoans who

were six feet tall. 1RP 556, 564, 630-31. Scoot was not fighting back. 1RP 564-65, 630. Mario pulled three guys off Scoot. 1RP 566-67. The Samoans came back along with another. 1RP 569. The Samoans were punching Scoot while he was on the ground. 1RP 571, 635. No one came to help Scoot and Mario. 1RP 633. People were just standing around watching. 1RP 652-53. Mario did not know what Walker or anyone else was doing. 1RP 569, 619, 624-25.

Mario noticed a hole in Scoot's head after he pulled the last Samoan off and went to pick his brother up off the ground. 1RP 572, 634. After police arrived, Mario realized he had been shot in the thigh. 1RP 578, 581, 586.

Rooney Key's Testimony

Rooney Key, also known as "Junior," was 6 foot three inches tall and weighed 250 pounds. 1RP 1178, 3008, 3036. He saw his friend Jacob heatedly arguing with a black woman who looked like a man outside the bar. 1RP 3009-11, 3036-37. Key told Jacob to leave the woman alone. 1RP 3010. Jacob resisted leaving the area and the argument continued between Jacob and some African American men. 1RP 3010-13, 3037. A fight broke out between Key, Jacob, another Samoan and the African American men. 1RP 3013-14. Key did not know what started the scuffle. 1RP 3014. Punches were thrown for five to 10 minutes. 1RP 3013-15.

There may have been kicking. 1RP 3056. A lot of people were fighting. 1RP 3038. People were yelling for them to stop. 1RP 3058.

Key picked up an African American with whom he was fighting and hit him against a car. 1RP 3019. Key beat him for a short time. 1RP 3059. People were trying to pull him off. 1RP 3022-23, 3042.

Key heard gunshots while he fought the African American and realized he had been shot in the arm. 1RP 3020, 3023-25, 3043-44. Key stopped fighting. 1RP 3017. Key said he probably would have continued fighting if he had not been shot. 1RP 3059.

Kabili Silver's Testimony

Kabili Silver, also known as "Spencer," was a bouncer at the Brickyard that night. 1RP 905, 2571. A group of Samoans was there. 1RP 980. Upon exiting the bar after patrons were told to leave, Silver saw his niece, Kimberly Miller, having an argument with a man named Jacob. 1RP 909-912, 985. Silver did not know what had happened in the parking lot before he arrived. 1RP 989-90.

Silver heard Scoot yelling at the Samoans and Silver tried to calm him down. 1RP 914-17, 993. Silver then noticed Walker standing near a building. 1RP 917-18, 993. When Silver approached and told him to leave because police were on their way, Walker pulled a gun out and fired two or three shots in the air. 1RP 920. No one was coming toward

Walker in a threatening manner when he fired the shots into the air. 1RP 920-21. Silver could not recall on the stand whether a fight between Scoot and Key started seconds before or after shots were fired in the air. 1RP 975. Silver told police that no shooting occurred until *after* the fight broke out. 1RP 1008-09.

Silver noticed Key and Scoot together after shots were fired into the air. 1RP 921-22. Key was 6 feet, four inches tall and Scoot was a "tiny" guy. 1RP 923, 995-96. Key told Scoot to "stop tripping." 1RP 922. Silver went over to break them up. 1RP 922-23. Scoot "jumped up" and punched Junior in the chin. 1RP 924, 996. Key shook it off. 1RP 1027. Scoot also kicked Junior in the crotch. 1RP 1033. Scoot continued to run his mouth. 1RP 1028. Pushing and shoving ensued. 1RP 924. Key ended up attacking Scoot, shaking him around and "slamming the little guy up against a car door" more than once. 1RP 997. Silver was concerned that Scoot could be "seriously hurt." 1RP 997. Scoot was on the ground, trying to fight back. 1RP 1016.

Silver did not see Mario fight the Samoans before Silver tried to separate Junior from Scoot. 1RP 994. "Scoot was pretty much by himself." 1RP 995. At some point Mario became involved trying to separate Key from Scoot. 1RP 926-28, 989. Silver took Mario down to the ground. 1RP 928, 998. Silver then "twisted" and struggled with Key,

at which point four shots rang out. 1RP 928. During the shots, Key was still "thumping" on Scoot. 1RP 998.

After the last shot, Silver looked up and saw Walker where he had seen him before, with a gun in his hand. 1RP 978-79. Walker jogged away. 1RP 932-33, 937-38. There were seven to twelve people in the parking lot at the time shots were fired. 1RP 938-39.

Kimberly Miller's Testimony

A group of Samoans inside the bar was being very rude and bumping into anybody that was around them: "It seemed like they had a problem with everybody." 1RP 2582. Miller and her girlfriend had a confrontation with one of the Samoans. 1RP 2582-83. Miller then heard gunshots. 1RP 2584. More than five Samoans chased someone she later identified as "Scoot" after being told the person's name. 1RP 2584-88. Miller saw "Scoot" with a laser sighted gun held straight down to the side. 1RP 2584-85, 2608, 2617-19. Miller then heard more gunshots go off from someone else. 1RP 2595-96. According to Miller, it was possible more than one person was shooting. 1RP 2608. At some point she saw a Samoan with a firearm coming out of the bar. 1RP 2604-05.

Channa Carsey's Testimony

Channa Carsey was with the group of Samoans that night. 1RP 1157-59. Her group got in a fight at a bar and they left. 1RP 1159, 1903-

04. They wound up at the Brickyard bar. 1RP 1160-61. Key was in this group. 1RP 1161. A man named "Wall" was also in this group, so named because he was about as big as a wall. 1RP 1161. Everyone one of the men in the group was big except for a man named Jacob. 1RP 1161.

After being asked to leave by security because something was "going down," Carsey walked out of the bar and saw Jacob arguing with Scoot and Mario. 1RP 1165-66, 1169-73, 1229. Jacob had been arguing with a woman. 1RP 1172. Scoot and Mario were sticking up for her. 1RP 1172. Carsey interceded. 1RP 1260, 1868. The situation resolved itself without fisticuffs. 1RP 1174.

As Carsey walked toward her car in the parking lot, she saw Walker fire two shots straight into the air. 1RP 1174-76, 1212-13. Key ran towards Walker and said "what are you going to do with that? Why -- you know, kind of antagonizing him, I guess, you can say, about having a gun in the first place and kind of threw his hands up and said, What?" 1RP 1177, 1179. Key argued with Walker. 1RP 1203, 1895. Scoot and Mario ran up. 1RP 1179-80, 1205.

Carsey hid behind a car. 1RP 1180. She did not look to see what was going on as she hid. 1RP 1193, 1206. She heard scuffling. 1RP 1209. She heard three or four more shots. 1RP 1180. She then saw Key holding his arm while running and Scoot lying on the ground. 1RP 1180, 1196.

Francis Sesepasar's Testimony

Francis Sesepasar worked security at adjoining bar that night. 1RP 2450-52. He witnessed an argument involving two Samoans, Scoot and an African American. 1RP 2455-57. Sesepasar heard a gunshot after the argument, but did not know where it came from or who fired it. 1RP 2457-58, 2462. As the argument continued, Walker fired two shots into the air. 1RP 2462-64.

Scoot ran from the argument. 1RP 2464-65. The largest Samoan in the argument caught up with Scoot, picked him up by his collar and jeans, and threw him against a car. 1RP 2466-67, 2509. Scoot got up stumbling and tried to run away. 1RP 2502, 2509-10. Scoot went to the ground. 1RP 2468-70. 2470. The largest Samoan straddled Scoot and kept punching him in the head. 1RP 2468-71, 2476. At the same time, another Samoan was kicking Scoot in the side. 1RP 2469-71.

Silver pulled off the Samoan who was punching Scoot in the head. 1RP 2470. An African American pulled away the Samoan kicking Scoot and tried to fight him. 1RP 2471-72. Sesepasar ran to check on Scoot. 1RP 2498-99, 2504. Sesepasar then heard more shots. 1RP 2472-74, 2504. Six people were in the area when the shots were fired. 1RP 2505.

Tim Nole's Testimony

Nole worked as a bouncer at an adjoining bar that night. 1RP 2812-13. Some Samoans were kicked out of the bar after being involved in a loud disagreement. 1RP 2818-19. Nole walked out to the parking lot after hearing about a disturbance there. 1RP 2820. He saw the group of Samoans in the parking lot amongst a group of 20 others, most of whom were of Samoan descent. 1RP 2850-52.

Scot was involved in an argument, angrily and aggressively yelling into a crowd of people. 1RP 2821, 2840, 2861, 2874. Silver was holding him back. 1RP 2861. Nole heard three gunshots from one gun as he was walking towards Scot. 1RP 2821, 2832-33. Chaos erupted. 1RP 2863. As Nole was returning to the bar to call police, he heard two or three more gunshots. 1RP 2833, 2865. Nole saw a short Samoan run from the group with a gun in his hand and went around the corner of a building. 1RP 2852-55, 2864-66. Nole thought the Samoan fired the second round of shots. 1RP 2867-68. Nole testified the first set and second set of gunshots came from different areas, were definitely from different guns and "sounded entirely different." 1RP 2833-35, 2870, 2880-82.

The scene was chaotic. 1RP 2835. Nole went inside the bar and called 911. 1RP 2835. Upon returning to the parking lot, Nole heard

three or four other gunshots from one of the two guns he had heard before. 1RP 2871-72, 2876. Scoot lay on the ground bleeding. 1RP 2837-39.

Police Interrogation

Officers located Walker hiding in a nearby parked vehicle after responding to the scene. 1RP 827-29, 839-41, 852, 1502. After being pulled from the car, Walker told officers he heard gunshots and took off running. 1RP 842. Walker said he never had a gun. 1RP 842.

