No._____

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ANDREW HOUSTON POINTER, III,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 57268-1
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 19-1-02937-6
The Honorable James Orlando, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

The Petitioner is ANDREW HOUSTON POINTER, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 57268-1, filed on April 23, 2024. (Attached in Appendix) The Court of Appeals affirmed the convictions entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Proof of intent cannot be proved beyond a reasonable doubt by evidence that is "patently equivocal" and with conclusions that are purely speculative. Did the Court of Appeals err in finding sufficient evidence to convict Andrew Pointer of first degree murder when the evidence relied upon to prove premeditated intent was patently equivocal and any conclusion that Pointer's acts demonstrated premeditation was purely speculative?

2. Did the trial court err when it gave the jury a first aggressor jury instruction when there was no evidence that Andrew Pointer made an aggressive or provoking act toward the victim prior to the act

that constituted the charged offense?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

A jury found Andrew Houston Pointer guilty of first degree premeditated murder and unlawful possession of a firearm. (CP 236-45; 13RP 1503)[1] The trial court imposed a standard range sentence totaling 480 months of confinement. (CP 387; 04/22/22 RP 159) Pointer timely appealed. (CP 397) The Court of Appeals affirmed Pointer's conviction and sentence.[2]

B. SUBSTANTIVE FACTS

1. Background

Andrew Pointer and Cassie Houston had an on-again, off-again relationship for about three years. (5RP

[1] The transcripts from trial labeled Volumes 1 thru 13 are referred to by their volume number (#RP). The remaining transcripts are referred to by the date of the proceeding.
[2] Additional procedural and substantive facts are contained in the Opening Brief of Appellant.

268; 9RP 942; 11RP 1242-43) In August of 2019, they were living together in Houston's two-story townhouse in Tacoma's Eastside. Houston's two teenage children, E.H. and A.J., also lived with them. (4RP 214-15; 9RP 932; 11RP 1243) Houston's former partner, Lawrence Andre Jeffries, is A.J.'s father. (4RP 212; 5RP 267) Jeffries hated Pointer. (8RP 778; 9RP 1029)

2. Events of August 3rd

In the afternoon of August 3, 2019, A.J., Houston, Jeffries and other family and friends gathered for swimming, boating and a barbecue at Lake Tapps. (4RP 217, 221; 9RP 934, 935; 11RP 1243-44) Pointer attended with his sons. (9RP 935; 11RP 1244) Later that night, after they returned to the townhouse, Pointer and Houston got into an argument, and Houston decided that she wanted to end the relationship for good. (9RP 946, 948; 11RP 1246)

Eventually they stopped arguing, and Houston

asked Pointer to drive her to Walmart. (9RP 954; 11RP 1247) Houston and Pointer went out the back door to the alley where Pointer's car was parked. (9RP 958; 11RP 1248) As they were getting into the car to leave, Jeffries arrived in an SUV being driven by his close friend Erik White. (8RP 755, 766-67; 9RP 955, 959, 1021)

Jeffries had been drinking. (8RP 766-67) Pointer could overhear Jeffries saying he wanted to "beat his ass." (11RP 1251) After 10 or 15 minutes, Jeffries left with White, and Houston left with Pointer for Walmart. (8RP 772; 9RP 965, 955, 1034; 11RP 1251-52)

3. Jeffries assaults Pointer

Pointer and Houston began arguing again on the drive to Walmart. (9RP 966-67) Houston told Pointer that their relationship was truly over, and told him to go back to the townhouse and move his belongings out. (9RP 967; 11RP 1253) She got out of the car and sprinted away. (9RP 966, 967) Houston then called Jeffries and

asked him to come pick her up, and told him where she was. (9RP 968)

Pointer, then accompanied by his teenage son, followed Houston in his car and tried to convince her to get back into the car so he could drive her home. (9RP 971; 11RP 1254) Pointer eventually stopped the car and got out to talk to Houston. (9RP 970; 11RP 1255) Jeffries and White arrived shortly after, and Jeffries got out of their SUV and immediately ran towards Pointer. (9RP 972; 11RP 1255) Pointer, who was having difficulty walking due to recent leg and ankle injuries and also had his jaw wired shut, was unable to reach the safety of his car before Jeffries was upon him. (9RP 948, 949, 1038-39; 11RP 1249; 1256)

Jeffries quickly overpowered Pointer and was able to take him to the ground and start hitting him. (8RP 781, 9RP 972; 11RP 1256, 1257-58) When Pointer's son tried to help his father, Jeffries punched him too. (8RP 781-82;

9RP 972, 1040)

Houston and White eventually broke up the fight and escort Jeffries back to the SUV. (8RP 781, 782; 9RP 972; 11RP 1258) Jeffries, Houston and White decided to continue to Walmart. On the way they picked Jeffries' friend, Derick Crump. (8RP 783-84; 9RP 973) The Walmart was closed, so they parked the SUV and drank, smoked, and took cocaine that Jeffries purchased from Crump. (8RP 785-86; 9RP 993) Houston also saw that Crump had brought a gun. (9RP 1044)

Meanwhile, Pointer and his son left in Pointer's car. (11RP 1258) Pointer's nose was bleeding as a result of the beating he received from Jeffries, and he used his shirt to wipe the blood. (11RP 1258, 1260) They drove to Pointer's sister's home, and Pointer cleaned himself up and changed into some clean clothes. (11RP 1259, 1260) Then he drove back to the townhouse to gather his belongings and move out, just as Houston had ordered

him to do. (9RP 967, 971; 11RP 1262)

4. The Shooting Incident

Pointer was worried that Houston and Jeffries would be waiting for him at the townhouse, so he drove through the alley and around to the front to be sure the SUV was not there. (11RP 1262) It was not, so he parked his car on the street in front of the townhouse. (11RP 1262) He rang the doorbell and A.J. let him in. (4RP 239) Pointer went inside and began gathering his belongings and taking them out to his car. (4RP 240-41; 11RP 1262) He tried to pack quickly because he was afraid of what would happen if Houston and Jeffries returned. (11RP 1263)

According to A.J. when Pointer overheard her talking to Houston he took the phone and started telling Houston that she should "come home, baby, and make sure you bring [Jeffries]. I just want to talk." (4RP 242, 243) A.J. thought Pointer sounded "off" and "weird." (4RP 244) Houston testified that Pointer told her that they

need to talk, and asked if she was with Jeffries. (9RP 997) But she testified that Pointer did not ask them to come back to the townhouse. (9RP 997)

Pointer returned the phone to A.J. and told her that he "probably won't see you for a while." (4RP 244; 11RP 1264) Then Pointer went out to his car and drove away, and A.J. texted Houston at 1:43 AM to tell her that Pointer had left. (4RP 245; 8RP 744; 11RP 1264; Ex. 173)

A short time later, White drove Houston, Jeffries and Crump back to the townhouse. (8RP 786) White parked by the front of the townhouse and Houston and Jeffries entered the townhouse through the front door. (8RP 788, 789; 9RP 978, 993-948RP 790; 9RP 995)

