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Printer Friendly View

• A rock that forms from cooling lava is classified as an extrusive igneous rock.

• During respiration carbon compounds synthesized by living organisms are mostly converted into which form of carbon? CO2.

• Metamorphic rock is made by which one of the following dynamic processes? subjection of rocks to heat and pressure.

• Carbon comes from decayed organic matter which becomes buried and under the right conditions can change into fossil fuels.

• Basalt is an igneous rock with very small crystals. It most likely forms as a result of cooling of lava above ground.

• A conglomerate is a rock that forms as a result of compaction and cementation.

• A rock that forms when magma hardens beneath Earth's surface is called an intrusive igneous rock.

• Rocks at the earth's surface are continually broken down, compacted, and cemented together. What is the name of the resultant type of rock? Sedimentary.

• Fossils are only found in sedimentary rocks.

• Granite is an igneous rock with large crystals. It most likely forms by cooling of magma underground.

• What rock-forming process occurs when hot magma forces its way into rock? contact metamorphism.

• Yosemite's Half Dome is the top of a huge underground rock that was exposed by erosion. Half Dome formed slowly beneath Earth's surface, so it is considered an intrusive igneous rock.

• When magma or lava cools and hardens it forms igneous rocks.

• Which of the following statements is most accurate of photosynthesis and respiration? Both involve carbon dioxide and water as either a reactant or product.

• Carbon moves through Earth's major spheres by way of the carbon cycle.

• A rock sample is stratified, finely textured, and contains shell fragments. This rock sample is most likely classified as which of the following types of rocks? Sedimentary.

• Quartz crystallizes at 1650 degrees C, and hematite crystallizes at 900 degrees C. A scientist finds quartz in a magma sample at 1200 degrees C, but no hematite. Later, at 500 degrees C, the same sample has both quartz and hermatite. The most likely explanation for this mineral formation sequence is that the mineral crystals form at different temperatures.

• Most metamorphic processes take place a few kilometers below Earth's surface.

• All of the energy that drives Earth's rock cycle comes from Earth's interior and the sun.

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF THE STATE OF FLORIDA

JOHN DOBBS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	DCA CASE NO. 5D07-1057

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KEVIN R. HOLTZ
Assistant Public Defender
Florida Bar No. 0161624
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
Phone: (386) 252-3367

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

In this brief, the following symbols are used to reference the nine volume record on appeal.

"H" references transcripts of the adversary preliminary hearing on, before Judge in Volume I;

"S" references transcripts of the, sentence hearing before Judge Lisa Munyon in Volume I;

"R" refers to court records and documents in Volumes I, II and III;

"T" refers to trial transcripts in the jury trial before Judge Lisa Munyon in trial transcript Volumes I, II, III, IV, V and VI.

STATEMENT OF THE CASE

Appellant, John Dobbs ("Dobbs"), asserted self-defense in a fight that occurred after closing hours outside an adult entertainment club in Orange County, Florida. (R 171-173, Vol. I; R 198-252, Vol. II) The State charged Dobbs in a five count information filed in the Circuit Court, for the Ninth Judicial Circuit, Orange County, Florida, with one count of second degree murder (with a weapon)[1], two counts of aggravated battery with a weapon or causing great bodily harm[2], one count of aggravated assault with a firearm[3]. At trial, Dobbs was acquitted of count five, shooting from a vehicle. (R 179-183, Vol. I; R 362, Vol. II)

Judge Lisa Munyon, presided over the jury trial held where the State presented various witnesses, including the fight participants, Andre Blanco, Frank Gotay, Anthony Riollano. In addition, the State presented photographs and

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[1] Count one against victim William Troy, in violation of Sections 775.087(1), and 782.04(2), Florida Statutes (2006), a life felony.

[2] Count two against victim Francisco Gotay, in violation of Section 775.084(1)(a)(1) and 775.084(1)(a)(2), Florida Statutes (2006); count two against victim Andre Blanco, in violation of Section 775.084(1)(a)(1) and 775.084(1)(a)(2), Florida Statutes (2006), both second degree felonies.

[3] Count four against victim Hanzel Holiday, in violation of Sections 775.087(2) and 784.021(1)(a), Florida Statutes (2006), a third degree felony.

physical evidence of Dobbs pocket knife used in the fight. (T 325-330, Vol. III) The defense presented four witnesses, including John Dobbs. At the close of Dobbs' case, Judge Munyon entertained arguments and denied Dobbs' counsel renewed motion for judgment of acquittal. (T 500-501, Vol. IV; T 626-633, Vol. IV, Vol. V) In the charge conference, Dobbs' counsel objected to the initial aggressor portion of the forcible felony instruction for all four victims citing a lack of evidence to issue the instruction. (T 655, 658, 666, 669, Vol. V) The court overruled the objection and included this instruction in the jury charge. (R 330-331, 334-336, 338-340, 343-345, Vol. II; T 655, 658, 666, 669, Vol. V) The jury returned guilty verdicts for second degree murder (with special finding of use of weapon), two counts of aggravated battery, one count of aggravated assault (and special jury finding Dobbs used a firearm), and not guilty for shooting a firearm from a vehicle. (R 352-358, Vol. II)

