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

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

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

AMENDED INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

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

"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 of the jury trial before Judge Lisa Munyon in Volumes I, II, III, IV, V and VI;

"SR" refers to exhibit evidence in the jury trial held before Judge Lisa Munyon, commencing February 26, 2007. ~~Appellant's motion to supplement the record has not been approved at the time of filing.~~

"PS" refers to police statements given to detectives of Orange County Sheriff's dept. the night of the incident Oct. 25 2006 titled Transcript of taped interview, and are distinguished by the first and last initial of the witnesses name. Appellants motion to supplement the record may not have been approved at the time of filing.

"IF" refers to the unsigned unnotarized charge information upon which Appellant argues in point I.

STATEMENT OF THE CASE

This appeal is from the judgments and sentences for one count of second degree murder (with a weapon); two counts of aggravated battery (with a weapon); and one count of aggravated assault (possession of firearm) in the Circuit Court for the Ninth Judicial Circuit, Orange County, Florida. Appellant, John Dobbs ("Dobbs"), was arrested following an altercation with four males in the parking lot of an adult entertainment club. (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]. (R 179-183, Vol. I; R 362, Vol. II). Appellant, John Dobbs ("Dobbs"), asserted self-defense in each count of the information.

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

[2] Count two, victim Francisco Gotay, in violation of Section 775.084(1)(a)(1) and 775.084(1)(a)(2), Florida Statutes (2006); count three, 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, victim Hanzel Holiday, in violation of Sections 775.087(2) and 784.021(1)(a), Florida Statutes (2006), a third degree felony. The fifth count involved Holiday, but Dobbs was acquitted of shooting from a vehicle.

In opening statement to jurors, the State set forth two themes in their case. First, Dobbs should have left the parking lot when he reached his car, and secondly, Dobbs brought a "knife to a fist fight." (T 149-150, 154, Vol. I). Faced with conflicting testimony in their own case as to whether Blanco approached John Dobbs and as to where the fight began, the State chose to tell jurors in opening statement that the incident occurred at the rear of Dobbs' car. (T 148-149, Vol. I)

The State's primary witnesses were fight participants Anthony Riollano ("Riollano"), Andre Blanco ("Blanco") and Frank Gotay ("Gotay"). The first individual engaged in a fight with Dobbs was Blanco, followed by Gotay and Riollano. The State also called independent witnesses, Justin Idle ("Idle") and Phillip Westfall ("Westfall"). The fight participants all testified that after Dobbs exited the club, he drove around the parking lot to Blanco and started a fight at Blanco's vehicle. However, Idle and Westfall stated that the fight began at the rear of Dobbs' vehicle, consistent with Dobbs version of events. Physical evidence introduced in the State's case included photos of two victims, the parking lot where the fight transpired along with Dobb's actual knife, and actual nine millimeter gun, DNA cards and fingerprints. (T 325-330, Vol. III; SR, State

Exhibits 1-13[4])

John Dobbs and girlfriend Deanna Washington, who was present during the incident, took the stand for the defense. The defense introduced photographs of Dobbs' injuries and blood splatters on the rear exterior of his Acura vehicle. (SR, Defense exhibit 1,(photos I 1-11); Defense exhibit 3-9) At the close of all evidence, Judge Munyon denied the renewed motion for a judgment of acquittal. (T 625-630, Vol. IV; T 632-633, Vol. V)

In the charge conference, the trial court declined to issue the first part of the forcible felony instruction, but overruled Dobbs' objection to the State's request for an initial aggressor exception instruction[5] and issued the instruction for both justifiable use of deadly and non-deadly force. (R 330-331, 334-336, 338-340, 343-345, Vol. II; T 655, 658, 666, 669, Vol. V).

In their rebuttal closing, the State repeatedly commented several times on Dobbs actions, " It's not justifiable, he wasn't justified, it wasn't self-defense. Was he defending himself? No, under the legal standards he was not. Okay? It was not a justifiable homicide. Okay? It's not justified when you instigate a fight." (T

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[4] Appellant has requested a motion to supplement the record with evidence submitted at trial, this shall be indicated by "SR" followed by the exhibit # at trial.