Jeffries showed A.J. some bruising on his hands and told her that he had beaten up Pointer. (4RP 245; 5RP 288) Then Jeffries and Houston went out to the front porch to smoke a cigarette. (4RP 245-46; 9RP 997) While they were outside, A.J. heard White's voice saying,

"he's in the back." (4RP 254; 5RP 288) She looked outside and saw White walking towards the grassy walkway next to the townhouse that leads to the back alley. (RP4 213-14, 252, 254; Ex. 196)

Houston also heard someone say, "he's in the back." (9RP 998) She told A.J. to lock the door, and she proceeded down the grassy walkway towards the alley to talk to Pointer. (9RP 998, 999) According to Houston, she saw Pointer in his car, parked in one of the spots behind the townhouse. (9RP 999) She realized Jeffries had followed behind her and was walking towards Pointer. (9RP 1001, 1002)

At trial Houston testified that she could see that Pointer was holding a gun. (9RP 1002) She immediately ran behind a car and ducked. (9RP 1002) But she heard a gunshot and claimed she could see that it came from Pointer's gun. (9RP 1002, 1003) As Houston continued to duck behind the car, she heard additional gunshots.

(9RP 1003) Then she saw Pointer duck down and get into his car, back up out of the parking spot, and drive away. (9RP 1003)

White testified that he did not get out of the SUV, but that he was able to see through the walkway between the townhouses and down to the alley from where he sat in the parked SUV. (8RP 789) He saw a car parked there with its lights still on. (8RP 791) White saw two people standing by the car, and one of them was Houston. (8RP 791) He heard Crump yell, "he's in the back alleyway." (8RP 820-21) Then he saw Jeffries walk between the townhouses to the parking area and approach Pointer and hit him. (8RP 792, 822) After this "tussle," White heard the first gunshot. (8RP 792, 852)

White saw Crump running down the walkway toward the alley, and then he heard additional gunshots. (8RP 792) He testified that he saw one muzzle flash coming from the area of the car, and additional muzzle

flashes coming from the walkway between the townhouses where Crump was standing. (8RP 793, 829, 830)

Crump was called to the stand but invoked his Fifth Amendment right against self-incrimination. He refused to testify or answer questions about the incident and his involvement in it. (10RP 1114-15)

M.J. was friends with A.J. and was present at the townhouse that night. (8RP 868) She also heard White yell, "Drew's back there." (8RP 894) She testified she opened the back door and saw Pointer and Jeffries facing each other, and saw Pointer shoot at Jeffries. (8RP 895; 9RP 921)

Several neighbors were awakened around 2:00 AM by the sound of gunfire. (5RP 338, 9RP 1085) Charmaine Scales looked out the window and saw Jeffries walking towards the parking area and to the back of Pointer's car. (9RP 1086, 1096) Scales saw Pointer's

car back up and run over Jeffries, then drive away. (9RP 1086) She could still hear gunshots as Pointer backed up and drove away. (9RP 1087-88) Neighbor Alishia Marks testified she looked out the window and saw Pointer's car back up and appear to run over a body lying on the ground. (5RP 341, 343)

5. Pointer's Testimony

After Pointer gathered his belongings and drove away from the townhouse, he noticed that he did not have his wallet. (11RP 1265) He pulled over and searched his pockets and car, but did not find it. (11RP 1265) He realized he left it in the kitchen of the townhouse. (11RP 1265) Forgetting his wallet is not an unusual thing for Pointer. (9RP 1072) But the wallet contained such important items as his social security card and health insurance card, so Pointer decided to return to the townhouse to get it. (11RP 1265; Ex. 108)

Pointer testified that he drove past the front of the

townhouse to make sure that Houston and Jeffries had not returned, then drove to the back of the townhouse to park so he could quickly go in through the kitchen door and get his wallet from the kitchen. (11RP 1266) Pointer pulled into a parking space directly behind Houston's townhouse. (11RP 1266) He noticed that some of his younger son's toys were on the back lawn, so he began to gather them and place them into his car. (11RP 1266-67)

As he was leaning inside his car, Pointer heard a "commotion" and the sound of people talking. (11RP 1260, 1269, 1270) He looked up, and saw a man wearing a hooded sweatshirt walking quickly towards him. (11RP 1270) He could see that the man was holding something in his hand. (11RP 1270) He climbed out of his car, and immediately Jeffries was next to him. (11RP 1270)

Pointer testified that Jeffries grabbed him, pinned him against the car, and struck Pointer in the head with a

pistol. (11RP 1271, 1272) Then Pointer heard gunshots, so he ducked for cover because he believed Jeffries and his friend were trying to kill him. (11RP 1273-74) As he cowered in fear, he saw Jeffries' gun laying on the ground. (11RP 1274) He picked it up and tried to get safely to his car. He could hear glass shattering nearby, and continued to hear gunshots. (11RP 1274, 1275, 1276, 1277) In fear for his life, Pointer raised the gun and fired without aiming. (11RP 1275) He was able to get into his car and drive away as the shooting continued. (11RP 1278) He later threw the gun out of the window because it was not his and he knew he was not supposed to possess a firearm. (11RP 1279)

Pointer learned the next day through a Facebook post that Jeffries had been shot and had died. (11RP 1279) He also learned that he was the primary suspect. (11RP 1279-80) His mother contacted a defense attorney, who arranged for Pointer to turn himself in to the

police. (11RP 1280) Pointer turned himself in on August 5, 2019, the day after the incident. (10RP 1200; 11RP 1280)

Pointer testified that he was upset and scared after Jeffries assaulted him, but he was not feeling angry or vengeful. (11RP 1319) He denied suggesting that Houston bring Jeffries home with her. (11RP 1342) He testified that he did not own a gun and did not bring a gun to the townhouse that night. (11RP 1281) He only returned to the townhouse to retrieve his wallet. (11RP 1381-82) He only pulled the trigger of the gun because he was afraid for his life and was trying to get away safely. (11RP 1370)

6. Physical Evidence

Several witnesses called 911 just after 2:00 AM to report the shooting, and police officers arrived shortly after. (8RP 744, 896; 9RP 984) Responding officers found Jeffries laying face-down in the parking area, with

an apparent gunshot wound to his chest and what appeared to be "road rash" on his arms. (5RP 309, 313; 7RP 602) Jeffries was transported to the hospital and pronounced dead shortly after arrival. (5RP 315, 317; 10RP 1110) The cause of death was determined to be a gunshot wound to the abdomen, with blunt trauma consistent with being hit by a car as a contributing factor. (10RP 1133)

Investigators found numerous spent .40 caliber casings next to the townhouse, and noted bullet strikes on the ground next to the townhouse and on the side of the building, and bullet damage to a car parked in the alley. (6RP 479, 482, 484-85, 505-06, 507-08, 509-10; 7RP 664-65; 10RP 1195; Ex. 73, 74, 101, 105) A bullet also entered a neighbor's home and shattered a coffee pot in their kitchen. (5RP 453; 7RP 679; 10RP 1195; Ex. 38, 41) The location of the cartridges and bullets indicated the .40 caliber gun was fired from the area by the

townhouses towards Pointer's car and the parking area and alley. (6RP 511; 10RP 1195-96) Officers found a magazine for a 9mm handgun and a single spent 9mm casing near where Jeffries had been laying. (5RP 315, 379; 6RP 511; 7RP 654-55; 10RP 1165-66; Ex. 55, 56) The bullet removed from Jeffries' body was consistent with a 9mm bullet. (10RP 1192)