The trail court adjudicated appellant guilty of Second Degree murder, two counts of aggravated battery and one count of aggravated assault with a firearm. The court ordered all sentences served concurrently and sentenced Appellant in the second degree murder with a weapon to life in the department of corrections; fifteen year prison sentences in each of the aggravated battery counts, and five years prison and a three year mandatory minimum for aggravated assault with a

weapon and 135 days credit for time served. (R 363-364, 382-384, Vol. II; S 168, Vol. I)

Judge Munyon denied Dobbs' motion for new trial and motion for a judgment notwithstanding the verdict. (R 402-408, Vol. III) Appellant filed a timely notice of appeal and the Public Defender was appointed for the purposes of appeal. (R 409, Vol. III)

STATEMENT OF THE FACTS

After attending a professional basketball game on October 24, 2006, and visits to several adult entertainment clubs, Andre Blanco, Francisco Gotay, Anthony Riollano and William Troy, completed the night in the VIP section of the Doll House, another adult entertainment establishment. (T 156-159, 186, 193-194, Vol. I; T 212-214, 219-220, 239, Vol. II) John Dobbs, a 5-11, 170 pound thirty-two-year-old male lived in Georgia, but visited Orlando with his girlfriend Deanna Washington to see his kids. (R 172, Vol. I; R 246, T 529, 539, 577-578, Vol. IV; T 624, Vol. V) Dobbs and Deanna arrived at the dollhouse a half hour before the club closed at 2:00 a.m., on October 25, 2006, and had one beer.

At closing time, the lights were turned on and patrons told to exit. Andre Blanco exited first of four and walked to his Chrysler vehicle followed by Frank Gotay while William Troy and Anthony Riollano remained in the club to pay the bill. (T 159, 195, Vol. I T 221-223, Vol. III) After Dobbs and Washington arrived, but before closing, William Troy was rude, obnoxious and interjected comments into a conversation between Deanna Washington and a female waitress or dancer. (H 24, Vol. I; T 196, Vol. I; T 200, 215, Vol. II) Washington and Dobbs provided the only details of the discussions between Deanna Washington, John Dobbs and William Troy inside the club. Others later heard yelling between

Dobbs and Washington, but others stated there were no problems in the club. (T 160, 196-197, Vol. I; T 222-225, 240, 264, Vol. II; T 540-542, 580-582, Vol. IV) With William Troy and friends in the roped off VIP section of the business, Dobbs did not see William Troy with Blanco, Gotay or Riollano. (T 544-545, Vol. IV)

Blanco was impeached on the number of felony convictions and admitted convictions for six felonies and was on probation. Gotay was a twice convicted felon and William Troy, registered a blood alcohol level of .183 at the time of the his death. (T 190-191, Vol. I; 211, Vol. II; T 497, Vol. IV) There were inconsistent versions of events in the parking lot between the two alleged victims, Andre Blanco, Francisco Gotay, witness Anthony Riollano and the State's independent witnesses, Justin Idle and Phillip Westfall. (T 156, 193, Vol. I; T 219, Vol. II; T 250, 284. Dobbs and Washington testified as they walked to their vehicle in the South part of the parking lot, William Troy's group stood by Blanco's parked Chrysler and yelled "pussy" to Dobbs and stated he needed security to escort him to his car. (T 530-531, 545, 583, Vol. V) The security guard comments were for Justin Idle, a valet worker who walked close to Dobbs and Washington en route to their vehicle. Idle, cleared the lot for female employees safety in the parking lot. Idle also heard the crude remarks and

comments made to Dobbs and Washington. (T 252-253, 266-268, Vol. II)

Dobbs and Ms. Washington reached the vehicle, parked away from the Club past Blanco's Chrysler approximately forty feet away. Washington got in her seat and Dobbs entered the driver side when Washington informed Dobbs one of the males, Andre Blanco, was walking toward their car. (T 532, 546, 568, Vol. IV) Idle and Westfall confirmed Blanco walked thirty feet to Dobbs vehicle. (T 290, 301-302, Vol. III)

The victims and Anthony Riollano testified Dobbs got into his vehicle and drove around the parking lot then parked four or five parking spots from Blanco's vehicle. (T 161, 179, 182, Vol. I; T 202, 225-226, Vol. II) Idle's testimony that Dobbs never drove his car in the parking lot corroborated Dobbs and Washington's testimony. (T 268, 307, Vol. III)