[5] Standard Jury Instructions, Section 3.6(f) and Section 3.6 (g). This instruction is derived from Section 776.041(2).

706, 710, 713, 715, Vol. VI) The prosecution's closing highlighted Dobbs failure to leave on several occasions, "He's in his car when they walk over. He could have left multiple times. He didn't. He gets out and he attacks the first guy with a knife. It's not excusable what he did. It wasn't an accident. It wasn't misfortune. He wasn't doing a lawful act. He intentionally got out of the car with the knife and attacked them one by one by one." (T 708, 711, 715, Vol. VI)

The jury returned verdicts of guilt 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 that Dobbs used a firearm).(R 352-358, Vol. II; T 772-774, Vol. VI) After the verdicts, the trial court adjudicated appellant guilty in counts I, II, III, IV with a judgment of acquittal on count V. At sentencing, the trial court ordered the following prison sentences to be served concurrent: life for second degree murder with a weapon, fifteen years in each count of aggravated battery, and five years with a three year mandatory minimum for aggravated assault with a weapon. The trial court issued 135 days credit for time served. (R 363-364, 382-384, Vol. II; S 168, Vol. I)

Appellant filed a notice of appeal and the Public Defender was appointed. (R 409, Vol. III)

STATEMENT OF THE FACTS

After they attended a professional basketball game on October 24, 2006, and drank alcohol, Andre Blanco, Francisco Gotay, Anthony Riollano, and William Troy, visited multiple adult entertainment clubs, continuing to consume alcohol. The four friends ended the evening in early morning hours at 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) A Doll House employee described the group inside as intoxicated and a little unruly. (T 276, Vol. II) John Dobbs, a thirty- two-year-old Georgia resident was visiting Orlando with his girlfriend, Deanna Washington, for two days to see his children at their mothers. (R 172, Vol. I; R 246, T 529, 539, 577-578, Vol. IV; T 624, Vol. V) Dobbs and Washington arrived at the Doll House thirty minutes before the Club's 2:00 a.m. closing, on October 25, 2006, and each consumed one drink of liquor. (T 529-530, Vol. IV)

As the club closed, Andre Blanco left and it is uncontested that he walked to his Chrysler 300 in the parking lot with Frank Gotay close behind, while Anthony Riollano and William Troy remained in the club to pay their bill. (T 159, 195, Vol. I T 221-223, Vol. III) Minutes before Troy's group left the club, William Troy eavesdropped on a conversation between Deanna Washington and a female employee of the Club and interrupted them several times. While Washington

exchanged personal information with the employee, Troy believed Dobbs had access to women in the area, calling him a "player". (T 160, 196-197, Vol. I; T 200, 215, 223-225, Vol. II; T 540-542, 580-582, Vol. IV) Troy's friends did not hear the content of the conversation, but stated that there did not seem to be a problem. (T 222, 240, 264, Vol. II) In the parking lot, Gotay and Riollano testified they heard more words exchanged between Dobbs, Washington, and Troy. (T 252-253, 268, Vol. II) Dobbs testified he did not see William Troy in the club with Blanco, Gotay or Riollano. (T 609, Vol. IV)

The main inconsistencies concerned whether: Dobbs or Blanco approached the other in the parking lot; the fight began by Dobbs or Blanco's vehicle; Andre Blanco or John Dobbs struck the first blow; and whether Dobbs was surrounded and attacked by the group or if the fight was a series of one on one encounters with each of the victims. Several of the inconsistencies existed in the State's own case between the independent witnesses' testimony and that from the victims.

Dobbs claimed self-defense in all counts and testified he and Washington exited the club then walked directly to Dobbs' Acura in the parking lot[6]. When Dobbs and Washington walked to the car, one or more individuals at Blanco's

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[6] The parking lot is South of the business with Dobbs Acura parked furthest from the business, five or six spots South of Blanco's Chrysler. (SR, State exhibit 11)

Chrysler 300 called Dobbs a "pussy" who needed security. (T 530-531, 543, 545, 583, 609, Vol. IV) State witnesses Phillip Westfall and Justin Idle, a Doll House employee walked the parking lot when Dobbs went to his car, did not see Dobbs move the Acura before the fight, but did overhear remarks directed at Dobbs. (T 252-253, 266-269, 280, 307, Vol. III)