A firearms expert determined that, in perfect laboratory conditions, one would see gunpowder residue on a surface if that surface was within seven feet of the firearm when it is fired. (6RP 571) If the surface is farther than seven feet from the firearm, then she would not expect to see residue. (6RP 571) She did not find any residue on Jeffries' shirt, which could indicate that Jeffries was farther than seven feet from the 9mm handgun when it fired. (6RP 565, 568, 569)

However, she acknowledged that the seven foot estimate is based on controlled laboratory conditions, and

that the residue deposit distance would be different if the 9mm handgun was fired outdoors where various weather conditions might be present. (6RP 571, 577) She also explained that residue can be easily rubbed off of an item if it is handled "roughly." (6RP 570) She did not have an opinion with respect to how far the 9mm handgun was from Jeffries' shirt when the trigger was pulled because she did not "know what happened exactly to that item of clothing … there could have been an intervening object or rough handling of the item that could affect those results." (6RP 572)

Investigators found Pointer's wallet in Houston's kitchen. (6RP 486; 7RP 663-64; Ex. 108)

V. ARGUMENT & AUTHORITIES

The issues raised by Pointer's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme

Court. RAP 13.4(b)(1) and (2). The State failed to meet its constitutional burden of proving beyond a reasonable doubt the offense of first degree murder, because the evidence presented regarding the premeditated intent to kill element was patently equivocal and speculative.

A. THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROVING THAT POINTER ACTED WITH PREMEDITATED INTENT.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

Although the evidence is viewed in the light most favorable to the prosecution on review, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). "A 'modicum' of evidence does not meet this standard. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900

(1998).

The State charged Pointer with premeditated first degree murder under RCW 9A.32.030(1)(a). (CP 173-74) A person is guilty of that offense if, "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]" RCW 9A.32.030(1)(a). "[P]remeditation is 'the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995)).

"Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." *Gentry*, 125 Wn.2d at 598. However,

while reasonable inferences are construed in favor of the prosecution, they may not rest on speculation or "arbitrary assumption." *State v. Vasquez*, 178 Wn.2d at 16 (citing *Jackson*, 443 U.S. at 319); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

"When intent is an element of the crime" it "may not be inferred from conduct that is 'patently equivocal.'" *Vasquez*, 178 Wn.2d at 7. "Rather, inferences of intent may be drawn only 'from conduct that plainly indicates such intent as a matter of logical probability.'" *Vasquez*, 178 Wn.2d at 8 (quoting *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)). For example, if the facts and circumstances fail to provide any clarity as to the defendant's intent, then the evidence is "patently equivocal." *Vasquez*, 178 Wn.2d at 14-16.

Washington's Supreme Court has identified four characteristics that are relevant to establishing premeditation: (1) motive, (2) procurement of a weapon,

(3) stealth, and (4) killing method. *Pirtle*, 127 Wn.2d at 644. In this case, the State addressed these four characteristics and argued that it had proved premeditation because (1) Pointer was angry at being assaulted and humiliated by Jeffries; (2) he procured a firearm and brought it to the scene; (3) he acted stealthily by saying goodbye to Amaiya then driving to the back of the townhouse, by changing into all black clothing, and by leaving his mobile phone at his sister's house; and (4) he encouraged Houston to bring Jeffries to the home and he shot Jeffries from a distance of more than seven feet. (12RP 1413-14, 1422-25, 1427-28; CP 50) However, the evidence relied on by the State to establish premeditated intent was all patently equivocal, and the inferences the State encouraged the jury to draw all rested on pure speculation and arbitrary assumptions.

First, the State argued that Pointer "obtained a gun" and brought it with him to the townhouse as part of a plan

to shoot Jeffries and Houston. (12RP 1424-24, 1427, 1430) But the State presented no evidence showing how, when, or why Pointer obtained the handgun.

The State told the jury that it could presume that Jeffries did not bring the 9mm handgun to the alleyway because Houston and Amaiya would have noticed a firearm in Jeffries' pocket if he had it with him inside the townhouse, and because White testified he did not see Jeffries with a gun. (12RP 1425, 1426-27, 1429-30) But this is mere speculation based on an incomplete picture and testimony of witnesses who were not wholly forthcoming. Crump refused to testify, and White and Houston never acknowledged that at least one other person in their group was armed and shooting at Pointer. The evidence also showed that Jeffries, White and Crump were out of Houston's sight and were all in the front yard or walkway before the confrontation began. (8RP 790, 791-92821; 9RP 1059, 1061, 1054-55) This evidence

shows that Jeffries also had both the motive and the opportunity to arm himself before confronting Pointer. It is therefore not a reasonable assumption that only Pointer could have brought the handgun.

Furthermore, there was no evidence to support the State's assertion that Pointer's only purpose in possessing the handgun was so that he could shoot Jeffries. There was no evidence showing how or when or why Pointer obtained the 9mm handgun. Furthermore, even if we assume Pointer brought the handgun, this is also an equivocal act. Jeffries hated Pointer, he was intoxicated, and he had earlier that night expressed that he wanted to "beat [Pointer's] ass." (11RP 1251) Pointer had already experienced a violent and unprovoked attack from Jeffries. Arming himself before returning to the apartment under these circumstances is a patently equivocal act. It is speculative and arbitrary to assume that this act was only done as part of a premeditated plan

to shoot Jeffries, rather than out of concern for Pointer's own safety.

The other acts that the State relied upon to show premeditated intent were also patently equivocal. Pointer said goodbye to Amaiya then drove to the back of the townhouse. Saying goodbye to a person when you move out of their house is normal under any circumstances. Leaving from the front of a house then returning to the back does not necessarily show an improper motive, especially when a person wants to retrieve an item that was left in a room in the back of the house. (6RP 486; 7RP 663-64; 12RP 1265, 1266; Ex. 108)

Changing into clean clothes after a day of swimming and barbecuing, and after being thrown to the ground and pummeled by another person, is not a suspicious act. Houston also changed out of her lake outfit before going to Walmart. (9RP 954) And it is not at all unusual for a person to accidentally leave their mobile phone

somewhere, especially if they are anxious or distracted by, for example, the fact that they were recently assaulted and must now quickly move all of their belongings out of their home. This behavior is patently equivocal.

The State asserted that Pointer tried to "lure" Houston and Jeffries back to the house and that he sounded "weird." (12RP 1413, 1493) This could just as easily show that Pointer was nervous after having been assaulted by Jeffries, but wanted to reconcile with Houston and needed to make peace with Jeffries in order to do this. The circumstances of Pointer's statement fails to provide any clarity as to his intent and is therefore equivocal.