Dobbs exited his car, told Deanna to stay in the vehicle and walked around by the trunk when Blanco arrived. (T 532, 555, Vol. IV) Dobbs testified Blanco removed his shirt while walking over, threw the first punch hitting Dobbs in the ear. Dobbs punched back and then took on Gotay, who threw two punches. (T 533, 584-585, Vol. IV) Dobbs testimony that the fight occurred behind the Acrua was supported by state witnesses, Justin Idle, Phillip Westfall (T 272, 301, Vol. III), and Orange County crime scene investigator Susan Mears. Mears opined ,

based on 22 drops and splatters of blood on the rear trunk and fender of the Acura, the fight occurred at the rear passenger side of the Acura. (T 343-344, 347-348, Vol. III; T 568, Vol. IV) After the incident, Mears placed a cone on the parking lot to represent Dobbs vehicle and cone 10 to represent Blanco's vehicle location. There were approximately eight parking spots between the two vehicles. (T 343-344, 374-376, Vol. III) Within the two cones contained all untested blood drops on the parking lot. The distance of the blood covered pavement between the two vehicles was fifty-five feet. (T 513-515, Vol. IV)

Blanco testified that Dobbs exited his vehicle, walked up to Blanco at his own vehicle and hit him in the face with no exchange of words. (T 161, 169, 184, 187, 197 Vol. I; T 203, 226 Vol. II; 288 Vol. III). According to Blanco, he spun around, caught himself and went back to Dobbs, grabbed him by the neck and punched him. (T 162, 182, Vol. I) Riollano stated that he did not see the first punch between Dobbs and Blanco, but saw a second person, Gotay, go to Dobbs and throw a punch and enter the fight within one to five seconds of the initial punch on Blanco. (T 228, Vol. II) Gotay admitted he approached Dobbs and threw a punch. (H 31-32, 37, Vol. I; T 188, Vol. I; T 204-205, 291, Vol. II; T 585-586, Vol. V) Riollano walked with William Troy and testified they were about fifteen feet away when the altercation started. (T 226, Vol. II)

Blanco, who received three stab injuries, did not mention when he was stabbed in the chest, but did testify Dobbs went and stabbed Frank Gotay. (T 165-166, 168, 182, Vol. I) This contradicts Frank Gotay's testimony that he approached and swung at Dobbs. Dobbs then punched Gotay, and stabbed him in the face and chest twice at some point. (T 204-205, Vol. II; T 585, 587-593, Vol. IV) The only state presented testimony of William Troy[4]'s involvement in the fight was that Blanco saw Troy and Dobbs scuffling together. (T 163, 182, Vol. I) Dr. Hansen stated that William Troy's cause of death was stab wounds, with three to the front torso and one in the arm. (T 485-492, Vol. II) Hansen stated that she is unable to determine the length of time, but that Troy would have become incapacitated from the stab wounds from seconds up to a minute. (T 495, Vol. IV)

Deanna Washington exited the vehicle and fought in an attempt to stop the individuals from attacking John Dobbs. (T 535, 551, 587-588, Vol. IV) Dobbs testified he removed his pocket knife from his back pocket when he heard someone say to get the girl. (T 588-592, 598, Vol. IV) Riollano testified he pulled Deanna off his friends back that was fighting with Dobbs and tossed her aside. (T 231, 240, Vol. II) Riollano entered From the side while Dobbs fought with another friend. Riollano grabbed Dobbs by the shirt and punched him three

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[4] William Troy had a blood alcohol level of .183. (T 497, Vol. IV)

to four times with his fists in the neck and back of the head. He then testified everything stopped. (T 231-232, 241-242, Vol. II; T 293-294, Vol. III; T 590, Vol. IV) Both Deanna and Dobbs testified Dobbs was on the ground being punched when he began swinging the knife to get people off of him. (T 550, 557, 592-593, 613, Vol. V) Anthony Riollano, who held Dobbs from the side, was the only participant not cut in the fight. (T 232, 241-242, Vol. II; T 591-592, Vol. IV) With the chance, Dobbs jumped in his Acura and left the lot with Deanna Washington (T 163, 173, Vol. I; T 209, 235, Vol. II; T 296, Vol. III; T 593-594, Vol. I) is when people in the fight realized they had been stabbed and fell down. (T 162, 170-174, Vol. II; T 217, 237, Vol. III; T 554, Vol. IV)

The victims describe all of the fights with John Dobbs as individuals fighting one on one. (T 183-184, Vol. I; T 208, 216, 229-230, Vol. II; T 260-261, Vol. III) Idle and Westfall stated there was a group surrounding Dobbs and he was taking punches throughout the entire fight. (T 255-261, 270, 278, Vol. III)

As Dobbs drove away, an employee of the gentlemen's club across the street, followed and struck the Acura with his truck in an attempt to stop the vehicle. (T 436-438, 594-595, Vol. IV) When Holiday pulled up next to the vehicle, he saw a gun pointed out of the drivers side window and stated he saw two shots fired before he broke off the chase and returned to the Dollhouse. (T

439-441, Vol. IV) Dobbs was stopped shortly thereafter by police, who stated Dobbs appeared shaken but cooperative as they recovered a bloody knife and handgun in the center console that were admitted as evidence. (T 325, 327, 376-377, Vol. III)

SUMMARY OF ISSUE/STANDARD OF REVIEW

POINT I: The denial of a judgment of acquittal and legal sufficiency of the evidence is subject to de novo review. *State v. Smyly*, 646 So. 2d 238 (Fla. 4th DCA 1994); *Tibbs. v. State*, 397 So. 2d 1120 (Fla. 1981). The trial court erred to deny the judgment of acquittal when defendant proved a prima facie case of self-defense and the State failed to rebut that with evidence and proving beyond a reasonable doubt that defendant did not act in self-defense.