Sergeant Paul Estes and Officer David Crommes interrogated Walker following his arrest beginning in the early morning hours of July 29. 1RP 1954, 1976, 1983-84, 2072. Walker told police there was an argument inside the bar and "kind of, alluded to some involvement with it." 1RP 2076-77. The fight eventually moved outside. 1RP 2076. Walker said there was an altercation between some Samoans and Mario and Scoot over a female. 1RP 1960. Walker heard some shots, was chased by a large Samoan, and ran and hid inside a truck until the police found him. 1RP 1960, 2078, 2134, 2160-61, 2185, 2188. He denied firing a gun. 1RP 1962. When informed Scoot was on life support and likely to die, Walker acted in disbelief and started crying. 1RP 1963, 2082. Walker said he was very close to Scoot and would never hurt him. 1RP 2084.

During subsequent interrogation later that morning, Walker said he grabbed a gun from his vehicle as the fight from inside the bar was moving outside. 1RP 2088-89. He fired shots into the air after several Samoans appeared to be about to fight with a female. 1RP 2089. One of the Samoans walked towards him. 1RP 2089. As Walker was backing up, he saw the largest Samoan begin to assault Scoot. 1RP 2089. He fired warning shots into the air. 1RP 1966, 2089-90. That had no effect. 1RP 1966. Walker then aimed and fired some shots at the Samoan fighting Scoot, intending to hit the Samoan in the legs. 1RP 1966, 1969, 2090. Walker said he fired the gun to protect his friends. 1RP 1967. Walker said he was trying to protect Scoot. 1RP 2189. He accidentally shot Scoot. 1RP 2086.

Walker's Testimony

At some point, there was some kind of commotion inside the bar, but Walker did not know who was involved. 1RP 345-59. A group of Samoans left. 1RP 3460. Walker decided to leave and told his companions he would be outside. 1RP 3458, 3460-61. Walker went into the parking lot and saw the Samoan group, which included six or seven men. 1RP 3462-63. Walker saw these men circle two women and argued with them. 1RP 3463-65. Walker was standing by his truck at the time. 1RP 3465. There was yelling and clothes were being pulled. 1RP 3465. The Samoans were not allowing the women to leave and it looked like the argument was about to turn

physical. 1RP 3465, 3473. Walker grabbed his gun from inside his car and put in his pocket because "there was too many Samoans for me" and he was concerned about the females' safety. 1RP 3473-75. Walker went over there and said something to the effect that they should not be arguing with females. 1RP 3466, 3476.

At that point, the Samoans shifted their attention to Walker and came toward him. 1RP 3466, 3476-77. The Samoans said "We'll knock anybody out of here." 1RP 3476, 3485. Walker backed up as they approached "like they was going to get their hands on me." 1RP 3481-84. Walker felt threatened. 1RP 3485-86. The Samoans pursued Walker through the parking lot. 1RP 3486-87. Knowing he could not fight all of them, Walker pulled his gun from his pocket and pointed it at the ground as a warning. 1RP 3486, 3492-95. The Samoans kept coming towards him. 1RP 3495. Walker cocked the gun as a second warning. 1RP 3495. The Samoans kept coming. 1RP 3496-97.

Walker fired two or three shots into the air, trying to let them know he could not fight them because they were too big. 1RP 3497-98, 3502. Walker did not see his friends outside and believed he was alone. 1RP 3500. The "main" Samoan was still "coming head-on" accompanied by others. 1RP 3500-01. The Samoans were in "attack mode," like "a shark frenzy."

1RP 3505. As Walker moved backwards, he saw Scoot in the parking lot.

1RP 3503-04.

The Samoans turned around. 1RP 3507. Scoot was by himself. 1RP 3508. A Samoan punched Scoot in the face. 1RP 3509. Scoot fell to the ground and did not move. 1RP 3509. The Samoan grabbed him off the ground by his clothes and started slamming him into the car. 1RP 3510-11. Walker fired in the Samoan's direction. 1RP 3511. The Samoan kept slamming Scoot. 1RP 3511.

Walker aimed at a non-vital body part of the Samoan and fired. 1RP 3512. There was no one else in the immediate vicinity. 1RP 3538-39. He would not have shot into a crowd of people. 1RP 3539. The Samoan kept beating Scoot. 1RP 3512. The Samoan was trying to do as much damage as he could to Scoot, who was the smallest person Walker knew. 1RP 3516. Walker fired again at the Samoan. 1RP 3512.

At that point Walker heard another gunshot. 1RP 2512-13. Walker saw Mario for the first time running in to help Scoot. 1RP 3513-14. Walker stopped shooting when he saw Mario. 1RP 3513. Two or three Samoans started running towards Walker again. 1RP 3513, 3520. Walker fired over them into a building. 1RP 3514. He then ran away and ducked inside a truck because the Samoans were chasing him. 1RP 3520-23.

At that point, Walker did not know he had shot anyone, including Scoot. 1RP 3523-24. He learned Scoot had been shot for the first time while being interrogated by police. 1RP 3554.

Post-Shooting Information

A gun with attached laser sight was later located amongst some tires at a nearby business. 1RP 867-68, 870-72. A firearm examiner testified the laser sight was not properly aligned. 1RP 1680-89, 1754-56. The examiner did not know what the condition of the laser sight was before he received it for testing and did not know if the laser was accurate at the time of the shooting. 1RP 1755-56, 1759-60, 1785. The accuracy of the laser could have been compromised if the gun had been tossed. 1RP 1759-60. The six fired cartridges recovered by police and tested by the examiner all came from this gun. 1RP 1692-94.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED WALKER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY REQUIRING HIM TO TESTIFY IN ORDER TO RECEIVE JURY INSTRUCTIONS ON DEFENSE OF OTHERS.

The trial court violated Walker's constitutional right against self-incrimination by wrongly conditioning Walker's right to present his defense on the waiver of his right not to testify. Walker had the right to have the jury instructed on his defense of another claim absent his testimony. Reversal on

all counts is required because the error was not harmless beyond a reasonable doubt.

a. The Trial Court Forced Walker To Choose Between His Sixth Amendment Right To Present A Defense And His Fifth Amendment Right Not To Testify.

During a pre-trial discussion on jury instructions, the trial judge stated "Now, obviously, I assume if there's going to be an affirmative self-defense argument, he would need to take the stand." 5RP 15. Defense counsel responded "It's a defense of others, and I guess we'll see if he has to take the stand." 5RP 15. The judge remarked if the testimony did not arise to the level of a "self-defense" instruction, she need not give one. 5RP 15-16.

On May 13, after the defense had begun presenting its case, the court was informed Walker had filed a pro se motion raising ineffective assistance of counsel. 1RP 3379-91. On May 14, the judge asked if Walker wanted to represent himself and Walker ultimately answered "no" because he did not know how. 1RP 3398-99, 3401-03. At one point, the judge told Walker "if you're going to continue with a self-defense defense or defense of others, I mean, you are, probably, going to have to testify because the burden of proof is on you." 1RP 3399. The prosecutor jumped in, saying that was not "quite" right because the burden of proof was on the State. 1RP 3399. The judge said the burden of proof shifts. 1RP 3399. That same day, Walker

took the stand and testified on direct examination as part of the defense case.

1RP 3405-3554.

When the trial resumed on May 26, defense counsel informed the court her client had not decided whether to retake the stand. 1RP 3560.

Counsel stated "I have informed him that if he does not retake the witness stand, the Court will strike his testimony and that we would not -- we would

highly, likely not receive a self-defense instruction or defense of other's instruction in the jury instructions." 1RP 3560.

The court told Walker:

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

1RP 3563.

The prosecutor, trying to correct the trial court, remarked "I do think that there is at least a discussion that has to be had on whether or not there is sufficient evidence on the self-defense issue. So it's not necessarily cut and dry if he declines to go forward. 1RP 3564. But after confirming Walker did not want to represent himself, the judge continued:

The Court: Now, let's get to the other question. You're on the stand, Mr. Walker. Do you wish to continue testifying and have yourself subject to cross-examination by Mr. Neeb or do you wish to decline to take the stand further, in which case the Court will be telling the jury that your testimony is stricken and they are to disregard anything that you've said, which leaves their decision based on what the other witnesses have testified about.

[Walker]: Since I thought my friend was in that much danger, I have to get on the stand.

The Court: You can't get a defense of others or self-defense in front of the jury without them hearing about what your mind set was. But that's what it boils down to. In the long run they'll determine, based on the instructions and the facts as they consider them, whether or not you were justified in your actions.

I've never seen a case go to a jury on a defense or defense of others where the defendant has not taken the stand and has not been subject to cross examination. That's one of the risks of these kinds of cases.

1RP 3569-70.

After rejecting Walker's ineffective assistance claim, the judge told Walker "Now, are you going to get back up on the stand so that we can get this case moving? You are?" 1RP 3573. Walker nodded affirmatively. 1RP 3573. Walker was then subjected to further examination, including extensive cross examination by the prosecutor. 1RP 3573-3682, 3689-3806.

Following conviction, Walker filed a pro se motion for "arrest of judgment," arguing ineffective assistance of counsel and denial of his right to a fair trial. CP 220-28; 4RP 9-11. In denying the motion, the judge stated:

I simply try to get the case tried, get the case to a jury; and the jury makes the decision on the facts. They determine what was the truth that was testified to, and they're the ones

who make the factual decisions; and they chose to convict you of the charges that were, originally filed in this matter; and to put you on the stand, we explained to you very carefully on the record that in a defense where you are asserting self-defense or defense of others that that defense revolves around what is your personal mind-set at the time you take the actions. If you do not testify at to what your state of mind is, then there will be no self-defense or defense of others instructions; and we went over that with you because at one point after your first day of direct and after the week where Ms. Corey was at her son's graduation, you, apparently, decided you did not wish to continue testifying, and I explained to you on the record the options you had, that if you did not continue testifying, to be subject to cross-examination, that we would simply instruct the jury that they were to disregard your testimony completely as if you had never taken the stand; and you weighed that against the fact that your sole defense in this case was defense of others. If you don't testify to that, then you don't get that defense; and it was your choice, then, to continue with your testimony.