As they entered their car, Washington observed and informed Dobbs that an individual, later identified as Andre Blanco, was walking toward them in an aggressive manner. (T 532, 546, 549, 555, 568, 584, 609-610, Vol. IV) Idle and Westfall testified Blanco walked about thirty feet from his vehicle to Dobbs parked Acura, where the fight began. (T 250, 284, 290, 301-302, Vol. III) Crime scene investigator Susan Mears, opined, based on blood splatters on the rear of the Acura, the fight occurred behind the Acura. (T 272, 301, 343-344, 347-348, Vol. III; T 568, Vol. IV; SR Def. Exhibit One)

Dobbs exited his car and told Deanna to stay in the vehicle. Dobbs walked to the rear of his car and encountered the approaching Blanco. (T 532, 546-547, 555, 610-611, Vol. IV) According to Idle, who did not see the first punch between Blanco and Dobbs, at least three of the four males yelled and walked together towards Dobbs vehicle before the first punch was thrown. (T 255, 269, Vol. III) Without an exchange of words, Dobbs and Washington stated Blanco threw a first

punch that partially struck Dobbs in the ear before Dobbs instinctively punched back, knocking Blanco to the pavement. (T 533, 547-549, 585, 610, Vol. IV)

Dobbs was next confronted by Gotay, who threw two punches at Dobbs. After responding in self-defense, Dobbs became surrounded and punched by all four males, including Troy and Riollano. Idle and Westfall stated Dobbs was surrounded by the group, who punched and attacked Dobbs throughout the incident. (T 256-260, 270, 272, Vol. III; T 533-534, 550, 584-585, 587-589, Vol. IV) Dobbs claim that he eventually pulled out a knife was consistent with Idle's testimony that when surrounded by the group and everyone involved, Dobbs began to use a sharp instrument to cut the others. (T 256-257, 260, 272, Vol. III; T 588-593, 598, 606-608, 612-613, 617, Vol. IV)

Despite alternate theories of who approached who, whether the fight started at the Acura or by Blanco's Chrysler, the State claimed Dobbs initiated fight with Blanco then attacked Gotay and Troy one by one with a knife in the parking lot. Blanco and companions stated they did not go to the Acura vehicle and that Dobbs entered his vehicle, drove thru the parking lot and parked by Blanco's vehicle. (T 161, 169, 179, 182, 198, Vol. I; T 201-202, 222-226, Vol. II) The victims, plus Riollano, testified the fight occurred at Blanco's vehicle after Dobbs approached and attacked Blanco with a knife, then attacked Gotay and Troy. (T 156, 161-162,

184, 187, 193, Vol. I; T 203, 226-227, Vol. II) The victims never saw Dobbs in possession of a knife and no one realized they were stabbed or wounded until Dobbs began to leave in his Acura. (T 1660167, 188, Vol. I; T 205, 207, 217, 236, 263, 269, Vol. II; T 554, 557-558, Vol. IV)

After the incident, crime scene investigator Mears placed cones 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) Mears' office measured the distance of the blood drops on the pavement, between the two vehicles, at fifty-five feet. (T 513-515, Vol. IV; SR, State exhibit 11)

There was no exchange of words between Dobbs and Blanco before the first blow. (T 161, 169, 184, 187, 197, Vol. I; T 203, 226, Vol. II; T 288, Vol. III) After being struck, Blanco spun around, caught himself on the ground, and then approached Dobbs, grabbed him by the neck and punched Dobbs. (T 162, 182, Vol. I) Neither Gotay, Riollano or Idle saw the first punch thrown, but Riollano saw a second unidentified individual approach Dobbs and throw a punch within one to five seconds of the initial blows. (T 203-204, 227-228, Vol. II; T 255-257, 269, Vol. III) Gotay stated after the initial blow, he approached next and swung at Dobbs. (H 31-32, 37, Vol. I; T 188, Vol. I; T 204-205, 291, Vol. II; T 585-586,

Vol. V) Riollano, walking with William Troy, testified they were about fifteen feet away when the altercation started. (T 226, Vol. II)