POINT II: A trial court's decision on jury instructions is reviewed under the abuse of discretion standard. *Bozeman v. State*, 714 So. 2d 570 (Fla. 1st DCA 1998). Incomplete and misleading jury instructions on elements of crime and are reviewed for fundamental error. *Hubbard v. State*, 751 So. 2d 771 (Fla. 5th DCA 2000). The initial provocation portion of the forcible felony instruction includes a misstatement of the law requiring a duty to retreat that is contrary to Florida law and constitutes fundamental error when Dobbs was involved in a fight with multiple individuals who continued to attack Dobbs and escalate the violence he faced. This standard jury instruction required Dobbs exhaust every reasonable means of escape against individuals he had not yet interacted with. This is contrary to Florida law.

ARGUMENT

THE TRIAL COURT ERRED TO DENY DOBBS' RENEWED MOTION FOR JUDGMENT OF ACQUITTAL BASED ON INSUFFICIENT EVIDENCE TO REBUT DOBBS' SELF-DEFENSE CLAIM BEYOND A REASONABLE DOUBT AND WAS INSUFFICIENT TO SUPPORT THE VERDICT.

While the defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove beyond a reasonable doubt that the defendant did not act in self-defense. *Brown v. State*, 454 So. 2d 596, 598 (Fla. 5th DCA 1984). If the defendant establishes a prima facie case of self-defense, the State must overcome the defense by rebuttal, or by inference in its case-in-chief. *State v. Rivera*, 719 So. 2d 335, 337 (Fla. 5th DCA 1998)

The concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal. *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1980). An appellate court, in reviewing the record in a case where such defense

is interposed, is required to heed the rules that "[t]he question of self defense is one of fact, and is one for the jury to decide when the facts are disputed." *Dias v. State,* 812 So. 2d 487 (Fla. 4th DCA 2002). "A motion for judgment of acquittal should not be granted unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1973).

If the State fails to sustain this burden of proof, the trial court is duty-bound to grant a judgment of acquittal in favor of the defendant. *Brown*, 454 So. 2d at 599. Here, the State did not present sufficient evidence to overcome Mr. Dobbs' self-defense claim. In fact, the testimony of State witnesses, physical evidence of blood splatters and drops, supported Mr. Dobbs claim that he was attacked outside his vehicle and responded in self-defense. In Dobb's judgment of acquittal argument at the close of all evidence, the defense cited *Jenkins v. State*, 942 So. 2d 910 (Fla. 2d DCA 2006). (T 626-630, Vol. IV; T 631-633, Vol. V) The trial court denied the motion and stated all cases cited in *Jenkins* are distinguishable and therefore a jury question exists on all counts. In the denial, Judge Munyon made no mention whether Dobbs failed to present a prima facie case of self-defense or if the State's evidence rebutted his claims. (T 625-630, Vol. IV; T 631-633, Vol. V)

The detail of a blow by blow account is lacking in the testimony due to fight participants description of the parking lot as dark, a lot of commotion and the fight quick, lasting less than a minute. (T 228, Vol. II; T 271, Vol. III; T 530-535, Vol. IV) Appellant contends examination of the victims testimony is critical to support Dobbs establishment of self defense. The State says they fought Dobbs one at a time individually while the testimony indicates otherwise. In the beginning, Dobbs testified he was punched by Blanco before striking back. Blanco went back and punched Dobbs which would occur about the same time, according to Riollano's testimony, that Gotay went up and threw two punches at Dobbs. There is no testimony of William Troy's involvement or actions in the fight, only his death. (T 161, 182, Vol. I) Roillano walked up from the side while Dobbs fought another directly in front of him, and grabbed his shirt then began striking him.

The use of deadly force requires a defendant to feel death or great bodily harm is imminent. A photograph of Dobbs and his injuries were admitted into evidence and state witnesses provided the nature of Dobbs injuries, including stitches in his left arm, teeth knocked out, facial cuts and bruises on the head, that were documented in photos admitted into evidence. (T 358, 376, 383-385, Vol. III; T 527-529, 604-606, Vol. IV) Great bodily harm requires more than slight,

trivial, moderate or some harm. *Chesnoff v. State*, 840 So. 2d 423 (Fla. 5th DCA 2003). Profusely bleeding head wound suffered by victim, would not have appeared slight or trivial to a reasonable officer, for purposes of whether perpetrator knowingly or intentionally caused great bodily harm as would convert a simple battery to an aggravated battery under Florida law. *McCormack v. City of Fort Lauderdale*, 333 F. 3d 1234 (11th Cir. 2003).