Now, self-defense and defense of others, you know, are difficult defenses; but to go forward with it, you have to testify. There's no other way we can construct what your mind frame is, what your state of mind is, what choices you weighed unless you testify about those; so I am going to deny the motion for arrest of judgment, and we will proceed to sentencing.

4RP 12-14.

b. Sufficient Evidence Supported Defense Of Another Instructions Without Walker's Testimony.

A defendant is entitled to have the trial court instruct upon his theory of the case where, as here, there is evidence to support that theory. State v. Hackett, 64 Wn. App. 780, 785, 827 P.2d 1013 (1992). In determining whether a defendant was entitled to present a defense of self-

defense, an appellate court must view the underlying facts in the light most favorable to the defendant. State v. Westlund, 13 Wn. App. 460, 465, 536 P.2d 20 (1975). "[A]s long as the record contains substantial evidence which, if believed by a jury, would justify defendant's actions, the jury must be properly advised of the law of self-defense and defense of others." State v. Fischer, 23 Wn. App. 756, 758, 598 P.2d 742 (1979).

To raise a claim of self-defense, there need only be some evidence admitted in the case *from any source*. State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983). Walker did not have to testify to raise a claim of defense of another and could rely on the testimony of others to raise that defense.

Indeed, the trial court in People v. Hoskins committed reversible error by denying the defendant's request for a self-defense instruction on the ground that insufficient evidence had been presented, wrongly believing it could not instruct the jury on self-defense unless the defendant had taken the stand and testified to his state of mind. People v. Hoskins, 403 Mich. 95, 96-97, 101, 267 N.W.2d 417, 419 (Mich. 1978). "If the State may prove a defendant's state of mind through circumstantial evidence, then common sense dictates that a defendant may attempt to prove his state of mind through circumstantial evidence as well." Williams v. State, 915 P.2d 371, 376 (Okla. 1996). Hoskins recognized "[a] ruling to the

contrary compromises a defendant's privilege against self-incrimination and his right to have the prosecutor prove beyond a reasonable doubt that he was not acting in self-defense." Hoskins, 403 Mich. at 100.

In order to raise self-defense before jury, a defendant bears the initial burden of producing some evidence which tends to prove that the killing or assault occurred in circumstances amounting to self-defense, however, there is no need that the evidence must create a reasonable doubt in the minds of the jurors on that issue. McCullum, at 488. The threshold burden of production is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

Defense of another is lawful when a person reasonably believes another is about to be injured and when the force is not more than necessary. RCW 9A.16.020(3); Janes, 121 Wn.2d at 238. The fact finder must determine, from the perspective of the one claiming the defense, whether there was a reasonable, subjective fear of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009). The degree of force is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

Had the trial court stricken Walker's testimony if he did not retake the stand and subject himself to cross examination, Walker still would have been entitled to defense of another instructions. Ample evidence, viewed in the light most favorable to Walker, supported such instruction in the absence of his testimony.

Scot was 5 feet one inch tall and weighed 124 pounds. 1RP 418. Key was 6 foot three inches tall and weighed 250 pounds. 1RP 3008. Mario testified Scot was being jumped by four or five Samoans who were six feet tall. 1RP 556, 564, 630. They were punching Scot. 1RP 631. Scot was curled up in a crouched position, not fighting back. 1RP 564-65, 630.

Silver testified Key attacked Scot, shaking him around and slamming him up against a car door more than once during an "intense" fight. 1RP 926, 997, 1031. Silver was concerned Scot could be "seriously hurt." 1RP 997.

Dart testified a "really, really big" Samoan man grabbed Scot, and started slamming and throwing him into a parked car. 1RP 1061-63, 1092, 1133-36. Scot put up no resistance. 1RP 1141. The Samoan slammed Scot many times. 1RP 1141. As the fight continued, "it became more violent." 1RP 347. Walker could see Scot being attacked. 1RP 1136-38.

Sesepasar testified the largest Samoan in the argument caught up with Scot, picked him up by his collar and jeans, and threw him against a

car loud enough that Sesepasar heard a thudding noise. 1RP 2466-67, 2509. The largest Samoan straddled Scoot and kept punching him in the head. 1RP 2468-71, 2476. At the same time, another Samoan was kicking Scoot in the side. 1RP 2469-71.

An officer testified Walker told them during interrogation that he fired warning shots into the air but that it had no effect on the fighting. 1RP 1966. Walker then fired shots at the Samoan fighting Scoot, intending to hit the Samoan in the leg. 1RP 1966, 1969. Walker said he fired the gun to protect Scoot. 1RP 1967, 2189. Key admitted he probably would have continued beating Scoot if Key had not been shot. 1RP 3019, 3059.

Walker was entitled to defense of another instructions based on this evidence, which tended to show the killing or assault occurred in circumstances amounting to defense of another. McCullum, at 488. Walker did not need to testify to obtain the instructions. The trial court's determination to the contrary is unsupported by fact or law. Walker had the right to present his defense without waiving his right against self-incrimination.

c. The Court Violated Walker's Constitutional Right Against Self-Incrimination In Wrongfully Conditioning His Right To Present A Complete Defense On Waiver Of His Right Not to Testify.

The doctrine of unconstitutional conditions precludes the government from coercing the waiver of a constitutional right by conditioning the exercise of one constitutional right on the waiver of another. United States v. Ryan, 810 F.2d 650, 656 (7th Cir. 1987). In holding a defendant cannot be forced to choose between asserting a Fourth Amendment claim and his Fifth Amendment right to silence, for example, the United States Supreme Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968).

Walker had the constitutional right to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, § 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." State v. Jones, __ Wn.2d __, __ P.3d __, 2010 WL 1492583 at *2 (slip op. filed April 15,

2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

Walker also had the constitutional right not to testify and avoid self-incrimination. Carter v. Kentucky, 450 U.S. 288, 305, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981); State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008); U.S. Const. amend. V; Wash. Const. art. 1, § 9. The Fifth Amendment commands no person "shall be compelled in any criminal case to be a witness against himself."

The trial court must avoid inappropriately influencing the defendant to waive his constitutional right not to testify. State v. Thomas, 128 Wn.2d 553, 560, 910 P.2d 475 (1996). In this regard, "[a] trial court cannot explicitly or effectively force a defendant to choose between his Sixth Amendment right to present a defense and his Fifth Amendment right not to testify." Williams, 915 P.2d at 377. That is what happened in Walker's case.

The trial court ruled it would strike Walker's testimony from the jury's consideration if he did not retake the stand and subject himself to cross-examination. Walker does not challenge that aspect of the ruling.

The trial court, however, wrongly ruled Walker was not entitled to defense of another instructions in the absence of his testimony being considered by the jury. Walker did not have to testify on his own behalf to

receive such instruction. In this manner, the trial court forced Walker to choose between his constitutional right to present the only viable defense he had and his constitutional right not to testify.

Williams is instructive. The trial court in that case violated Williams' constitutional right to not testify when he was required to take the stand before he could present evidence of self-defense. Williams, 915 P.2d at 376-77. Williams was "compelled" to testify in the sense that if he chose not to testify he lost the opportunity to present his self-defense claim. Id. at 377. The trial court insisted that Williams was not required to take the stand but wrongly believed some direct evidence of Williams' state of mind was required in order for Williams to claim self-defense. Id. at 375. Requiring Williams to choose between his Fifth and Sixth Amendment rights under these circumstances constituted an "insurmountable violation" of his constitutional rights. Id. at 378.

As in Williams, the trial court effectively forced Walker to testify as a prerequisite to being able to present his defense, even though Walker was entitled to present that defense supported by jury instructions without having the jury hear or consider any of his testimony. In so doing, the trial court violated Walker's constitutional right against self-incrimination.

The Williams court analogized to Brooks v. Tennessee, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972). Williams, 915 P.2d at 376. In

Brooks, the United States Supreme Court held unconstitutional a Tennessee statutory requirement that a defendant in a criminal case had to be his own first witness if he was to take the stand at all. Brooks, 406 U.S. at 612. The rule was an "impermissible restriction on the defendant's right against self-incrimination, 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" Id. at 609 (quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 1493, 12 L. Ed. 2d 653 (1964)). The rule "'cuts down on the privilege (to remain silent) by making its assertion costly.'" Brooks, 406 U.S. at 611 (quoting Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965)).

Walker's case illustrates the same concerns. It is intolerable that one constitutional right should have to be surrendered in order to assert another, at least where, as here, the defendant is entitled to assert both rights simultaneously. Simmons, 390 U.S. at 394. "A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 120

(3d Cir. 1977) (conditioning exercise of right to testify upon waiver of the right to counsel is impermissible infringement upon both rights).

Walker's argument is also supported by State v. Eaton, 30 Wn. App. 288, 633 P.2d 921 (1981). In Eaton, the trial court wrongly required the defendant to take the stand before allowing the defense to present expert testimony on the issue of whether he was incapable of forming the requisite intent to commit the crime based on intoxication. Eaton, 30 Wn. App. at 290-92, 294-98. The trial court ruled the psychiatrist could not base his opinion on defendant's statements given during previous interviews unless Eaton first testified and subjected himself to cross examination. Id. at 290-91. Based on the trial court's erroneous ruling, Eaton could exercise his right against self-incrimination only by forfeiting his only viable defense. Id. at 291. Eaton therefore decided to take the stand. Id. The trial court committed reversible error in ruling the psychiatrist could not reasonably rely on Eaton's account of the incident until Eaton testified under oath and subjected himself to cross examination. Id. at 292, 294-98.