Each of the individual actions that the State relied upon to show premeditated intent were patently equivocal. And together, they do not create a reasonable inference of premeditation. For example, the State asserted that Pointer left his mobile phone behind so that

he could not be tracked to the scene. (12RP 1493) But if his plan was to avoid detection, why drive a car that the neighbors recognize belongs to him (5RP 340; 9RP 1083), park directly behind Houston's townhouse on an alley lined with other homes (8RP 791, 9RP 999; Ex 196), leave his wallet behind (6RP 486; 7RP 663-64), and turn himself in to police the very next day (10RP 1200; 11RP 1280)? If, as the State also asserted, he actually left the wallet behind so he would have an excuse to return (12RP 1429, 1485-86), then why also try to avoid detection by leaving the mobile phone behind? These acts are patently equivocal, and are also contradictory. The State's inferences make no sense, and the acts the State relied upon do not unequivocally show that Pointer had a premeditated plan to kill Jeffries and Houston. No reasonable jury could infer that his actions that night show beyond a reasonable doubt that he formed and carried out a premeditated intent to kill Jeffries.

The Court of Appeals found that "the fact that after Pointer shot Jeffries, Pointer then proceeded to run over Jeffries twice with a car, viewed in the light most favorable to the State, supports a reasonable inference that Pointer acted with premeditation by inflicting multiple wounds on Jeffries. (Opinion at 10-11) But this misrepresents the evidence. Someone in Jeffries' party was shooting at Pointer as he got into his car and tried to leave the parking area and alley. (9RP 1087-88) And Jeffries was behind Pointer's car. (9RP 1086, 1096) This evidence shows that Pointer had no choice but to back up and pull forward again if he wanted to escape the gunfire, not that Pointer intentionally targeted Jeffries with his car.

The jury decides credibility, but it cannot find facts through guess, speculation, and conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In order to find that Pointer acted with premeditated intent, the jury necessarily had to speculate, guess, and resort to

conjecture to find facts supporting its determination that the State had met its burden. Pointer's first degree murder conviction must be reversed and the charge dismissed.

B. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INCLUDING A FIRST AGGRESSOR INSTRUCTION THAT WAS NOT FACTUALLY OR LEGALLY SUPPORTED.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). "When read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.

1. The trial court erred in giving the first aggressor instruction because it was not supported by the evidence.

The court's instructions to the jury included a "first aggressor" instruction. (CP 225) Defense counsel

objected but the trial court found that the instruction "would seem to be appropriate to allow the State to argue its theory of the case." (12RP 1406) The court erred in giving this instruction because the facts of the case did not warrant it and the court thereby reduced the State's burden to disprove self-defense beyond a reasonable doubt.

A defendant's use of force is lawful and self-defense can be asserted as a defense if the defendant subjectively and reasonably believes that the victim will inflict imminent harm. *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750 (2020). However, "the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation." *Grott*, 195 Wn.2d at 266 (citing *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999)). A court may give a "first aggressor" jury instruction where "there is credible evidence from which a jury can reasonably determine that the defendant

provoked the need to act in self-defense." *Riley*, 137 Wn.2d at 909.

"'[A]n aggressor instruction impacts a defendant's claim of self-defense,' so 'courts should use care in giving an aggressor instruction.'" *Grott*, 195 Wn.2d at 266 (quoting *Riley*, 137 Wn.2d at 910 n.2).

The first aggressor instruction given in this case read:

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

(Instruction 26, CP 225)

Appellate courts review de novo whether sufficient evidence justifies a first aggressor jury instruction. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011).

To support a first aggressor instruction the State

must offer credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense. *Riley*, 137 Wn.2d at 909-10. This means there must be a separate and distinct act apart from the crime. *State v. Brower*, 43 Wn. App. 893, 902-03, 721 P.2d 12 (1986) (citing *State v. Upton*, 16 Wn. App. 195, 204, 556 P.2d 239 (1976)). In cases in which the defendant undisputedly engaged in a single aggressive act, and that act was the sole basis for the charged offense, a first aggressor instruction is inappropriate. *Grott*, 195 Wn.2d at 272.

In *State v. Douglas*, 128 Wn. App. 555, 563-64, 116 P.3d 1012 (2005), the defendant pointed a gun at the victim prior to shooting to keep him from harming him and his wife and to convince the victim to leave. This Court held that it was reversible error to give a first aggressor instruction because there was no distinct wrongful or

unlawful conduct before the charged crime. 128 Wn. App. at 563- 64.

In *Brower*, the defendant was charged with second-degree assault for pulling a gun on another man, Frederick Martin. 43 Wn. App. at 895. Brower claimed self-defense and alleged that Martin approached him in a threatening manner with a knife. 43 Wn. App. at 897. At trial, the court gave a first aggressor jury instruction. 43 Wn. App. at 901. Division 3 found that this instruction was improper because there was no evidence that Brower acted to precipitate the incident-other than the charged assault:

> Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident with Mr. Martin .... If Mr. Brower was to be perceived as the aggressor, *it was only in terms of the assault itself*. Under the facts of this case, the aggressor instruction was improper.

43 Wn. App. at 902 (emphasis added) (internal citations

omitted). The aggressor instruction "effectively deprived him of his theory of self-defense" because "the jury was left to speculate as to the lawfulness of this conduct prior to the assault." 43 Wn. App. at 902.

Similarly, here the first aggressor instruction was improper because Pointer engaged in no aggressive or wrongful conduct before the act of shooting Jeffries. Pointer was simply parked in the alley behind the home he had lived in until that very evening, shortly after moving his belongings out of the home as he was asked to do by Houston. According to the State's evidence, the man who had earlier committed an unprovoked assault on Pointer approached him and Pointer shot him.

But this act was the charged act of intentional murder, and the charged act cannot also be the provoking act justifying a first aggressor instruction. The evidence established that either Pointer shot Jeffries unprovoked, or Jeffries attacked Pointer first and Pointer defended

himself. Under these facts, a first aggressor instruction was inappropriate and undermined Pointer's ability to present a defense.

The State may attempt to argue that Pointer's provoking act was his mere presence at the townhouse. This argument should be rejected as well. "[T]he 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. For the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm. *Riley*, 137 Wn.2d at 912. Jeffries may have been angry that Pointer was still present, but Jeffries did not have authority to react with force to Pointer's unthreatening presence in the alley.

2. This Court should address the instructional error for the first time on appeal.

The Court of Appeals improperly refused to address

this issue on the mistaken ground that Pointer did not meet his burden of showing the instruction was a manifest error affecting a constitutional right. (Opinion at 14-15)

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As pointed out in *Scott*, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused "'in order that the trial court may have the opportunity to correct any error.'" *Scott*, 110 Wn.2d at 686 (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). In this case, trial counsel objected to the inclusion of the first aggressor instruction, but did not elaborate on the reasons for the objection. (12RP 1406)

To demonstrate that an error qualifies as manifest

constitutional error an appellant must "'identify a constitutional error and show how the alleged error actually affected the [appellant's] rights at trial.'" *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting *State v. Kirkman*, 159 Wash.2d 918, 926-27, 155 P.3d 125 (2007)). The court looks to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. *Grott*, 195 Wn.2d at 268; *O'Hara*, 167 Wn.2d. at 98.