Dobbs also provided testimonial evidence that he was attacked and feared for his life before using the knife he carries for personal protection as deadly force. (T 559, 588-593, 607, 623, Vol. IV) The State's testimonial evidence of Justin Idle, Phillip Westfall, and crime scene investigator Susan Mears, support Dobbs defense that Blanco approached Dobbs seated in his Acura, the entire fight occurred at the rear of Appellant's vehicle when others approached and surrounded Dobbs in a fight taking punches at Dobbs before he elected to use his knife for defense. (T 255, 259-260, 268-270, 272, 275, 277-279, 283, Vol. III; T 559, 597, 589, 592-593, 611- 613, 617, Vol. IV)

Group of four seemed intoxicated drinking a lot inside club. (T 273, Vol. III) The evidence and establishment of Dobbs self-defense claim, and State's rebuttal evidence, will be examined independently as to each of the four victims.

ANDRE BLANCO

Dobbs and Washington testified Andre Blanco approached their Acura, and Blanco tried to punch Dobbs after he exited the vehicle. (T 546-568, 532-533, 547, 549, 585, Vol. IV) While the testimonial evidence by Blanco that Dobbs threw first punch, Blanco counters that it was Dobbs. (T 161, 182, Vol. I; T 533, 547, 549, 585, Vol. IV) While Blanco was knocked down initially, spun around, he returned to grab Dobbs by the neck and punch him.

FRANCISCO GOTAY

After seeing Blanco knocked to the ground temporarily, Frank Gotay approached and tried to hit Dobbs twice. (T H 31-32, 37, Vol. I; T 188, Vol. I; T 204-205, 291 Vol. II; T 585-586, Vol. IV) The State's own evidence of Francisco Gotay shows no provocation to enter the altercation between Mr. Blanco and Mr. Dobbs, but voluntarily entered into the fray and without being hit or attacked, and offered force by immediately swinging at Mr. Dobbs. At a minimum, the State's own testimony and Dobbs testimony establishes a prima facie case of self-defense, that is not rebutted by any State evidence, against Fracisco Gotay. Riollano testified Gotay went after Dobbs within five seconds of the first punch. Blanco testified he returned, grabbed Dobbs and punched him after being hit. This, along with Troy Riollano's testimony of his involvement,

clearly shows Mr. Dobbs was facing multiple attackers simultaneously. As argued in point two below, Mr. Dobbs had asserted self-defense in the altercation with Blanco and because he was in a place he had a lawful right to be, was then within his legal right of the self-defense statute to stand his ground and meet Mr. Gotay's force with force, including deadly force, if necessary.

WILLIAM TROY

The State presented medical testimony from Dr. Hansen that the cause of death for William Troy was multiple stab wounds when Troy suffered three stab wounds to the torso, one in the arm. (T 180-181, Vol. I; T) The only testimony on the stab wounds suffered by William Troy are that he and Dobbs were observed scuffling together. (T 163, 182, Vol. V) The only evidence was that Troy and his friends, approached Dobbs and either took turns attacking Dobbs or were in a group fight. (T 255-257, 259, 261, 270, 275, 278, 306, Vol. III) Dobbs asserted his self defense and in the case of William Troy's death, there is no evidence to rebut that in the case of William Troy and prove beyond a reasonable doubt that Dobbs did not engage in self-defense with the deceased.

If this court is not persuaded that the State's evidence is not sufficient to rebut Dobbs self defense claim or sufficient to sustain the verdict as it related to self-defense, appellant asserts in the alternative that the evidence is insufficient to

make a prima facie case for second degree murder. The testimony was clear Dobbs and none of the victims knew each other previously and were only in the same club for thirty minutes together. Their interaction was minimal and when the first punches in the fight were thrown, there were no words exchanged. (T 161, 169, 184, 187, 197, Vol. I; T 203, 226, Vol. II; T 288, Vol. III)

Dobbs asserts, in the alternative to the other arguments advanced in this brief, that the case of *Williams v. State*, 674 So. 2d 177 (Fla. 2d DCA 1996), may be applicable as an alternative to the argument in Point one of this brief. In Williams, the jury found Williams guilty of second degree murder. The district court reduced the conviction to manslaughter when the defendant's use of a knife against a single unarmed roommate could be considered excessive and permitted the jury to reject Williams claim of self-defense. While the state categorized Dobbs as angry, the evidence does not support a depraved mind finding and no evidence showing that Williams acted out of ill will, hatred, spite, or an evil intent.

In *Light v. State*, 841 So. 2d 623 (Fla. 2d DCA 2003), the court wrote that the crime of second-degree murder is normally committed by a person who knows the victim and has had time to develop a level of enmity toward the victim. In *Light*, the second degree murder charge arose out of an incident between two

complete strangers in a "mosh pit" at a heavy metal musical show. The defendant picked up the drunken victim and slammed him on the ground. The court wrote that for purposes of offense of second-degree murder, hatred, spite, evil intent, or ill will usually require more than an instant to develop.