As in Eaton, the trial court's ruling in this case placed a significant burden on Walker's constitutional privilege against self-incrimination by forcing him to testify in order to secure the right to present his defense.

Walker had the constitutional right not to testify and thereby avoid self-incrimination. Generally, constitutional rights may only be waived by

knowing, intelligent, and voluntary acts. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). Courts must indulge every reasonable presumption against waiver of constitutional rights. State v. Earls, 116 Wn.2d 364, 383, 805 P.2d 211 (1991); City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). In examining a claimed waiver by a criminal defendant of a right constitutionally guaranteed to protect a fair trial, every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary. State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The State's bears the burden of establishing a valid waiver. Wicke, 91 Wn.2d at 645.

The State cannot establish a knowing, voluntary and intelligent waiver here. Walker was compelled to retake the stand and subject himself to cross examination because the trial court wrongly conditioned Walker's ability to present his defense on the waiver of his right against self-incrimination.

d. This Constitutional Error Was Not Harmless Beyond A Reasonable Doubt.

"Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable

juror would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The presumption of prejudice may be overcome if and only if the reviewing court is able to express an abiding conviction that the error "cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The State cannot meet its burden of overcoming the presumption that Walker's compelled self-incrimination prejudiced the outcome of the case. None would deny the choice of whether to testify poses "serious dangers to the success of an accused's defense." Brooks, 406 U.S. at 609.

The danger was realized here. Rational jurors, upon assessing the credibility of Walker and his testimony on the stand, may have decided to reject his defense of another claim because they did not believe him based on what they heard come out of his mouth and any number of factors jurors use to assess the credibility of a witness.

The State vigorously attacked Walker on cross-examination. Walker repeatedly resisted the prosecutor's intense questioning, which made him appear evasive. 1RP 3631, 3640, 3648, 3656, 3662-63, 3669, 3670-71, 3672, 3681-82, 3700, 3705-06, 3781-85.

Walker was impeached and made damaging admissions during cross examination. For example, Walker admitted he told police he did not have a gun but at first resisted calling this a lie. 1RP 3700-01. Upon further examination, Walker gave in and said it was a lie. 1RP 3701. The prosecutor pressed the point, repeatedly emphasizing Walker lied until an exasperated Walker complained "you're turning me into the biggest li[a]r in the world." 1RP 3710-111, 3780.

At one point on cross examination, Walker said he lied to police because he was scared. 1RP 3711. Walker also said he lied when he was scared. 1RP 3711. The prosecutor skillfully obtained Walker admission that being very nervous was no different than being scared. 1RP 3711, 3714. At the beginning of his direct examination testimony, Walker had testified he was very nervous. 1RP 3405. On cross, Walker denied he gave this testimony. 1RP 3712. The prosecutor then questioned whether Walker was lying under oath on the stand. 1RP 3712, 3714.

The prosecutor accused Walker of changing his story. 1RP 3607, 3646-47. The prosecutor questioned why Walker's memory of the altercation between the Samoans and the woman was different than the accounts given by other witnesses. 1RP 3645-47.

Walker would not admit he shot Scoot. 1RP 3620. Walker did not know if he shot Scoot. 1RP 3626, 3659, 3673, 3776. The prosecutor asked

why he was denying he shot Scoot when he admitted it to the police. 1RP 3672. Walker also would not admit he shot Mario or Key. 1RP 3660-61. He also denied shooting into a group, contradicting other witness accounts. 1RP 3626, 3630. Walker elsewhere said he did not know if he hit Key because he "kept going like he didn't get shot," even though his upper arm was shattered. 1RP 3628, 3631. Such responses provided a basis for doubting Walker's version of events.

Walker admitted he never shot the gun before to verify its accuracy. 1RP 3625-26. Walker also admitted he was responsible for knowing who was in harm's way before he fired shots in a parking lot. 1RP 3673. Walker admitted he did not make sure Scoot was out of harm's way before he fired at the Samoan. 1RP 3673-74. Walker further admitted it was his "fault" if his aim was off and that it was his fault if he fired into a crowd of people and did not hit the right person. 1RP 3627, 3662.

The prosecutor made Walker look bad. For example, Walker did not run up to see if Scoot was okay after shooting. 1RP 3674. Nor did he yell to Scoot to see if he was okay. 1RP 3674 ("Why? Is your mouth broken?"). Walker never bothered to try and physically fight with the Samoans, even though Mario did. 1RP 3675-76. The prosecutor questioned why Walker did not run in and physically fight with the Samoan attacking Scoot. 1RP 3778-79 ("Were your feet broke?"). Mario ran to help Scoot when Walker

just fired the gun and ran away. 1RP 3678. Walker admitted he had the option of running in and getting into the fistfight but did not choose it. 1RP 3678-79. Walker also admitted his guilt to unlawful possession of a firearm. 1RP 3616-17.

In sum, Walker's testimony provided a basis to doubt Walker and his defense. The prosecutor encouraged the jury to consider Walker's credibility on the stand in reaching a verdict. 3RP 9-10.

"Fact finders consider many factors when determining whether evidence is credible, including demeanor, bias, opportunity, capacity to observe and narrate the event, character, prior inconsistent statements, contradiction, corroboration, and plausibility." In re Det. of Stout, 159 Wn.2d 357, 382, 150 P.3d 86 (2007) (Madsen, J. concurring). Walker's credibility was at issue because he testified on his own behalf on disputed matters. State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

This Court cannot conclude the error was harmless beyond a reasonable doubt "[b]ecause credibility determinations cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable." State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988) (reversal required due to improper references to defendant's assertion of right to remain silent). Had the trial court not coerced Walker's testimony, the jury might

have reached a different result after being instructed to disregard testimony already given on direct examination. Reversal on all counts is required.

e. This Constitutional Error Is Preserved For Review.

Walker did not object to the trial court's ruling conditioning his right to present a defense on the waiver of his right against self-incrimination. This is an error of constitutional magnitude that may be raised for the first time on appeal. A constitutional error is manifest under RAP 2.5(a)(3) "if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). The concrete detriment here is that Walker was forced to give up his right against self-incrimination, thereby allowing the jury to reject his defense based on his compelled testimony.

In the alternative, defense counsel was ineffective in failing to object. Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "A claim of ineffective assistance of counsel is an issue

of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Kylo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The defendant has authority to make certain fundamental decisions. State v. Cross, 156 Wn.2d 580, 606-07, 132 P.3d 80 (2006). "The defendant, not trial counsel, has the authority to decide whether or not to testify." Thomas, 128 Wn.2d at 558. Counsel could not waive Walker's right against self-incrimination. Only Walker could do that, and such waiver is only valid when it is knowing, voluntary and intelligent. Id. Allowing the trial court to wrongfully coerce Walker into testifying by failing to object is not a legitimate tactic. Walker was prejudiced for the reasons set forth in C. 1. d., supra.

2. THE COURT'S IMPROPER FIRST AGGRESSOR INSTRUCTION REQUIRES REVERSAL.

Aggressor instructions are disfavored. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) overruled on other grounds as noted in In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Courts should use care in giving an aggressor instruction because it impacts a claim of self-defense or defense of another, which the State has the burden of disproving beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Indeed, "[f]ew situations come to mind where the necessity for an aggressor instruction is warranted." State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

Here, the court ruled the aggressor instruction was appropriate on the theory that Walker provoked the attack on Scoot. 1RP 3851-52. Reversal on the murder and assault counts is required because the record does not support this conclusion.

a. The Court Gave An Aggressor Instruction Over Defense Objection.

Instruction 25 read:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense of another and thereupon kill or use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the

fight, then self-defense or defense of another is not available as a defense.

CP 171.

Defense counsel objected to this instruction, arguing no factual basis allowed for the reasonable conclusion that Walker provoked Key to beat Scoot. 1RP 3848-49; 3851, 3886.

The court gave the instruction because "there was testimony that he was standing there watching the fistfights and produced the gun. His own testimony on direct over a week ago had him walking down with the gun already when they're having this verbal altercation outside the Brickyard and displaying the gun and doing warning shots there. So his own testimony has him producing the gun and shooting in the air long before anybody else was even throwing punches. So I think the aggressor instruction is appropriate in this case." 1RP 3851. Defense counsel argued that was not her client's testimony. 1RP 3851. The trial court had a different recollection: "his testimony a week or two weeks ago before the break was that he fired warning shots when they're having this verbal altercation down by the Brickyard." 1RP 3851-52.

At sentencing, the defense moved under RCW 9.94A.535(1)(a) for an exceptional sentence downward on count IV, the assault against Key. 4RP 39-40. The court granted the motion, agreeing Key was, to a

significant degree, an initiator, willing participant, aggressor, or provoker of the incident. CP 237; 4RP 56-57.

- b. The Record Does Not Show Walker Engaged In An Intentional Act That Was Reasonably Likely To Provoke Key Into Beating Scoot.

An aggressor instruction should be given only where there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense. Riley, 137 Wn.2d at 909-10. Key himself testified his Samoan friends were fighting with the Moss brothers and Key joined in by attacking Scoot. 1RP 3013-14, 3019-23. He did not know what started the fight. 1RP 3014. He did not mention being provoked by anything Walker did. Indeed, Key did not even remember seeing Walker. 1RP 3045-46. Based on Key's own testimony, there was no evidence he was actually prompted to attack Scoot based on Walker's action of firing warning shots into the air or anything else Walker did.

The trial court based its decision to give the aggressor instruction based on its recollection that Walker's testimony established he displayed a gun and fired it into the air in response to a verbal altercation. 1RP 3851-52. Walker's testimony does not establish he was the first aggressor that entitled Key to respond by attacking Scoot.