First aggressor instructions negate a defendant's self-defense claim "effectively and improperly removing it from the jury's consideration." *Douglas*, 128 Wn. App. at 563. Negating the defense runs counter to the constitutional requirement that the State bears the burden of disproving self-defense beyond a reasonable doubt. *Riley*, 137 Wn.2d at 910 n.2. Therefore, in this case, the error "is constitutional" because it prevented Pointer "from

fully asserting [his] self-defense theory." *State v. Stark*, 158 Wn. App. 952, 961, 244 P.3d 433 (2010).

If the claimed error is of constitutional magnitude, the court then determines whether the error is manifest. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *O'Hara*, 167 Wn.2d. at 99 (quoting *Kirkman*, 159 Wn.2d at 935). To demonstrate actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case."' *O'Hara*, 167 Wn.2d. at 99 (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935).

The instructional error in this case had identifiable prejudicial consequences. It allowed the jury to find that, by his mere presence in the alley, Pointer was the first aggressor, and nothing he did after that was justified. The improper and misleading jury instruction allowed the jury to disregard his self-defense claim entirely. The

instruction had the effect of relieving the State of its obligation to prove the elements of the crime and disprove that Pointer acted in self-defense. The error is therefore constitutional, manifest, and prejudicial. Reversal is required.

VI. CONCLUSION

This Court should accept review, and reverse Pointer's first degree murder conviction.

I hereby certify that this document contains 6,232 words, excluding the parts of the document exempted from the word count.

DATED: May 22, 2024

STEPHANIE C. CUNNINGHAM
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Attorney for Petitioner Andrew Pointer

APPENDIX

Court of Appeals Opinion in *State v. Pointer*, No. 57268-1-II

May 22, 2024 - 2:27 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Washington State
Court of Appeals
Division Two

April 23, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW HOUSTON POINTER, III, Appellant.	No. 57268-1-II UNPUBLISHED OPINION

CHE, J. — Pointer appeals his conviction for first degree murder. At trial, Pointer contended he was acting in self-defense, which would make the homicide justifiable. The trial court gave jury instructions on self-defense, first aggressor, no duty to retreat, and the definition of necessary. Pointer challenges the instructions on first aggressor and the definition of necessary, the sufficiency of the evidence to prove premeditated intent, and whether the State disproved Pointer's self-defense theory. Pointer raises additional challenges in a statement of additional grounds (SAG).

We hold (1) there was sufficient evidence to show that Pointer acted with premeditated intent, (2) there was sufficient evidence to disprove self-defense, (3) assuming without deciding the trial court erred by giving the jury instruction defining necessary, the error was harmless, and (4) Pointer did not receive ineffective assistance of counsel. Because Pointer does not meet his burden under RAP 2.5 to warrant review of unpreserved issues, we decline to reach (1) whether the first aggressor instruction was supported by sufficient evidence and (2) whether the trial court

should have sua sponte given instructions that words alone could not make the defendant the first aggressor and one for "revived" self-defense.[1]

Thus, we affirm.

FACTS

The State charged Andrew Pointer with first degree murder of Lawrence Jeffries, attempted first degree murder of Cassie Houston-Collazo, attempted first degree murder of Jeffries, first degree unlawful possession of a firearm, and first degree manslaughter of Jeffries.

I. BACKGROUND

In August 2019, Houston-Collazo lived in a townhouse with her son and her daughter, AJ. Pointer sometimes stayed at Houston-Collazo's house. Pointer and Houston-Collazo had an on-again, off-again relationship. Jeffries, AJ's dad, did not live with Houston-Collazo but maintained a close relationship with Houston-Collazo.

Pointer and Jeffries disliked each other; Houston-Collazo once said, Jeffries "hated" Pointer. 9 Rep. of Proc. (RP) at 1029. Pointer was afraid of Jeffries because Jeffries was "way bigger" than Pointer. 11 RP at 1302. Pointer and Houston-Collazo argued over Houston-Collazo's continued contact with Jeffries. Pointer was suspicious that Houston-Collazo was still romantically involved with Jeffries.

[1] "Washington has adopted the revival theory of self-defense." *State v. Dennison*, 115 Wn.2d 609, 617, 801 P.2d 193 (1990). Before the right to self-defense may be revived to justify or excuse a homicide, an aggressor must withdraw in good faith "from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." *Id.* (quoting *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973)).

On the evening of August 3, during an argument, Houston-Collazo told Pointer that he needed to leave the townhouse, but he did not. Houston-Collazo then asked Pointer to take her to the store and he agreed. Jeffries arrived just as Houston-Collazo and Pointer got into their car to leave. Houston-Collazo got out of the car and told Pointer to lock the door to avoid a conflict with Jeffries. Houston-Collazo talked briefly with Jeffries, then Houston-Collazo and Pointer left to pick up Pointer's son.

During the drive, they argued about Houston-Collazo being involved with Jeffries. When they arrived, Houston-Collazo ran away from Pointer and called Jeffries to pick her up. Eventually, Pointer found Houston-Collazo on a sidewalk and Jeffries arrived shortly thereafter with Erik White. Jeffries and Pointer got into a physical fight with Jeffries repeatedly punching Pointer.[2] Jeffries told Pointer, "Leave [Houston-Collazo] alone. I'm tired of my kids seeing their mom hurt." 9 RP at 972.

Pointer's teenage son approached the fight and Jeffries punched him. During the fight, AJ, who was on the phone with Houston-Collazo, heard Pointer say, "oh, you want to hit me in front of my son?" 4 RP at 238 Houston-Collazo and White were able to break up the fight.

Houston-Collazo left with White and Jeffries to pick up Derick Crump.[3] After the fight, Pointer and his son went to his son's house and then to Pointer's sister's house where Pointer cleaned off the blood on his face and changed into all black clothes.

[2] Prior to the fight, Pointer's jaw had been wired shut and he used a cane to walk due to a limp from a previous leg injury.

[3] Houston-Collazo saw that Derick Crump was carrying a firearm.

When Pointer arrived at Houston-Collazo's home, AJ let him in and he began packing.[4] AJ's friend, MJ, was also there. According to MJ, Pointer did not appear to be carrying a firearm.

AJ called her mom to let her know Pointer was there. Pointer grabbed AJ's phone and told Houston-Collazo that he was leaving.[5] Pointer had a weird tone when Pointer said to Houston-Collazo "come home, baby and make sure you bring your baby daddy. I just want to talk" and "nothing bad is going to happen. Just bring [Jeffries]." 4 RP at 242, 8 VRP at 891. As Pointer was leaving, he told AJ that he might not see her "for a while." 4 VRP at 244. After leaving, Pointer realized he did not have his wallet with him and needed to return to retrieve it.