Appellant asserts at the time of trial, any self-defense case cited by either counsel was inherently distinguishable as those cases were not decided after the October 1, 2005, legislative amendments to Florida's self-defense law. Prior to the statutory amendment, a person may not resort to deadly force without first using every reasonable means within his or her power to avoid the danger, including retreat. *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999). In addition, the trial judge did not properly consider or evaluate the evidence and assertion of a right to stand your ground in self defense in each count asserted by one defendant against four separate individuals. Counsel asserts this is a case of first impression under the new self-defense statute. With no existing case law to interpret a prima facie case of self-defense under Section 776.013(3), Florida Statutes (2006), the plain language used expands the right of self defense by abolishing the common law duty to retreat.

To establish a valid self-defense claim, although reviewed under the previous self defense statute, Dobbs directs the court to the facts in *Baker v. State*,

506 So. 2d 1056 (Fla. 2d DCA 1987), where the defendant was convicted of manslaughter and attempted manslaughter, is the most factually similar case law. In *Baker*, the Second District expressed empathy with Baker's situation being confronted by what the court described as "animals", but rejected Baker's claim that self-defense was established as a matter of law and the trial erred to deny his motion for acquittal.

Baker and Dobbs both claimed self defense after being approached at their vehicle in a parking lot by more than one intoxicated individuals. The facts are nearly identical, with several subtle but important differences. Both cases involved multiple victims who had consumed large quantities of alcoholic beverages, a brief exchange of words in a parking lot of a business, victims approach the defendant's vehicle and the defendant carried a knife or pocket knife on his person and defendant testified they were struck by the victims while standing outside their vehicle, and eventually stabbed several victims in response.

Besides a new law that does not mandate the duty to retreat before resorting to deadly force, two facts in Baker that did not exist in this case is the defendant standing in the triangle of an open car door with testimony that it was possible to retreat in the car prior to the stabbing. Further evidence to negate Baker's self-defense claim was testimony from a defense witness that Baker removed the knife

from his pocket as the victims approached his vehicle. Nobody ever saw Dobbs remove a knife prior to the attack. Almost twenty years too early, Baker argued there should be no duty to retreat from your vehicle when you are a law-abiding citizen. Court denied argument based on the then existing law that required retreat before use of deadly force.

Cases involving a defendant being outnumbered by the victim and his allies where the court fond a valid claim of self defense in *Ramos v. State*, 496 So. 2d 837 (Fla. 1986), and *Thompson v. State*, 552 So. 2d 264 (Fla. 2d DCA 1989). Also, leaving a scene after a death only shows poor judgment and panic after an attack and despite such facts, does not serve to negate a claimed defense of self-defense. *Fowler v. State*, 921 So. 2d 708 (Fla. 2d DCA 2006).

The only inference in the State's case in chief is Andre Blanco's testimony, which is not supported by independent witnesses or physical evidence, that Dobbs drove his vehicle to Andre Blanco's location in the parking lot, exited his vehicle and punched or stabbed Blanco.

ISSUE II

THE TRIAL COURT ERRED, OVER DEFENSE COUNSEL'S OBJECTION, BY INSTRUCTING THE JURY AS TO THE PROVOCATION PORTION OF THE FORCIBLE FELONY INSTRUCTION AND FUNDAMENTALLY ERRED BY GIVING THIS STANDARD JURY INSTRUCTION THAT REQUIRED APPELLANT TO RETREAT BEFORE STANDING HIS GROUND TO MEET FORCE WITH FORCE.

Dobbs' counsel objected to the initial aggressor portion of the forcible felony instruction for all four victims citing a lack of evidence to issue the instruction. (T 655, 658, 666, 669, Vol. V) The trail court erred to overrule the objection and included this instruction in the jury charge. (R 330-331, 334-336, 338-340, 343-345, Vol. II; T 655, 658, 666, 669, Vol. V)

The jury was issued the standard jury instruction as follows for the right to use both non-deadly force and right to use deadly force against William Troy, Francisco Gotay, and Hanzel Holiday. The standard instruction states:

The use of non-deadly force is not justifiable if you find the defendant initially provoked the use of force against himself, unless:

(A) The force asserted toward the defendant was so great that the defendant reasonably believed that he was in imminent danger of death or great bodily harm *and had exhausted every reasonable means to escape the danger*, and other than using non-deadly force on WILLIAM TROY.

(B) In good faith, the defendant withdrew from physical contact with

WILLIAM TROY and indicated to WILLIAM TROY that the defendant wanted to withdraw and stop the use of non-deadly force, but WILLIAM TROY continued or resumed the use of force.

(R 330-332, 334-336, 338-340, 343-345, Vol. II)

As illustrated in the argument above, the State's evidence did not rebut Dobbs claim of self defense that he was surrounded by four males and battered continually. Likewise, the State failed to present evidence to justify a jury instruction that Dobbs initially provoked the use of force against himself. At a minimum, there was no evidence presented that Dobbs' exercise of self defense or engaged in the initial encounter with Blanco constitutes provocation for Blanco's drunken associates to flex their "beer muscles" and attack Dobbs. The standard provocation instruction was given and repeated in the justifiable use of non- deadly and deadly force in each charge and for each defendant. To determine if there was sufficient evidence to issue the instruction, we must examine each individuals interaction with Dobbs.