Walker testified he saw a group of Samoans arguing and with two women and snatching at their clothing. 1RP 3462-65. When it appeared the Samoans were not allowing the women to leave and it looked like the argument was about to turn physical, Walker grabbed his gun from inside his car and *put in his pocket* because "there was too many Samoans for me" and he was concerned about the females' safety. 1RP 3465, 3473-75. Walker approached the Samoans and said they should not be arguing with females. 1RP 3466, 3476.

At that point, the Samoans wanted to attack Walker. 1RP 3466, 3476-77. The Samoans said "We'll knock anybody out of here." 1RP 3476, 3485. They pursued Walker. 1RP 3481-87. Walker pulled his gun from his pocket and pointed it at the ground and then cocked the gun as a warning. 1RP 3486, 3492-95. The Samoans kept coming towards him. 1RP 3495-97. Walker fired two or three shots into the air, trying to let them know he could not fight them because they were too big. 1RP 3497-98, 3502.

Walker's testimony shows the Samoans were the initial aggressors and Walker was merely trying to ward them off by shooting into the air. That is not evidence from which a jury could reasonably determine Walker provoked the need to act in defense of another. Riley, 137 Wn.2d at 909-10.

In any event, "the initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." Id. at 912. The instruction was unwarranted here because Key was not entitled to attack Scoot with lawful force in response to Walker's action of shooting the gun in the air.

"For the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm." Id. It is undisputed Walker did not aim the gun at anyone before Key attacked Scoot. Walker fired warning shots into the air. That was a nonviolent action. Key could not reasonably believe he was in danger of imminent harm from Walker based on the act of Walker firing into the air.

The aggressor instruction was unwarranted even if Key could reasonably believe he was in danger of imminent harm from Walker because the evidence does not show Key was in imminent danger from Scoot. Key's assault on Scoot did not constitute lawful force because Key was not in imminent danger of harm from Scoot. The prerequisite for a first aggressor instruction is unsatisfied for this reason.

If Key responded to a belligerent action by Walker and then attacking Walker with lawful force, then the aggressor instruction could

arguably defeat a claim of self-defense. But that is not what happened here under anyone's version of events.

There is a disconnection between Walker's action and Key's response. In order to justify its aggressor theory, the State needed to show Key could reasonably respond to Walker's alleged aggression by beating up Scoot. The State failed to meet its burden under Walker's testimony as well as Key's testimony.

Testimony from other witnesses likewise fails to establish Key was prompted to attack Scoot in response to Walker's act of shooting a gun into the air.

Sesepasar witnessed an argument involving two Samoans, Scoot and an African American. 1RP 2455-57. As the argument continued, Walker fired two shots into the air. 1RP 2462-64. Scoot ran from the argument. 1RP 2464-65. The largest Samoan in the argument caught up with Scoot, threw him against a car, and punched him in the head while another Samoan kicked him. 1RP 2468-71, 2476.

Carsey testified an argument between one of the Samoans and a female outside the bar had resolved itself when Walker fired shots into the air. 1RP 1174-76, 1212. Key confronted Walker about having fired the gun and they argued. 1RP 1177, 1179, 1203, 1895. The Moss brothers

ran up. 1RP 1179-80, 1205. Carsey hid behind a car, where she heard scuffling and more shots. 1RP 1180.

Again, even if Walker's shooting into the air could have reasonably provoked Key into confronting Walker with lawful force, there is no reasonable likelihood that action provoked Key into attacking Scoot. It does not make sense to conclude Walker provoked Key's attack on Scoot when Key was faced with a threat from Walker, not Scoot. The aggressor instruction was not intended to encompass situations where, as here, a victim unlawfully attacks a third person in response to an allegedly belligerent action by a defendant.

"If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction." Riley, 137 Wn.2d at 910 (citing State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584 (1987)). An aggressor instruction was proper in Riley, where the defendant pulled a gun first and aimed it at the victim. Riley, 137 Wn.2d at 907, 909. In Thompson, the defendant made the first move by drawing his gun on the victims and then shooting them. Thompson, 47 Wn. App. at 4, 7. In State v. Wingate, an aggressor instruction was warranted where there was evidence an initial altercation had ended, at which point the defendant pulled a gun on the victim's

friends and then shot the victim when the victim interceded. State v. Wingate, 155 Wn.2d 817, 820, 823, 122 P.3d 908 (2005).

Application of the first aggressor rule makes sense in situations where the victim responded with force against the person who provoked that response, thereby necessitating the act of self-defense. In this case, however, the victim did not respond with force against Walker, the person who allegedly provoked a response. Key attacked Scoot. Walker's conduct did not provoke Key into attacking Scoot. Moreover, unlike the defendants in Riley, Thompson and Wingate, Walker did not aim his gun at the victim.

Mario testified a group of five or six large Samoans were yelling at him and Scoot while coming toward them in an aggressive manner, saying "You guys are the bitch-ass niggers that was with him." 1RP 553, 556-57, 560-61, 615-16, 621-22. The Samoans tried to box the Moss brothers in. 1RP 653. Mario engaged in a fistfight or shoving match with two people in the parking lot after telling his brother to leave. 1RP 554, 556, 559. Mario then became aware Scoot was being physically attacked by a group of Samoans in another area of the parking lot. 1RP 556, 562, 564-65, 629-31.

Under Mario's version of events, there was only one aggressor and that was the Samoans. Dart similarly testified the Samoans started the

fighting without any provocation from anyone in her group. 1RP 1055-57, 1089-90, 1114-15. Dart told police the same thing. 1RP 346-47, 397. As Mario fought the Samoans, Dart, Scoot, and Walker backed away from the fray. 1RP 1061, 1128. One of the Samoans ran up and started beating Scoot. 1RP 1061-62, 1092, 1133-36. Again, the Samoans were the aggressors. Indeed, the trial court later found Key was an aggressor in the incident and therefore imposed an exceptional sentence downward for the assault charge involving Key. CP 237; 4RP 56-57.

The dispositive issue is whether Key was provoked to attack Scoot due to an aggressive act by Walker. Walker's mere association with Scoot does not count as an aggressive act. Moreover, there is no evidence Key was the one who made the comment that Scoot was with Walker or even that he heard the comment. Key did not testify Walker provoked him into attacking Scoot.

Finally, bouncer Kabili Silver's testimony does not establish Walker was the first aggressor. Silver testified he heard Scoot yelling at the Samoans. 1RP 914-17, 993. When Silver approached Walker as he stood nearby, Walker pulled a gun out and fired two or three shots in the air. 1RP 917-18, 920, 993. Silver then noticed Key talking to Scoot. 1RP 921-22. Key told Scoot to "stop tripping" and Scoot punched Junior in the chin and kicked him in the crotch. 1RP 922, 924, 996, 1033. Pushing and shoving

ensued. 1RP 924. Key attacked Scoot and slammed him against the car door. 1RP 926, 997, 1016. Shots were fired while Key was beating on Scoot. 1RP 928-29, 998.

Under Silver's version of events, the initial aggressor was Scoot. If true, that does not defeat Walker's defense of another claim. See CP 172 (Instruction 26) ("One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the person whom the actor is defending is the aggressor."). There is no evidence by which it can reasonably be concluded Key attacked Scoot in response to Walker firing warning shots into the air. Silver's testimony shows Key attacked Scoot because Scoot punched and kicked Key.

It is reversible error to give an aggressor instruction when not supported by the evidence. State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039 (1989); State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986). An improper aggressor instruction is prejudicial because it guts a self-defense claim. Birnel, 89 Wn. App. at 473; Brower, 43 Wn. App. 902. This constitutional error cannot be deemed harmless unless the State proves it was harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473. The State cannot meet its burden because Walker presented a viable defense of another claim. Reversal is required because the aggressor

instruction undermined Walker's claim of self-defense, allowing the jury to reject Walker's defense out of hand and relieving the State of its burden of proving lack of defense of another beyond a reasonable doubt.

3. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON DEFENSE OF ANOTHER.

The court wrongly instructed the jury about the level of injury Walker needed to reasonably believe Scoot was facing in order to justify defense of another in relation to the assault counts. Reversal on those counts is required because the instructions did not make the law of defense of another manifestly apparent and resulted in the State being relieved of its burden of disproving Walker's defense of another claim.

Walker received defense of another instructions pertaining to the assaults on Key and Henri (Mario) Moss. CP 190-193 (Instructions 44-47). Instruction 44 provided in relevant part:

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

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

CP 190 (emphasis added).

Instruction 44 is based on WPIC 17.02. It is consistent with RCW 9A.16.020(3), which states "force upon or toward the person of another is not unlawful . . . [w]hen used by a party about to be injured."

Instruction 45 accordingly stated "A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual *danger of injury*, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful." CP 191 (emphasis added). Instruction 45 is based on WPIC 17.04.

Unfortunately, the court also gave Instruction 46, which stated:

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

CP 192 (emphasis added).

The State proposed Instruction 46. CP 328. Instruction 46 is not a WPIC instruction.

Defense counsel objected to Instruction 46, arguing it was inconsistent with the right to act on appearances and could not be reconciled with instruction 45 (WPIC 17.04). 1RP 3863-64, 3866, 3887;

CP 191. The court responded "Well, I think they can, and it is up to the jury to reconcile them." 1RP 3866.

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. The State also has the burden of proving, beyond a reasonable doubt, the absence of self-defense or, in this case, defense of another. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

The adequacy of challenged jury instructions is subject to de novo review. State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002). The Supreme Court has established a high threshold for clarity of jury instructions and self-defense instructions are subject to more rigorous scrutiny. State v. Irons, 101 Wn. App. 544, 550, 4 P.3d 174 (2000). "Jury instructions must more than adequately convey the law of self-defense." LeFaber, 128 Wn.2d at 902. Read as a whole, the instructions must make the relevant legal standard "manifestly apparent to the average juror." Id. at 900 (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

The instructions at issue here fail this demanding standard. Contrary to Instructions 44 and 45, Instruction 46 told the jury that Walker was entitled to use deadly force only if he reasonably feared another

would suffer "great personal injury." Thus, under Instruction 44 and 45, Walker could lawfully defend Scoot if he was subject to apparent "injury," but under Instruction 46, Walker could use force only if Scoot was confronted with "great personal injury."