Although he did not see a knife, Blanco thought he was punched but determined he must have been stabbed in the face after he began to feel dizzy and light headed. (T 161, 182, Vol. I) Blanco stated that during the fight, Deanna Washington threw punches and attacked him. (T 170, Vol. I) Blanco did not specify as to what point he received cuts in the face and chest, but testified Dobbs went quickly and stabbed Frank Gotay. (T 165-166, 168, 182, Vol. I) This contradicts Gotay's testimony that he first approached and swung at Dobbs. Dobbs testified he punched Gotay, who received a stab wound in the face and two in the chest, then became surrounded by all four males and was being punched from all directions. (T 204-205, Vol. II; T 585, 587-593, Vol. IV) Phillip Westfall stated Dobbs punched Blanco, but did not see any blood on Blanco or Gotay. (T 288-289, 302, Vol. III)

Outside Westfall and Idle's description of the group walking toward Dobbs, Blanco provided the only details of Troy's involvement in the fight, when he saw Troy and Dobbs scuffling together. (T 163, 182, Vol. I) William Troy died from multiple stab wounds, three to the front torso (including the fatal blow to the heart) and one in the arm. (T 485-492, Vol. II; SR, State exhibit 13, cumulative photos

M1-M12) Without more information, Hanson estimated William Troy was able to stand a few seconds up to a minute before he became incapacitated. (T 495, Vol. IV) The parking lot interaction was a lot of commotion, quick moving with the encounter lasting under a minute. (T 228, Vol. II; T 271, 275, Vol. III; T 534-535, 552, Vol. IV) Blanco saw William Troy on the ground when Dobbs left. (T 163, 182, Vol. II; T 554, Vol. IV)

During the fray, Deanna Washington exited the Acura and began to strike at the males surrounding Dobbs. (T 534-535, 551, 587-588, Vol. IV) As Riollano approached, he pulled Deanna off of a friend's back, who was engaged in a fight with Dobbs, tossed her aside, and then approached Dobbs from the side. (T 231, 240, Vol. II) Riollano, the only individual not injured in the fight, stood behind Dobbs as he grabbed the back of Dobbs shirt and punched him four times in the neck and back of head. (T 231-232, 241-242, Vol. II; T 293-294, Vol. III; T 590-592, Vol. IV)

With one knee on the ground, outnumbered and surrounded by four males while being hit in the head , Dobbs feared for his life and removed a knife from his pants pocket once he heard, "get the girl." (T 534-535, 550-551, 557, 588-593, 598, 613, Vol. IV) Idle stated he did not see Dobbs use the sharp edge object until Dobbs was surrounded by the group in a fight. (T 256-260, Vol. III) With

Westfall's threats of mace to the parties and a realization by others that they had been stabbed, the fighting quickly ended. Dobbs ran to the Acura with Deanna Washington and left the lot. (T 162-163, 170-174, Vol. I; T 209, 217, 235, 237, Vol. II; T 296, Vol. III; T 554, 593-594, Vol. I)

The complainants, along with portions of Idle and Westfall's testimony, described fights with Dobbs as individual one on one incidents while surrounded by the group. (T 183-184, Vol. I; T 208, 216, 229-230, Vol. II; T 260-261, Vol. III) Although Idle never saw two hit Dobbs together, he described a group wanting to win the fight surrounding Dobbs, who took punches throughout the episode. (T 255-261, 270, 278, Vol. III)

Blanco admitted, once impeached, to six prior felonies and being on felony probation. Gotay had two prior felony convictions and the deceased, William Troy, registered a blood alcohol level of .183. (T 190-191, Vol. I; 211, Vol. II; T 497, Vol. IV) Although not before the jurors, discovery revealed both Gotay and Troy had a prior felony conviction for violence in unprovoked attacks against others and law enforcement. (R 274-309, Vol. II)

A valet at a neighboring club, Hanzel Holiday, used his truck to try and stop Dobbs and Washington's departure. (T 436-438, 594-595, Vol. IV) Unsuccessful, Holiday broke off his pursuit after seeing a gun pointed from the Acura. (T 439-

441, Vol. IV) Police stopped Dobbs vehicle within five minutes, and then recovered a bloody knife in the center console with a handgun that were both were admitted as State's evidence. (T 325, 327, 376-377, Vol. III; T 538, Vol. IV)

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's evidence did not rebut Dobbs' self-defense claim beyond a reasonable doubt.