John Blanco, a six-time convicted felon on probation walked towards Dobbs' vehicle with three friends as support behind him. (T 255, 269, 271, 279-280, 290-291, 302, Vol. III; T 532, Vol. IV) While there is dispute between Blanco and Dobbs who threw the first punch, the only other inconsistency is within the State's own case and theory of events. Blanco, Gotay, and Riollano

testified Dobbs drove his car through the parking lot to Blanco's Chrysler vehicle. This is contradicted by Deanna Washington, John Dobbs and Justin Idle, a state witness. (T 268, 307, Vol. III) Justin Idle had his head turned when the first punch was thrown. (T 255-257, Vol. III) The only possible explanation for Blanco going to Dobbs and his vehicle is to fight Dobbs. Dobbs asserts any punches thrown are preemptive self defense to stop future dangerousness and do not fit the legal definition of provocation. Blanco's actions in walking to Dobbs' vehicle are the initial provocation.

There was not sufficient evidence to issue the provocation instruction in the self defense instruction portion of the charge for aggravated battery to Francisco Gotay and Gotay's encounter with Dobbs occurred when Gotay ran over to Dobbs and threw two punches in an already ongoing fight. (T 203-205, 291, Vol. II) Aside photographs of William Troy and the medical examiners report that he died as a result of multiple stab wounds, there was no testimony in the State's evidence of William Troy's involvement in the fight other than falling to the pavement. (T 161, 182, Vol. I) The only evidence is statements by associates that all four males who approached Dobbs fought with him and took swings. (T 255-257, 259, 261, 270, 275, 278, 306, Vol. III) This does not constitute evidence that John Dobbs initially provoked the use of force in Dobbs'

involvement with William Troy and it was error to include the provocation language in the second degree murder charge of William Troy.

It was error to issue the instruction with Hanzel Holiday as the victim where the evidence established Holiday initially hit Dobbs' Acura vehicle with a deadly weapon, his pickup truck as they traveled on the roadways.

In addition to their argument that Dobbs against four larger males[5] does not necessitate the use of deadly force, the State's repeated in both opening statements and closing argument was Mr. Dobbs would have, should have, could have avoided the situation by leaving the scene in his car. (T 150, 152, Vol. I; T 711, 715, Vol. VI) As stated previously, Florida self-defense law permits an individual not engaged in unlawful activity to stand his ground and meet force with force. The latter argument on a duty to retreat as advanced by the state is one of common sense, but not a legal requirement under Section 776.013(3), Florida Statutes (2006).

The damage to improperly issue this instruction, in addition to the reasons stated elsewhere in this argument, is to have jurors think that because Dobbs did not leave when he initially entered the vehicle, before his encounter with Blanco

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[5] Dobbs testified he stands 5-11, and weighs 170 pounds. (T 624, Vol. IV). Francisco Gotay, stands 5-11 and weighs 200 pounds (T 215, Vol. II); Anthony Riollano stands 5-11, and weighs 225 pounds. (T 241, Vol. II)

is sufficient to constitute a failure to exhaust all reasonable means to escape the danger. The State's heavy reliance on the additional duty to retreat in this improperly issued instruction surfaced when the court overruled defense counsel's objection and issued the provocation instruction portion of the forcible felony. Going one step further, the State asserted in closing, "It wasn't self-defense. Okay? He could have left. He should have left and he didn't. He got out of the car with a knife in his hand and immediately attacked the guys." (T 715, Vol. VI) This statement to jurors that because he did not leave before encountering Andre Blanco outside his vehicle, which he has a right to do anytime or under self-defense, leads jurors to improperly believe self defense is not available. This misstatement of the law was also committed in the issuance of the provocation portion of the forcible felony exception.

FUNDAMENTAL ERROR

While most of the cases on fundamental error out of the District Courts concern the first half of the forcible felony exception jury instruction, Dobbs asserts the provocation portion of the standard instruction as presented in this case is based on outdated self-defense laws and conflicts with the existing right to stand your ground in Florida and constitutes fundamental error. Dobbs asserted his right to self-defense as his only defense in each of the charges.

Standard jury instructions are not "immutable postulates from Olympus." *Harvey v. State*, 448 So. 2d 578 (Fla. 5th DCA 1984). The Florida Supreme Court's approval of the standard instructions cannot relieve the trial judge of responsibility under the law to charge the jury properly and correctly in each case as it comes before that judge. *Matter of Use By Trial Court of Standard Jury Instructions*, 431 So. 2d 594, 598 (Fla. 1981).