The difference is significant. WPIC 2.03 defines "bodily injury" and "physical injury" as "physical pain or injury, illness, or an impairment of physical condition." Instructions 44 and 45, applicable to the assault counts, reflect the level of injury Walker needed to reasonably fear Scoot was facing before Walker was justified in using force to defend Scoot.

On the other hand, the "great personal injury" is injury that produces "severe pain and suffering." WPIC 2.04.01. Instruction 47 defined "great personal injury" for the jury. CP 193.

"Great personal injury" is far more severe than mere "injury." A reasonable juror would come to that conclusion just based on the qualifier "great personal" being added to the simple term of "injury."

The "great personal injury" standard is applicable only to the murder counts in Walker's case. Under Instructions 44 and 45, that standard is inapplicable to the assault counts. Instruction 46, however, does not specify it is only applicable to the murder counts. It is a generalized instruction ostensibly pertaining to both the murder and assault counts.

The instructions, read as a whole, do not unambiguously inform jurors that mere "injury" is the requisite level of harm for defense of another in the assault counts. Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902 (single WPIC instruction failed to make the law of self-defense manifestly clear to the jury because it could be interpreted as a misstatement of the law on whether actual imminent harm required).

Instructions 44 and 45, when compared with Instruction 46, are inconsistent regarding level of injury needed to justify use of force for assault. Internally inconsistent jury instructions are ambiguous. Irons, 101 Wn. App. at 553 (instructions did not make manifestly apparent that self-defense could be justified due to fear of multiple assailants rather than just victim). When jury instructions read as a whole are ambiguous, the reviewing court cannot assume that the jury followed the legally valid interpretation. State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997), aff'd sub nom., State v. Studd, 137 Wn.2d 533, 73 P.2d 1049 (1999). Misstatement of the law arising from the inconsistency must be presumed to have misled the jury in a manner prejudicial to the defendant unless the error can be declared harmless beyond a reasonable doubt. Irons, 101 Wn. App. at 559.

The State cannot overcome the presumption of prejudice. Whether Scoot faced apparent injury as opposed to "great personal injury" was a disputed issue. Reasonable minds could differ as to whether Key's beating rose to the level of inflicting "great personal injury." Although Walker does not have the burden of proof here, prejudice may be demonstrated where an erroneous instruction is applied to a close or disputed factual question. State v. Brown, 36 Wn. App. 549, 554, 676 P.2d 525 (1984).

Even had defense counsel not objected, the instructional error would be one of constitutional magnitude capable of being raised for the first time on appeal because it lessened the State's burden of proving Walker did not act in lawful defense of another. The ambiguity regarding apparent level of harm needed to justify force goes to an elemental component of the defense of another instructions. Compare LeFaber, 128 Wn.2d at 899, 903 (self-defense instruction ambiguous on whether State had to disprove defendant reasonably believed there was imminent danger of harm as opposed to actual imminent danger of harm was constitutional error that could be raised for the first time on appeal) with State v. O'Hara, 167 Wn.2d 91, 108, 217 P.3d 756 (2009) (failure to include statutory definition of "malice" did not relieve State of burden of disproving self-defense and could not be raised as error for first time on appeal).

In the alternative, defense counsel was ineffective in failing to properly object to Instruction 46 on the ground that it misstated the requisite level of injury needed to justify assault. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26; U.S. Const. amend. VI; Wash. const. art. I, § 22. There was no strategic or tactical reason for counsel not to object to Instruction 46 on the ground that it eased the State of its burden of proof on defense of another. See State v. Woods, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007) (counsel provided ineffective assistance in proposing self-defense instructions that misstated level of injury needed to justify use of force). Walker was prejudiced because the jury may have applied the more stringent "great personal injury" language rather than the "about to be injured" and "danger of injury" language in considering whether the State proved Walker did not lawfully act in defense of another on the assault counts. Woods, 138 Wn. App. at 202. Reversal of the assaults counts is required.

4. PROSECUTORIAL MISCONDUCT VIOLATED
WALKER'S RIGHT TO A FAIR TRIAL

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper

methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3.

The prosecutor repeatedly and emphatically misstated the law regarding defense of another. The prosecutor also made multiple improper arguments that diminished the beyond a reasonable doubt standard, undermined the presumption of innocence, shifted the burden of proof, and misled the jury as to its proper role in determining whether the State had proven Walker was guilty. Finally, the prosecutor improperly commented on Walker's exercise of his right to present a vigorous defense.

Reversal is required because these constitutional errors were not harmless beyond reasonable doubt or there is a substantial likelihood prosecutorial misconduct affected the verdict. In the alternative, defense counsel was ineffective in failing to properly object to this misconduct.

- a. The Prosecutor Committed Misconduct By Twisting The Presumption Of Innocence, Diminishing Its Burden Of Proof, And Otherwise Misstating The Law On The Role Of The Jury As It Deliberated On Walker's Fate.

The State has the burden of proving, beyond a reasonable doubt, the absence of lawful defense of another. Acosta, 101 Wn.2d at 615-16. The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The proof beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (quoting Winship, 397 U.S. at 363).

Not just once or twice but many times over the prosecutor improperly minimized the State's burden, shifted the burden to Walker and misled the jury as to its proper role.

- i. The Prosecutor Committed Misconduct In Telling The Jury It Needed To Affirmatively Identify A Reasonable Doubt Before It Could Acquit.

The prosecutor addressed the reasonable doubt instruction, arguing "a doubt for which a reason exists" meant "If you are to find the defendant not guilty in this case, you have to say, 'I had a reasonable doubt.' When someone says, 'What was your reasonable doubt?' You tell them." 2RP

54. The corresponding PowerPoint slide for this portion of the prosecutor's argument stated:

WHAT IT SAYS

A doubt for which a reason exists.

If you were to find the defendant not guilty,
you have to say:

"I had a reasonable doubt"

What was the reason for your doubt?

"My reason was _____."

CP 352.

The Pierce County Prosecutor's office made this same argument in State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). This Court condemned the argument, recognizing "[t]he jury need not engage in any such thought process." Anderson, 153 Wn. App. at 424, 431. By implying that the jury had to find a reason in order to find Walker not guilty, the prosecutor made it seem as though the jury had to find Walker guilty unless it could come up with a reason not to. Id. "Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper." Id. Furthermore, this argument implied Walker was responsible for supplying such a reason to the jury in order to avoid conviction. Id. Telling jurors they need to come up with a specific reason they believed Walker was not guilty was the

same as saying that there is a presumption of guilt, rather than a presumption of innocence.

More recently, this Court found this same argument to be *flagrant* misconduct in State v. Venegas, __ Wn. App. __, 228 P.3d 813, 2010 WL 1445673 at *7 (slip op. filed April 13, 2010). In Venegas, the prosecutor stated, "In order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is'-blank." Venegas, WL 1445673 at *7. In finding this misstatement of the law flagrant, the Venegas Court cited Anderson and pointedly noted a deputy Pierce County Prosecutor made the similar remarks in both cases. Id. at *7. The Court reiterated "prosecutors who continue to employ an improper 'fill-in-the-blank' argument needlessly risk reversal of their convictions." Id. at *8.

- ii. By Comparing The Jury's Decision To Decisions Made In Everyday Life, The Prosecutor Committed Misconduct In Diminishing The Burden Of Proof Beyond A Reasonable Doubt.

In arguing the State had proven its case beyond a reasonable doubt, the prosecutor told the jury:

"Beyond a reasonable doubt" is another of those phrases that I'm willing to bet not a single one of you have used in the last couple of years when you were talking to your friends, but is a common standard that you apply every day. Anyone here ever had surgery? Anybody here ever left their child with a babysitter? You know what? When you

leave your child with a babysitter, especially the very first time, and you think to yourself, "Will the babysitter eat me out of house and home? Will the boyfriend or girlfriend come over? Will they watch TV and ignore the cries for help? Will they put the kid in the tub and not pay enough attention? Will they eat me out of house and home?" On and on. Doubts. When you walk out the door, and your child's with that babysitter, you're convinced beyond a reasonable doubt.

2RP 55-56.

The PowerPoint slide for this portion of the prosecutor's argument stated:

**BEYOND A REASONABLE
DOUBT**

NOT A COMMON PHRASE YOU SAY

A COMMON STANDARD YOU APPLY

EVER HAD SURGERY?

EVER LEFT YOUR CHILDREN WITH A
BABYSITTER?

CP 353.

Defense counsel challenged the prosecutor's comparison in her closing argument. 2RP 104-05. In rebuttal, the prosecutor "corrected" defense counsel:

It was suggested to you the State -- you should not let the State trivialize the burden of proof by equating it to a decision that you folks make regarding the welfare of your children when you leave them for the very first time with a brand-new babysitter. If that isn't beyond a reasonable doubt, then beyond a reasonable doubt doesn't exist.

3RP 14.

The Pierce County Prosecutor's Office made this same argument in Anderson. Anderson, 153 Wn. App. at 425. This Court held the prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were improper because they "minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden." Id. at 431. By comparing the certainty required to convict with the certainty people often require when they make everyday decisions, the prosecutor "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case" against Walker. Id.