Houston-Collazo and Jeffries arrived at the front door of the townhouse and talked with AJ and MJ. According to MJ, Jeffries did not appear to be carrying a gun. White and Crump remained in the car initially. Someone yelled, "he's in the back." 4 RP at 248.

II. THE SHOOTING

At trial, the witnesses testified to the facts discussed above but witnesses testified to differing accounts of the shooting.

In Houston-Collazo's account, she walked to the back alley[6] and watched Pointer exit his parked car from the driver's side. Jeffries was a little behind Houston-Collazo. Houston-Collazo saw a gun in Pointer's hand and she ran between some cars and ducked, but she saw Jeffries continue walking towards Pointer. Houston-Collazo saw the muzzle flash from Pointer's gun, and

[4] Pointer did not have a key to Houston-Collazo's house at this time.

[5] Pointer no longer had his phone with him and intended to retrieve it from a stop earlier in the evening.

[6] When looking at the front of the townhouse, there is a townhouse to the left and a grassy area to the right. There is an alley on the back side of the townhouse where residents often park.

she heard one gunshot followed by more. She saw Pointer shoot two to three times. Houston-Collazo watched Pointer get in his car.

In MJ's account, MJ was looking towards the alley while holding back AJ during the shooting. MJ saw Pointer shoot Jeffries and Jeffries fall over. MJ heard a couple shots together, a pause, and then another shot or two. MJ saw Pointer put the gun in his waist area and get in his car.

Two neighbors heard gunshots and then witnessed Pointer reverse his car over Jeffries. Pointer then ran over Jeffries again to exit the alley.

The lead detective testified that the closest he could place Jeffries to Pointer was as follows: "Pointer near the open driver's side, . . . and Mr. Jeffries near the rear passenger side." 10 RP at 1202.

A forensic scientist expected to find gunshot residue on the target if someone fired the gun at a target within seven feet in laboratory conditions. The forensic scientist clarified that there would be some variance from that estimate at the scene.

Jeffries's t-shirt did not have gunshot residue on it. But the forensic scientist did not opine as to how far the gun was from the t-shirt when it was fired, noting that there could have been rough handling of the shirt or an intervening object.

In White's account, he was alone in his car in front of the house when he saw Jeffries approach Pointer, "a little tussle [occurred] and then I heard a gunshot." 8 RP at 792. "There was like a little movement and [Jeffries] moved [Houston-Collazo] out of the way. And I saw a little movement, and I hear[d] gunshots." 8 RP at 792.

More specifically, White saw Jeffries approach Pointer and hit him. White then saw a muzzle flash from Pointer's car and then he saw a couple flashes coming from the alleyway. According to White, Jeffries never carried guns. White believed that Pointer shot Jeffries and Crump then shot at Pointer.[7]

In Pointer's account, after he left Houston-Collazo's house, he came back to get his wallet that he had left in the kitchen. He parked in the back alley because it was closer to the kitchen. Seeing his son's toys on the ground, Pointer loaded the toys by leaning into the rear-driver-side seat. As he leaned into the seat, Pointer saw someone wearing a hoodie approach with something in his hand.

Pointer stepped out of the car and Jeffries "was right there." 11 RP at 1270. Pointer backed up when he saw Jeffries. Jeffries grabbed Pointer, pinned him against the car, and started "swinging" a gun in his hand to pistol-whip[8] Pointer. 11 RP at 1273. Immediately after Jeffries struck Pointer on his head, the "shooting starts, and I start ducking." 11 RP at 1273. Pointer sought cover near the back of his car when he noticed a gun on the ground and picked it up. Pointer heard glass breaking and he fired the gun. Pointer claimed, "I didn't aim at nobody. I wasn't trying to shoot nobody." 11 RP at 1275. Pointer then jumped in his car and drove away amid more gunfire; he did not recall striking anyone with his car. Later, Pointer tossed the gun out of the car window.

[7] Crump invoked his Fifth Amendment right against self-incrimination and did not testify.

[8] "Pistol-whip" is defined as "to beat with a pistol." WEBSTER'S THIRD NEW INT'L DICTIONARY 1724 (1993).

III. JURY INSTRUCTIONS

As part of the self defense instructions, the State asked the trial court to give a first aggressor instruction and Pointer objected. Pointer did not elaborate on the legal basis for his objection.

The trial court gave jury instructions on self-defense, actual danger is not necessary, no duty to retreat, and the following first aggressor instruction:

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

Clerk's Papers (CP) at 25. The no duty to retreat instruction stated,

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

CP at 229. The actual danger not necessary instruction stated, "Actual danger is not *necessary* for a homicide to be justifiable." CP at 228 (emphasis added).

The trial court also gave an instruction defining necessary as "under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended." CP at 227.

In closing argument, Pointer argued "For Mr. Pointer it happened quickly, and it is life and death. He said I turned around. He's there. He's got me. I can't yell. I can't run." 12 RP at

1460. The jury convicted Pointer of first degree murder of Jeffries and first degree unlawful possession of a firearm.[9] Pointer appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

When the defendant challenges the sufficiency of the evidence underlying their conviction, we determine whether any rational juror could have found the essential elements of the charged crime beyond a reasonable doubt based on the evidence presented at trial. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015). In making this determination, we view the evidence in the light most favorable to the State. *Id*. Additionally, when the defendant makes a sufficiency of the evidence challenge, they admit the truth of the State's evidence. *Id*.

All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant when challenging the sufficiency of the evidence in a criminal case. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Notaro*, 161 Wn. App. 654, 671, 255 P.3d 774 (2011). We review de novo sufficiency of the evidence challenges. *State v. Heutink*, 12 Wn. App. 2d 336, 359, 458 P.3d 796 (2020).

"'[S]pecific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.'" *Notaro*, 161 Wn. App. at 671 (quoting *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). Relatedly, "[w]e do not infer criminal intent from evidence that is patently equivocal." *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318

[9] The jury found Pointer not guilty of attempted first-degree murder as to Houston-Collazo.

(2013). We defer to the trier of fact's determinations as to conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Notaro*, 161 Wn. App. at 671.

A. *Premeditated Intent*

Pointer argues that his first degree murder conviction should be reversed and dismissed because the State failed to prove that he acted with premeditated intent. We disagree.

"A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a). "'Premeditation' is 'the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of . . . deliberation, reflection, weighing or reasoning for a period of time, however short.'" *Condon*, 182 Wn.2d at 315 (internal quotation marks omitted) (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995)). Premeditation involves "more than a moment in point of time." RCW 9A.32.020(1).

"Factors relevant to establish premeditation include motive, procurement of a weapon, stealth, and method of killing." *State v. Aguilar*, 176 Wn. App. 264, 273, 308 P.3d 778 (2013). Inflicting multiple wounds or shots supports a premeditation finding. *Notaro*, 161 Wn. App. at 672.

Here, viewing the evidence in the light most favorable to the State, a rational juror could find premeditation beyond a reasonable doubt. As to motive, Jeffries had physically assaulted Pointer earlier in the day in front of Pointer's son, when Pointer had his jaw wired shut and was using a cane to walk. Jeffries also punched Pointer's son during the same incident. Even before the aforementioned incident, Pointer and Jeffries disliked each other. And Pointer had a suspicion that Houston-Collazo was romantically involved with Jeffries, which irritated him.