In *Martinez v. State*, 933 So. 2d 1155 (Fla. 3d DCA 2006), the Third District held that an examination of the record is required to determine if error in giving the aggressor portion of the self-defense jury instruction absent an independent forcible felony was fundamental error in a particular criminal case. The initial aggressor or provocation portion of the forcible felony instruction as issued in counts two, three and four of the information is unclear, misleading as misstatement of the law and negates Dobbs only defense in addition to creating an improperly interchangeable instruction relating to all four victims. This improperly instructs jurors that Dobbs cannot stand his ground to face the escalation in threat to death or great bodily harm by the presence and attacks from Frank Gotay, William Troy, Anthony Riollano and Hanzel Holiday, who joined in the fight against Dobbs immediately. Although possible to clean this instruction up by making mention in the no duty to retreat instruction, the provocation

instruction given is misleading, a misstatement of the law and confusing.

The immediate entry of Blanco's three friends into Blanco's initial fight with John Dobbs instantly escalated the force asserted against Dobbs. As issued in this case, the standard instruction, taken from Section 776.041, now adds an additional duty to retreat, contrary to Section 776.031, as to any additional participants who enter a fight or attack the defendant. While you can't claim a right to self defense in a one on one situation when you clearly start the attack, this should not reduce your ability to assert a self defense claim against other individuals who join in the attack or when faced with an increase from non-deadly to deadly force by the victims. This increase in escalation could be in the form of a fist fight with a victim who was initially provoked but during the fight brandishes a deadly weapon or brings associates in to assist him in the fight.

Assuming for argument that Dobbs "initially provoked" a fight, under this outdated instruction. Dobbs is now required to retreat against the escalation in force against him to be able to retain the right to invoke a self defense claim.

These "initial aggressor" instructions improperly intermingled any provocation with any victim to all victims. These instructions are confusing and impermissibly misleads the jury that initial provocation applies to all victims when independent evident of state witnesses establishes there was no provocation

by Dobbs against Fransisco Gotay, William Troy or Hanzel Holiday. The only initial provocation to Gotay, Troy or Hanzel is Dobbs' engagement in a fight with Blanco and should not serve as a free pass for Gotay and William Troy to commit battery or aggravated battery upon Mr. Dobbs while already engaged in self-defense against Mr. Blanco.

Under the facts presented in the record, this improper and misleading instruction contradicts the current law of self defense, Section 776.013(3), Florida Statutes (2006), by imposing a duty to retreat, and negates Dobbs only claim of self-defense against those individuals who punched at Dobbs, without provocation. Furthermore, Dobbs was harmed by this additional required duty to retreat in order to regain the right to assert self-defense when the State argued his failure to retreat before even a display of force was presented, clearly confused and misled jurors. Based on the initial fight with Blanco, even if jurors believe Dobbs was reasonable in his belief that the situation now required a use of deadly force, after three more individuals approached and entered into the fight against him, the jury was instructed that Dobbs is precluded from asserting a claim of self defense against others, unless he exhausted every reasonable means to escape the danger. That is not required under the current self-defense law.

This court in *Davis v. State*, 886 So. 2d 332 (Fla. 5th DCA 2004), required an examination of the record to determine if the error was fundamental. In *Carter v. State*, 469 So. 2d 194 (Fla. 2d DCA 1985), the court reversed a manslaughter conviction after finding that portion of the self defense instruction given by the trial court regarding a duty to retreat was erroneous and inherently misleading. Under the new self-defense law, this added duty to retreat in the standard provocation instruction negates Dobbs only defense and is inherently misleading. The Florida Supreme Court in *Motley v. State*, 20 So. 2d 798, 800 (Fla. 1945), made it clear over sixty years ago that failure to properly define elements of a crime, as well as failure to properly charge on the law, relative to the defense was equally prejudicial and misleading. As a matter of due process and the fundamental right to a fair trial, appellant asserts the jury was not properly instructed on his defense as it was contrary to the existing self-defense law.

WHEREFORE, Dobbs respectfully requests this Honorable Court, based on the abuse of discretion and fundamental error in issuing this jury instruction, vacate the judgment and sentence entered below and remand for a new trial with appropriate instructions.

CONCLUSION

Based on the legal argument and authority contained herein, undersigned counsel respectfully requests this Honorable Court vacate the judgment and sentence for second degree murder, two counts of aggravated battery, and aggravated assault and release the Appellant from custody. If this Court deems proper and necessary, vacate all judgment and sentences entered and remand to the trial court for a new trial with proper instructions. In the alternative, undersigned counsel respectfully requests this Honorable Court to reduce the second degree murder conviction to manslaughter.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KEVIN R. HOLTZ
Assistant Public Defender
Florida Bar No. 0161624
444 Seabreeze Boulevard, Suite
Daytona Beach, Florida 32118
Phone: 386/ 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 via his basket at the Fifth District Court of Appeal; and mailed to Mr. John Dobbs, Inmate # C-00618, 01-211U, Gulf Correctional Institution - Annex, 699 Ike Steele Road, Wewahitchka, Florida 32465-0010, on this 6th day of November 2007.

CERTIFICATE OF FONT

I CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

KEVIN R. HOLTZ
Assistant Public Defender