POINT II: A trial court's decision on jury instructions is subject to review under an abuse of discretion standard. *Bozeman v. State*, 714 So. 2d 570 (Fla. 1st DCA 1998). Incomplete and misleading jury instructions on elements of crime are reviewed for fundamental error. *Hubbard v. State*, 751 So. 2d 771 (Fla. 5th DCA 2000). Giving the initial provocation jury instruction, over objection, was error when this instruction includes a duty to retreat that is contrary to Florida self defense law and constitutes fundamental error when this misstatement of the law also negates Dobbs' sole defense in the case.

POINT III Dobbs was denied his due process rights to a fair and impartial trial when the State committed fundamental error in improper closing arguments by obfuscating relevant facts, violating trial courts previous rulings and making arguments that misstate the self-defense law.

POINT I

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.

The State did not present sufficient evidence to overcome Mr. Dobbs' self-defense claim, when testimony and physical evidence in the State's case support Dobbs' claim that he was approached, punched outside his vehicle and responded in self-defense using both non-deadly and deadly force after being surrounded and beaten by four males in an escalating force of violence.

While the defendant carries 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). 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. In a criminal proceeding, finding that

evidence is legally insufficient is equivalent to a determination that prosecution has failed to prove defendant's guilt beyond a reasonable doubt. *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981)

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 of the evidence to support a conviction is matter of law and an appropriate concern of an appellate tribunal while the weight of legally sufficient evidence is for the jury. *Id.* 397 So. 2d at 1123. In the alternative, based on facts presented herein, Dobbs relies on *White v. State*, 446 So. 2d 1031 (Fla. 1984), for the proposition that a jury verdict, like all other findings of fact, is subject to review on appeal by the competent, substantial evidence test.

In the renewed judgment of acquittal, counsel cited and relied on *Jenkins v. State*, 942 So. 2d 910 (Fla. 2d DCA 2006). (T 626-630, Vol. IV; T 631-633, Vol. V) Judge Munyon reasoned the facts in *Jenkins* and cases cited therein are distinguishable, and denied Dobbs motion with no mention of whether Dobbs presented a prima facie case of self-defense or the State's evidence was sufficient to rebut Dobbs' self-defense claim beyond a reasonable doubt. (T 625-630, Vol.

IV; T 631-633, Vol. V) Dobbs contends cases distinguished by the trial court occurred prior to October 1, 2005, when the self-defense law changed and provided individuals with the right to stand their ground without retreat. Therefore, the cases are inapplicable and inherently distinguishable to reach a proper ruling under an amended law. In light of facts presented at trial, the trial court erred to deny the renewed judgment of acquittal at the close of all evidence. (T 628-630, Vol. IV; T 632-633, Vol. V)

Under previous self-defense law, a person may generally 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). Effective October 1, 2005, the legislature eliminated the common law duty to retreat and authorized individuals to stand their ground to meet force with force, including deadly force. Four intoxicated, unruly males in a parking lot versus one must be analyzed under current self-defense rights.

Though decided under the pre-amendment self-defense statute, these facts closely resemble *Baker v. State*, 506 So. 2d 1056 (Fla. 2d DCA 1987), where the defendant was convicted of manslaughter and attempted manslaughter. The Second District expressed empathy with Baker, who was confronted under nearly identical facts as Dobbs by individuals the Second District described as

"animals". The court held Baker failed to establish, as a matter of law, a prima facie case of self-defense, when the opportunity to leave during the fight existed, but Baker did not retreat. Here, in contrast, there was no statutorily imposed duty to retreat. The facts in this case, in light of the substantial change in the law, established a prima facie case of self-defense.

The facts in Baker and Dobbs both included; multiple victims with high levels of alcohol in their systems, brief exchange of words in a business parking lot, victim(s) approaching the defendant at his vehicle, defendant carrying or possessing a pocket knife on his person, both defendants stating being struck by one victim while standing outside their vehicle, and in response to attacks, defendants stabbing multiple victims.