Pointer told Houston-Collazo to bring Jeffries to the townhouse shortly before the murder in a weird tone of voice indicating "nothing bad is going to happen." 4 RP at 242. Pointer admits that this invitation could be probative of his desire to harm Jeffries. Although contrary inferences may also be drawn—like Pointer invited Jeffries for reconciliation—a reasonable inference from the evidence viewed in the light most favorable to the State is that Pointer invited Jeffries to kill him.

As to procurement of a weapon, Pointer did not appear to have a gun on him when he asked Houston-Collazo to bring Jeffries to the townhouse in front of AJ. But Houston-Collazo, as she walked to the back alleyway, saw a gun in Pointer's hand as he exited his car. Moreover, White testified that Jeffries did not carry a gun and MJ did not see Jeffries carrying a gun that evening. A reasonable inference from such evidence, viewed in the light most favorable to the State, is that Pointer procured the gun before arriving in the back alley.

As to stealth, Pointer arrived at Houston-Collazo's house in all black clothing without his phone, which could be used for tracking. Pointer parked in the back alley instead of parking in front of the house as he had earlier in the evening. Additionally, Pointer told Houston-Collazo to bring Jeffries to the house, that he just wanted to talk, and that nothing bad would happen. Thus, reasonable inferences from the evidence viewed in the light most favorable to the State and most strongly against Pointer undermine Pointer's benign theory of returning to the house for his wallet and instead supports the reasonable inference that Pointer returned with malicious intentions toward Jeffries.

As to method of killing, under *Notaro*, the fact that after Pointer shot Jeffries, Pointer then proceeded to run over Jeffries twice with a car, viewed in the light most favorable to the State,

supports a reasonable inference that Pointer acted with premeditation by inflicting multiple wounds on Jeffries.

Pointer argues that the State relied on only patently equivocal evidence to prove premeditation, and so, the jury relied on only speculation to find premeditation. It is true that much of the aforementioned evidence could support different inferences. But viewing the evidence as a whole, drawing all reasonable inferences in the light most favorable to the State, and admitting the truth of the State's evidence, we disagree that the evidence is patently equivocal. Given the evidence presented at trial, a rational juror could find beyond a reasonable doubt that Pointer acted with premeditated intent.

B. *Self-Defense*

Pointer argues that the State failed to disprove that he acted in self-defense. We disagree.

If the defendant raises some credible evidence that their actions constituted self-defense under the circumstances, the State bears the burden to disprove self-defense beyond a reasonable doubt.[10] *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750 (2020). RCW 9A.16.050 provides that a homicide is justifiable under two circumstances:

> (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

[10] Justifiable homicide is not synonymous with the phrase self-defense. *State v. Moreno*, 26 Wn. App. 2d 681, 693 n.2, 529 P.3d 431 (2023). But a justifiable homicide defense falls under the broader rubric of self-defense. *Id.*

> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.[11]

Our Supreme Court has stated the conceptual distinction between these two circumstances as follows:

> RCW 9A.16.050(1) contemplates justifiable homicide where the defendant reasonably fears the person slain is *about to* commit a felony upon the slayer or inflict death or great personal injury, and there is *imminent* danger that the felony or injury will be accomplished. *See* 9A.16.050(1). In contrast, RCW 9A.16.050(2) considers a homicide justifiable where the defendant acted in *actual resistance* against an attempt to commit a felony on the slayer.

State v. Brightman, 155 Wn.2d 506, 520-21, 122 P.3d 150 (2005).

To have a valid claim of self-defense, the slayer's use of deadly force must be necessary. *Id*. at 521. "'Necessary' means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended." RCW 9A.16.010(1). When the defendant employs lethal force, the force is only necessary when used to defend against a threat to life or great bodily harm. *Brightman*, 155 Wn.2d at 522. Additionally, if the defendant is the first aggressor and provokes the altercation, the defendant generally cannot invoke self-defense. *Grott*, 195 Wn.2d at 266.

Here, the State presented evidence of Pointer and Jeffries' tumultuous and assaultive relationship. The State presented testimony that earlier in the evening, Jeffries beat up Pointer and punched Pointer's son in the same incident. The State also presented evidence that Pointer

[11] RCW 9A.16.050(2) "require[s] the slayer to reasonably fear great personal injury before using deadly force." *State v. Brown*, 21 Wn. App. 2d 541, 564, 506 P.3d 1258, *review denied*, 199 Wn.2d 1029 (2022).

returned to Houston-Collazo's house with the gun, shot Jeffries, and then ran over Jeffries twice. Generally, Jeffries did not carry guns, and Jeffries did not appear to be armed that evening.

Moreover, the State presented evidence that there was some distance between Pointer and Jeffries when Pointer shot him. The State also presented evidence suggesting that the additional gunfire that night likely originated from Crump, that Crump fired at Pointer after Pointer shot Jeffries. Viewing the evidence in the light most favorable to the State, Jeffries was not armed, Pointer was armed with a firearm, and Jefferies was not close to Pointer when Pointer shot Jeffries.

Also, White testified that as Jeffries approached Pointer, "[t]here was like a little movement and [Jeffries] moved [Houston-Collazo] out of the way. And I saw a little movement, and I hear gunshots." 8 RP at 792. Such testimony suggests that Jeffries took protective action as to Houston-Collazo because, as other evidence shows, Pointer was pointing the gun at the time of Houston-Collazo and Jeffries's initial approach and that Pointer fired the gun before other shots were fired.

As shown in the premeditation section of this opinion, the State presented evidence that Pointer had motive, procured a weapon, and employed stealth. And, as discussed above, the State also presented evidence that there was some distance between Pointer and Jeffries and that he ran over Jeffries twice after shooting Jeffries. Pointer maintained that he acted in justifiable self-defense. But, the evidence showed, and the jury found, premeditated murder. Although Pointer had a different version as to what happened, we cannot reweigh the evidence or evaluate the credibility of witnesses. *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793 (2012).

We hold that the State presented sufficient evidence to prove beyond a reasonable doubt that Pointer did not act in self-defense when he shot Jeffries.

II. JURY INSTRUCTIONS

A. *Pointer Failed to Show That the Alleged Error in Giving the First Aggressor Instruction Was an Error of Constitutional Magnitude*

Pointer argues that the trial court erred by giving the first aggressor instruction as it was not supported by the evidence. The State argues that this issue is unpreserved and Pointer failed to show that it warrants review under RAP 2.5(a). We agree with the State.

To preserve a jury instruction challenge for appeal, the appellant must apprise the court of the precise legal reason for the objection. *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). We may refuse to review unpreserved claims of error. RAP 2.5(a). "However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right." RAP 2.5(a). The party urging review of the unpreserved error bears the burden of showing that the error is of constitutional magnitude, and if so, that the error is manifest. *Grott*, 195 Wn.2d at 267.