This argument was improper for another reason. By focusing on the degree of certainty the jurors would have to be willing to act, rather than that which would cause them to hesitate to act, the prosecutor confused the jury's duty to find Walker not guilty unless the State proved its case against him beyond a reasonable doubt with the idea that it should convict him unless it found a reason not to. Id. at 432. This essentially amounted to an invitation to the jury to render a decision based on a standard less than what is constitutionally required. Id.

The United States Supreme Court condemned the kind of "willing to act" language used by the prosecutor in this case over a half century ago.

Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954). Since Holland, "courts have consistently criticized the 'willing to act' language" as inviting the jury to render a decision based on a standard less than that constitutionally required. Tillman v. Cook, 215 F.3d 1116, 1126-27 (10th Cir. 2000) (citing cases). "Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act. . . in the more weighty and important matters in your own affairs.'" Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965).

iii. The Prosecutor Committed Misconduct In Telling
The Jury Its Job Was To Declare The Truth.

At the outset of closing argument, the prosecutor told the jury:

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

2RP 7-8.

The PowerPoint slide for this part of argument states "BY YOUR
VERDICT YOU WILL DECLARE THE TRUTH ABOUT WHAT

HAPPENED TO TAVARRUS MOSS, MARIO MOSS, AND ROONEY KEY ON JULY 29, 2006." CP 332.

The prosecutor returned to this theme later on after discussing the reasonable doubt standard:

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

2RP 58.

There was, naturally, a PowerPoint slide for this portion of the argument as well, stating "DECLARE THE TRUTH." CP 354.

The prosecutor ended his rebuttal argument with these parting words: "He committed murder in the first degree, murder in the second degree, assault in the first degree, and assault in the first degree, and unlawful possession of a firearm. That's a just verdict. That's the truth. Trials are a search for the truth. Your verdict will declare the truth, and I would ask you to declare in this case." 3RP 24-25.

The Pierce County Prosecutor's Office made the same argument in Anderson. Anderson, 153 Wn. App. at 423-24. This Court soundly condemned the argument as a misstatement of the law. A prosecutor's request that the jury "declare the truth" is improper because jury's job is

not to "solve" a case and "declare what happened on the day in question." Id. at 429. "Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Id.

b. The Prosecutor Committed Misconduct In Commenting On Walker's Right To Present A Complete Defense.

In closing argument, the prosecutor characterized Walker's supposed defenses and ended with this one: "And in this particular case, I think there's one more defense, or at least one potential defense, and that's this: This case drags out long enough, may be you folks will forget everything you heard in the State's case and you won't be able to reach a verdict." 2RP 9. The accompanying PowerPoint slide stated "**ONE MORE . . . IF THIS CASE DRAGS ON LONG ENOUGH, MAY BE THE JURY WON'T REMEMBER ANY OF THE STATE'S EVIDENCE.**" CP 332.

Misconduct occurs during closing argument when the prosecutor comments on the exercise of a defendant's constitutional right and invites the jury to draw adverse inferences from its exercise. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); State v. Gregory, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006).

Walker had the constitutional due process right to present a complete defense, no matter how long it took. Wittenbarger, 124 Wn.2d at 474;

Crane, 476 U.S. at 690; U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, § 22. No prosecutor may employ language that "limits the fundamental due process right of an accused to present a vigorous defense." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990). The danger underlying such statements is that they invite the jury to punish the defendant for making the jury go through the ordeal of a long trial.

Walker did no more than present a vigorous defense, which he had every right to do. The prosecutor's argument improperly commented on the exercise of that fundamental right.

c. The Prosecutor's Misstatement Of The Law On Defense Of Another Comprised The Theme Of Closing Argument.

In closing argument, the prosecutor repeatedly told the jury the objective standard for defense of another boiled down to whether "you would do it too." 2RP 43-48, 50, 51, 53; 3RP 18, 21-22. This was the theme of closing argument. The prosecutor exhorted the jury "While you're listening to the defense argument, while you're deliberating this, ask yourselves and ask each other repeatedly, 'Would I do it too if I knew what he knew?'" 2RP 45. The prosecutor argued Walker's conduct is not justifiable under the law if jurors would not do what he did. 2RP 48.

Lest the point be missed, the prosecutor hammered it home with multiple PowerPoint slides. CP 346-47, 349. One slide told the jury:

REASONABLE PERSON

SO THE LAW OF DEFENSE OF OTHERS
REQUIRES A JURY TO REVIEW
THE DEFENDANT'S CLAIM TO DETERMINE
IF IT WAS REASONABLE

THE JURY MUST FIND:

**I WOULD DO IT TOO, IF I KNEW WHAT HE
KNEW.**

CP 346.

The prosecutor made sure the jury should understand that the "you would do it too" standard for defense of others applied to the assault charges as well: "The law defining self-defense and defense of others in the context of an assault is slightly different than a homicide. Bottom line, though, is the same two-prong standard, which is, did he think he needed to? Would you do it too? Same standard." 2RP 53.

The prosecutor pressed on in rebuttal argument:

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

Ms. Corey: Objection again.

Mr. Neeb: Or it's not lawful.

Ms. Corey: Misstatement of the law.

Mr. Neeb: It's the objective person standard, Judge. Reasonably prudent --

The Court: I'll overrule the objection. This is closing argument.

Mr. Neeb: You folks are each a reasonably prudent person. You, as a group of 12, determine the reasonably prudent person's standard. And that's, would you do it too if you knew what he knew?

3RP 21-22.

Evidence of defense of another, like self-defense, "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." Janes, 121 Wn.2d at 238; see also State v. Penn, 89 Wn.2d 63, 66, 568 P.2d 797 (1977) (addressing defense of another standard); Fischer, 23 Wn. App. at 758 (same).

This approach incorporates both subjective and objective characteristics. Janes, 121 Wn.2d at 238. It is subjective in that the jury is "entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id. (quoting State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). It is also subjective in that "the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant." Janes, 121 Wn.2d at 238. The evaluation is objective in that "the jury is to use this information in determining 'what a reasonably prudent [person] similarly situated would have done.'" Id. (quoting Wanrow, 88 Wn.2d at 236) (internal quotation marks omitted).

The prosecution's statements to the jury must be confined to the law stated in the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). The "would you do it too?" argument advanced as the touchstone of the prosecutor's closing argument misstates the law for several interrelated reasons.

First, whether an individual juror would do the same thing is no different than asking them whether they would personally feel the need to respond as Walker responded. Jurors are supposed to assess Walker's conduct against an objectively reasonable person standard, not their personal standards. Janes, 121 Wn.2d at 238. The prosecutor's argument invited 12 jurors to map their 12 personal viewpoints onto that standard. "Jury instructions are meant to instruct the jury on what law to apply to the facts it finds." State v. Tang, 75 Wn. App. 473, 476, 878 P.2d 487 (1994). "The trial court may not delegate to the jury the task of determining the law." State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992). It follows that the prosecutor cannot delegate that task to jurors either.

Second, whether an individual juror would do the same thing Walker did is irrelevant. Whether defense of another is justified under the law does not turn on whether jurors would *act* in the same manner as the accused. A juror may not have chosen to act as Walker did but still find he acted in a reasonably prudent manner.

Jurors apply the law to the facts produced through evidence. In determining whether the State carried its burden of proving beyond a reasonable doubt that Walker did not act in lawful defense of another, the jury is supposed to measure Walker's conduct against the legal standard for when use of force is lawful. The jury has no business measuring the legality of Walker's conduct against the personal standards of 12 individual jurors. Whether jurors would do the same thing is a factual issue, which is not part of the evidence received by the jury.

Finally, the prosecutor's argument wrongly presumes 12 individual jurors would act as an objectively reasonable person would. Jurors are ordinary people. Ordinary people act unreasonably at times. There is no basis in law to equate how jurors would act with how an objectively reasonable person would act. The two concepts are distinct.

d. The Prosecutor's Misconduct Requires Reversal.

The cumulative effect of misconduct may be so flagrant that no instruction can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Walker's case is a textbook example.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Defense counsel

objected to the prosecutor's "you would do it too" argument, albeit late. The fact that counsel's late objection was overruled shows any earlier objection would have suffered the same fate. The error is preserved for review. See State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (failure to properly object may be excused where it would have been a useless endeavor). It is not as if an earlier objection would have alerted the court to correct the error. The court did not see any problem with the argument.

The trial court's overruling of counsel's lone objection "lent an aura of legitimacy to what was otherwise improper argument." Davenport, 100 Wn.2d at 764; see also State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (effect of improper argument compounded when the court overruled objection, which gave additional credence to the argument).

Indeed, by overruling counsel's objection that the prosecutor's argument was a misstatement of the law, the trial court effectively conveyed to the jury that it was a correct statement of the law. The prosecutor's repeated and emphatic misstatement of the law severely undercut the court's defense of other instructions, making it difficult, if not impossible, for the juror to apply the correct law to the facts. There is a substantial likelihood the jury used the wrong legal standard in

determining whether the State had successfully disproved a critical feature of Walker's defense of another claim.

Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

During closing argument, the prosecutor violated Walker's right to due process by misstating the reasonable doubt standard, shifting the burden of proof and turning the presumption of innocence on its head. Defense counsel did not object to this misconduct but it rises to the level of constitutional error.

Some misstatements of the law can be overlooked because they are relatively minor or so obvious that even lay jurors can act without prompting on the instruction to disregard any argument not supported by the court's instructions. See CP 146 ("You must disregard any remark, statement, or argument that is not supported by . . . the law in my instructions."). But some misstatements are not so easily dismissed,

particularly those pertaining to the State's burden and proof requirements. See Fleming, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill intentioned," and required a new trial).

The instructions in Walker's case encouraged jurors to consider the lawyers' remarks when applying the law. CP 146 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law."). The standard reasonable doubt instructions are not a model of clarity. See Bennett, 161 Wn.2d at 317 (recognizing concept of reasonable doubt difficult to explain even under the pattern instructions, making it tempting to expand the definition).