Unlike the present case, there was testimony in Baker that the defendant stood in the triangle of an open car door with opportunity to retreat in the car prior to the stabbing. Further evidence to negate Baker's self-defense claim were defense witnesses' testimony that Baker removed the knife from his pocket as the victims approached his vehicle. There was no evidence Dobbs removed or held a knife prior to or during initial contact. Dobbs testified he did not use deadly force until being surrounded and punched by a group. Almost twenty years before the legislature agreed with Baker's arguments and amended the statute, Baker argued

there should be no duty to retreat in society or from your vehicle when you are a law-abiding citizen. While the trial court denied Baker's argument based on then existing law, testimony in this case from Dobbs, Washington and the independent witnesses, established a prima facie case of self-defense.

Likewise, the testimony in the State's case was not sufficient to meet the State's burden to prove beyond a reasonable doubt that Dobbs did not act in self-defense. Dobbs testified he was approached and attacked by his Acura, where he used non-deadly force until he resorted to deadly force when outnumbered, surrounded and being hit in the head and the body by a number of attackers. (T 585-593, 606-608, Vol. IV) At that point, Dobbs used his knife in a stabbing motion to get the attackers off of him. Evidence indicates Blanco and associates were unarmed. However, it is reasonable to believe a person attacked by four unknown intoxicated strangers would need to employ both non-deadly and deadly force to remove themselves from the situation when no reasonable means of escape existed. When surrounded, Dobbs reasonably feared for his and Deanna Washington's lives and used a pocket knife to stab and get others off of him. (T 559, 588-593, 598, 606-607, 623, Vol. IV)

The State's independent witnesses, Idle, Westfall, and Mears, support Dobbs claim that Blanco approached Dobbs, not vise versa, and the fight began

at the Acura. (T 255, 259-260, 268-270, 272, 275, 277-279, 283, Vol. III; T 559, 597, 589, 592-593, 611- 613, 617, Vol. IV) This is not the only State evidence to support Dobbs self-defense claim. By his statements, Dobbs acted in self-defense when he punched Blanco and Gotay. (T 188, Vol. I; T 204-205, Vol. II; T 291, Vol. III; T 585-586, Vol. IV) The State's evidence to rebut the self-defense claim is Blanco's testimony that after Dobbs approached the Chrysler 300, he lunged and struck Blanco in the face. (T 161, 182, Vol. I; T 533, 547, 549, 585, Vol. IV) According to Blanco, he was never at the Acura, and certainly did not see a knife in Dobbs' possession. Blanco thought he was punched, but determined later he was stabbed in the face. However, Blanco stated, without observations or support for his conclusion, that he must have been stabbed at the outset. The complainants' testimony of who approached who, and the location of physical force being exerted is refuted by independent witnesses and physical evidence of blood splats on the Acura in the State's own case. Blanco's testimony is not sufficient evidence to rebut Dobbs' self-defense claim in light of Justin Idle and Phillip Westfall's testimony.

Westfall did not see any blood on Blanco or Gotay after the initial punches. (T289, 291, 302, Vol. III) After being struck by Dobbs, Blanco pulled himself up, approached and punched Dobbs. Riollano stated a second person approached

Dobbs and threw two punches at Dobbs within one to five seconds. The State's claim that Dobbs used a knife at the outset of a fist fight is not supported by sufficient evidence in the State's case. (T 166-167, 188, Vol. I; T 207, 236, Vol. II; T 269, Vol. III) Although he did eventually use a knife with deadly force when surrounded and attacked, there was no specific rebuttal evidence in the State's case as to when Dobbs held and used a knife. The quickness and commotion associated with the fight, led to inconsistent testimony filled with a general conclusion that Dobbs stabbed everybody at the outset. Testimony in the State's case was that no blood was visible until the end of the fight, nobody saw a knife during the whole fight, and people did not realize they were stabbed until the end of the fight. This evidence in the State's case supports Dobbs' initial use of non-deadly force is evident in photos of Dobbs scraped, cut bloody knuckles on his right hand. (T 289, 291, 293-294, 302, Vol. III; SR, Defense exhibit 9)