Here, the trial court noted that the self-defense instructions would need to include the first aggressor instruction. Initially, Pointer agreed with the trial court, but later, Pointer objected to the first aggressor instruction. Pointer did not provide a legal reason for the objection. Under *Salas*, this is insufficient to preserve the issue for appeal. As such, Pointer must establish that giving the first aggressor instruction was a manifest error affecting a constitutional right.

We determine on a case-by-case basis whether erroneously given first aggressor instructions are errors affecting a constitutional right. *Grott*, 195 Wn.2d at 268. We consider how

the alleged error compares to other instructional errors, like directing a verdict, improperly shifting the burden of proof, or not requiring a unanimous verdict. *Id*.

On appeal, Pointer asserts that erroneously issuing a first aggressor instruction is of constitutional magnitude because it prevented Pointer from arguing his theory of the case. Pointer does not explain how giving the first aggressor instruction prevented him from arguing his theory of the case, especially when the trial court gave the jury instructions on self-defense and no duty to retreat. He cannot meet his burden with such a passing argument.

B. *The Instruction Defining "Necessary"*

Pointer also argues that the trial court erred by failing to make clear that there is no duty to retreat when acting in self-defense because the court included an instruction defining "necessary." Br. of Appellant at 57. The State argues that Pointer waived the right to challenge the jury instructions by failing to object below. Assuming without deciding that error occurred, and that the error is of constitutional magnitude, we conclude it was harmless beyond a reasonable doubt.[12]

Pointer argues that it was error to include the instruction defining necessary. Here, Pointer must establish that giving the instruction was a manifest error affecting a constitutional right. RAP 2.5(a), *Grott*, 195 Wn.2d at 267.

Where the instructional error relieves the State of its burden to disprove self-defense, it is a manifest constitutional error. *State v. O'Hara*, 167 Wn.2d 91, 100-02, 217 P.3d 756 (2009). In contrast, failure to define individual terms in the jury instructions does not constitute a manifest

[12] Pointer proposed a jury instruction using the word necessary, but did not propose an instruction defining necessary. Pointer agreed to the instruction defining necessary used by the court.

constitutional error. *Id*. at 103. "If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis." *O'Hara*, 167 Wn.2d at 98.

Pointer maintains that this alleged error is of constitutional magnitude because it eliminated the State's burden to disprove self-defense because a juror could view retreat as a reasonable alternative to force.

Jury instructions are sufficient when, read as a whole, they "correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *Id*. at 105. In determining the legal sufficiency of the jury instructions, we engage in de novo review. *Heutink*, 12 Wn. App. 2d at 348.

We note that there is a presumption that the jury follows the court's instructions. *State v. Sutton*, 18 Wn. App. 38, 44, 489 P.3d 268 (2021). Misstating the law of self-defense is a constitutional error that we presume is prejudicial. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). When the instructions are inconsistent, our duty is to determine if the inconsistent instructions misled the jury about its function and duties under the law. *Id*. at 478.

Assuming without deciding that the trial court erred when it issued the instruction defining necessary, such error was harmless beyond a reasonable doubt. The State bears the burden to show the error was harmless beyond a reasonable doubt, which is shown only when the error "'in no way affected the final outcome of the case.'" *Id*. (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

Here, there was overwhelming evidence that Pointer engaged in the premeditated murder of Jeffries, as discussed above. Pointer argues that the "necessary" instruction "could easily mislead jurors into disregarding the 'no duty to retreat' instruction." Br. of Appellant at 61. But

we disagree that the instruction would mislead the jurors in such a manner. We presume that the jury follows the court's instructions. *Sutton*, 18 Wn. App. at 44. The trial court gave an instruction that stated, "It also is your duty to accept the law from my instructions. . . . The law is contained in my instructions to you. . . . [The instructions] are all important." CP at 198-200. And the trial court expressly instructed the jury that "[t]he law does not impose a duty to retreat." CP at 229. Given the trial court's instructions to the jury as a whole, including the no duty to retreat instruction, a reasonable juror would not have been misled to disregard the no duty to retreat instruction.

Additionally, under the entirety of the jury instructions, Pointer was able to argue his theory of the case that shooting Jeffries was justifiable self-defense because he could not retreat: "it happened quickly, and it is life and death. He said I turned around. He's there. He's got me. I can't yell. I can't run." 12 RP at 1460. Under these circumstances, we conclude that any instructional error was harmless beyond a reasonable doubt.

III. STATEMENT OF ADDITIONAL GROUNDS

A. *Failure to Issue Certain Jury Instructions*

Pointer argues that the trial court erred in not sua sponte giving (1) an instruction that words alone could not make the defendant the first aggressor and (2) a revived self-defense instruction.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). We view the evidence in the light most favorable to the requester when determining if a party is entitled to a

jury instruction—whether such an instruction is supported by substantial evidence. *State v. Fleeks*, 25 Wn. App. 2d 341, 352, 523 P.3d 220 (2023), *review denied*, 1 Wn.3d 1014 (2023).

i. *Words Alone Not Adequate Provocation for Defendant to Be Aggressor Instruction*

Pointer did not request an instruction specifying that words alone cannot make him the first aggressor. Thus, Pointer cannot raise this issue on appeal unless he shows that the lack of the instruction constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Pointer does not address this burden and, therefore, fails to show he is entitled to review of this unpreserved issue.

ii. *Revived Self-Defense Instruction*

Pointer did not request a revived self-defense instruction below. Thus, Pointer cannot raise this issue on appeal unless he shows that the lack of the instruction constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Pointer does not address this burden and, therefore, fails to show he is entitled to review of this unpreserved issue.

B. *Ineffective Assistance of Counsel*

Lastly, Pointer argues that he received ineffective assistance of counsel because his counsel failed to request a "revived" self-defense jury instruction. SAG at 2. We disagree.

To establish ineffective assistance of counsel, the defendant must show their counsel deficiently performed and that such performance prejudiced them. *Fleeks*, 25 Wn. App. 2d at 351. To show deficient performance, the defendant must show their counsel performed below the objective standard of reasonableness. *Id.* We presume counsel performed effectively. *Id* at 352. To overcome that presumption, the defendant must show counsel lacked a legitimate strategic or tactical reason for the challenged conduct. *Id*.

If the defendant is the first aggressor, their right to self-defense may be revived when they withdraw "from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action." *Id*. at 353 (quoting *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973)). If a reasonable juror could find that the defendant withdrew from the confrontation, a revived self-defense instruction would have been justified. *State v. Dennison*, 115 Wn.2d 609, 613, 801 P.2d 193 (1990).

At trial, Pointer testified that Jeffries attacked him with a pistol. In closing, Pointer emphasized that he could not escape, run away, or yell. Pointer's theory is not predicated on Pointer being the first aggressor, but the opposite. In light of the testimony, Pointer's counsel reasonably relied on the self-defense theory—not revived self-defense. Therefore, we hold that Pointer's counsel was not deficient for not requesting a revived self-defense instruction and not doing so was consistent with the defense strategy.

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Lee, J.

Cruser, C.J.