Jurors would be particularly tempted to follow the prosecutor's approach because his comments and visual aids had the ring of truth. To a layperson, the prosecutor's description of reasonable doubt — what must occur to find the defendant "not guilty" and what reasonable doubt means when compared to matters of ordinary life — sounds correct and provided a simple (albeit mistaken) way for jurors to decide guilt or innocence.

The State cannot show, as it must, that its misconduct was harmless beyond a reasonable doubt. By misstating reasonable doubt and rendering the presumption of innocence inapplicable, the prosecutor eased the State's constitutional burden. This increased the odds jurors would

convict Walker of murder and first degree assault rather than acquit him outright or convict him of lesser offenses.

The constitutional harmless error standard also applies to prosecutorial comment on a defendant's exercise of constitutional rights. State v. Johnson, 80 Wn. App. 337, 349-40, 908 P.2d 900 (1996) (comment on Sixth Amendment right to be present at trial and confront witnesses), overruled on other grounds, State v. Miller, 110 Wn. App. 283, 40 P.3d 692 (2002). The prosecutor's comment on Walker's "defense" of making the jury forget the State's evidence by dragging out the trial falls into this category. The jury, having sat through a trial that lasted more than two months, would naturally be inclined to harbor generalized resentment about this disruption to their lives. The prosecutor's comment focused that resentment on Walker, who had the temerity to present a defense that took a long time. The State cannot overcome the presumption that this comment affected the verdict.

Moreover, in the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. Fisher, 165 Wn.2d at 747. The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Id.

This Court has already determined the prosecutor's "fill in the blank" argument is flagrant misconduct. Venegas, 2010 WL 1445673 at *8. A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to diminish the burden of proof in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

This Court should hold the prosecutor's misleading statements regarding the reasonable doubt standard, presumption of innocence, burden of proof, and role of the jury was flagrant and incurable misconduct. In determining whether misconduct is flagrant and ill intentioned, this Court can take judicial notice that a deputy in the Pierce County Prosecutor's Office made the same improper arguments before. Warren, 165 Wn.2d at 27 n.4.

Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). The cumulative effect of misconduct can overwhelm the power of instruction to cure. Case, 49 Wn.2d at 73; Suarez-Bravo, 72 Wn. App. at 367.

Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. Case, 49 Wn.2d at 70-71. Statements made during closing argument are presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984).

The prosecutor's remarks in this case were not accidental and were designed to win conviction. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215. These were not off the cuff statements made in the heat of passionate argument. These were carefully scripted statements calculated to sway the jury, as shown by the fact that the same arguments, nearly verbatim, were made in Anderson.

Although jurors are instructed to disregard any argument not supported by the court's instructions, the problem is that the jury was in no position to determine whether the prosecutor's misstatements of the law were actually supported by the trial court's instructions. The prosecutor's arguments have a seductive attraction even though they are wrong. The harm in this case is that jurors concluded the prosecutor's misstatements of the law were consistent with the jury instructions and provided a convenient and understandable way to decide Walker's guilt.

Furthermore, arguments about what a jury needs to do in order to do its "job" are particularly egregious when they misstate the proper role of the jury. State v. Coleman, 74 Wn. App. 835, 838-41, 876 P.2d 458 (1994). An objection to the prosecutor's argument that the jury should "declare the truth" would have been done more harm than good. By objecting, defense counsel would have confirmed the prosecutor's implicit allegation that the defense does not want the jury to know the truth. The defense would have appeared to be hiding behind "technicalities" such as reasonable doubt. The prosecutor's argument boxed the defense into a corner. This misstatement of the bedrock of criminal justice also requires reversal of Walker's convictions.

Appellate courts are not required to "wink" at prosecutorial misconduct under the guise of harmless error analysis. State v. Neidigh, 78 Wn. App. 71, 79-80, 95 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct, the prosecutor responded, "it's always been found to be harmless error" when no objection is raised). Without a remedy, there is little incentive for prosecutors to avoid intentional misconduct.

e. Counsel Was Ineffective In Failing To Object To The Misconduct.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice resulting from any misconduct, then defense counsel was ineffective in failing to take such action. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26; U.S. Const. amend. VI; Wash. const. art. I, § 22.

There was no legitimate reason not to object given the prejudicial nature of the prosecutor's arguments. Walker derived no benefit from letting the jury consider those misstatements of the law as it deliberated on his fate. Reasonable attorney conduct includes a duty to investigate and research the relevant law. Kyllo, 166 Wn.2d at 862. As this Court recognized in Neidigh, "defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. Defense counsel needed to protect her client's right to a fair trial when the prosecutor failed to honor its duty of ensuring one.

If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in the juror's minds without instruction from the court that its improper argument should be disregarded and play no role in their deliberations.

Reversal is required where, as here, defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). This makes sense because the purpose behind both the prohibition against prosecutorial misconduct and the right to effective assistance is to protect the defendant's right to a fair and impartial trial. Strickland, 466 U.S. at 684. Charlton, 90 Wn.2d at 664-65.

5. CUMULATIVE ERROR VIOLATED WALKER'S
CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR
TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. V and XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a

defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

As discussed above, an accumulation of errors affected the outcome of Walker's trial and produced an unfair trial. These errors include (1) violation of Walker's constitutional right against compelled self-incrimination or, in the alternative, ineffective assistance of counsel in failing to properly object to this violation; (2) improper first aggressor instruction; (3) improper instruction on level of injury needed to justify use of force on assault counts or, in the alternative, ineffective assistance in failing to properly object to this instruction; and (4) prosecutorial misconduct, consisting of the multiple instances set forth in C. 4., supra, or, in the alternative, ineffective assistance of counsel in failing to properly object to this misconduct.

6. WALKER'S CONVICTIONS FOR BOTH FIRST DEGREE MURDER AND SECOND DEGREE FELONY MURDER VIOLATE DOUBLE JEOPARDY AND REQUIRE THAT HIS SECOND DEGREE FELONY MURDER CONVICTION BE VACATED.

Walker was convicted of first degree murder by deliberate indifference (count I) and second degree felony murder (count II). The court did not sentence Walker for the felony murder offense. Neither did it conditionally dismiss it. At sentencing, the judge indicated the two offenses merged. 4RP 20. The State did not agree the two offenses merged but asked that the court not impose sentence on count II. 4RP 24-25. The judgment and sentence makes no reference to count II. Under these circumstances, Walker's constitutional right to be free from double jeopardy requires vacature of the felony murder conviction.

Both the Fifth Amendment of the United States Constitution and Article 1, section 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The legislature did not intend to impose multiple punishments for first degree murder and second degree felony murder where there is only one victim and

the crimes occurred at the same time and place. State v. Schwab, 98 Wn. App. 179, 184-85, 988 P.2d 1045 (1999); State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001).

Here there is only one victim for the two counts at issue and the crimes occurred at the same time and place. Walker's convictions for both first degree murder and second degree felony murder therefore violate double jeopardy.

This Court has held convictions that would otherwise violate double jeopardy do not do so as long as the lesser conviction is not reduced to judgment. State v. Faagata, 147 Wn. App. 236, 193 P.3d 1132, 1138-39 (2008), review granted, 165 Wn.2d 1041, 204 P.3d 215 (2009); State v. Turner, 144 Wn. App. 279, 283, 182 P.3d 478, review granted, 165 Wn.2d 1002, 198 P.3d 512 (2008). The Supreme Court granted review of those decisions and heard oral argument on January 21, 2010.

Faagata and Turner conflict with the Supreme Court's decision in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). In Womac, the Supreme Court held where separate convictions violate double jeopardy the law requires the court to vacate one or more of the convictions. Womac, 160 Wn.2d at 660. A trial court has no authority to take a verdict on another charge, find that it violates double jeopardy, not sentence the defendant on it, and just hold it in abeyance for a later time. Id. at 659. The Court agreed

with Womac's attorney that it is unjust, "to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the homicide by abuse gets reversed . . . then they can sort of rise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated double jeopardy." Id. at 651.

Womac makes clear that where two separate offenses are charged, a conviction on both is punishment under double jeopardy jurisprudence regardless of a trial court's clerical decision not to "enter judgment", as it did in this case. A court's decision not to enter judgment on a conviction but hold the conviction in abeyance is simply a sleight of hand clerical maneuver without constitutional significance.

Even if the Supreme Court affirms Faagata and Turner, Walker's case is distinguishable. Unlike in Faagata, the trial court here did not conditionally dismiss the felony murder charge. Faagata, 193 P.3d at 1134. Unlike in Turner, the court here did not "vacate" the count for purposes of sentencing. Turner, 144 Wn. App. at 281. The court here did not resolve the legal status of the felony murder count in any cognizable manner, leaving it to exist in a sort of twilight zone for the indefinite future, with no mechanism to dispose of it once Walker's appeal is resolved.

This case is like State v. Elmi, where the trial court found a double jeopardy violation for convictions on attempted murder and assault of a

single person, but simply declined to impose punishment on the lesser offense rather than vacate it altogether. State v. Elmi, 138 Wn. App. 306, 321, 156 P.3d 281 (2007). Vacature of the lesser offense was the proper remedy. Elmi, 138 Wn. App. at 321. Walker is entitled to an order vacating the felony murder charge (Count II).

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial on all counts. In the event this court declines to do so, then Walker's conviction for second degree felony murder should be vacated.

DATED this 14th day of May 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39420-1-II
)	
AQUARIUS WALKER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
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TACOMA, WA 98402

[X] AQUARIUS WALKER
DOC NO. 845614
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY, 2010.

x Patrick Mayovsky

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SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY, 2010.

x Patrick Mayovsky

FILED
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MAY 17 AM 10:00
STATE OF WASHINGTON
BY [Signature]
DEPUTY