The State's evidence does not rebut Dobbs self-defense claim beyond a reasonable doubt, in particular that he did not use deadly force until the attack escalated in violence and Dobbs was surrounded and punched by a group where an attempt to escape would have been futile. This claim is not rebutted, but supported by Idle's statements that Dobbs used a sharp object once surrounded and attacked by the group. (T 257, Vol. III)

There is little testimony of William Troy's involvement or actions in the fight, only that he scuffled with Dobbs. (T 161, 182, Vol. I) Riollano walked up from the side while Dobbs fought another directly in front of him, and grabbed his shirt then began striking him. (T 231-232, 241-242, Vol. II) Gotay or Riollano did not see the initial punch[7], and voluntarily entered the fracas when they struck or swung at Dobbs. (T 203-205, 228, 231-232, 241-242, Vol. II)

Great bodily harm requires more than slight, trivial, moderate or some harm. *Chesnoff v. State*, 840 So. 2d 423 (Fla. 5th DCA 2003). A 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 testified he feared for his life, and Deanna Washington testified she wiped blood from Dobbs head in the car. Photographs at the police station, to document Dobbs injuries, were admitted into evidence. Both state and defense witnesses indicate injuries to Dobbs before the use of a knife. (T 358, 376, 383-385, Vol. III; T 527-529, 568-569, 604-605, Vol. IV)

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[7] Phillip Westfall also testified Dobbs punched the first male in the head knocking him to the ground. (T 288-289, Vol. III)

At a minimum, Dobbs established a prima facie case of self-defense to strike Gotay and Troy that is not rebutted by any evidence or inference in the State's case. After seeing Blanco on the ground, Frank Gotay tried to hit Dobbs twice. (T 188, Vol. I; T 204-205, 291 Vol. II; T 585-586, Vol. IV) Gotay, Troy and Riollano all voluntarily entered the altercation and offered force by immediately swinging at Mr. Dobbs. Riollano saw Gotay go after Dobbs within five seconds of the first punch. Blanco admitted he returned, grabbed Dobbs and punched him. This testimony, along with Riollano's involvement, shows Dobbs was facing multiple attackers within seconds of each other. The neutral witnesses establish Troy and his friends, approached Dobbs and either took turns attacking Dobbs individually or were in a group fight. (T 255-257, 259, 261, 270, 275, 278, 306, Vol. III) Dobbs asserted self defense and in the case of William Troy's death, there is no evidence to rebut that in the count involving William Troy, nor any evidence proving beyond a reasonable doubt that Dobbs did not engage in self-defense in all other counts.

Counsel acknowledges the question of whether a defendant committed a homicide in justifiable self-defense is ordinarily one for the jury, however the State's evidence is legally insufficient to rebut the prima facie self-defense by Dobbs. The conflict in testimony is between the State's victims and the

independent witnesses, that corroborate Dobbs' testimony. Under the previously controlling self-defense statute, the appellate court found the State's evidence was legally insufficient to prove guilt beyond a reasonable doubt. *Hernandez Ramos v. State*, 496 So. 2d 837 496 So. 2d 837 (Fla. 2d DCA 1986). The finding of insufficiency in *Hernandez Ramos* was based on the defendant self-defense claim in a homicide case in which the State failed to rebut the defendant's direct testimony that he acted in self-defense. In *Hernandez Ramos*, as here, some of the State's evidence corroborated the defendant's testimony of self-defense. Similarly, the victim in *Hernandez Ramos* initiated the fight, and the defendant tried to leave before using deadly force, and was prevented from retreat by the victim's friends.

In *Fowler v. State*, 921 So. 2d 708 (Fla. 2d DCA 2006), the State did not carry its burden to rebut the prima facie case of self defense in a case involving a charge of second degree murder, despite testimony that the direction the deceased fell was inconsistent with defendant's testimony in his self-defense claim. Here, the individual testimony of Andre Blanco, conflicts with Dobb's and Washington's versions of events, and is thus in sufficient evidence to meet the State's burden to rebut Dobbs self-defense claim. Blanco had a motive to lie, to avoid being charged with a felony, in the resulting death of William Troy. In

Fowler, the District Court found the eyewitness's testimony did not contradict physical evidence and the defendant's testimony. Dobbs contends that the evidence offered by the State, below, does not contradict, but rather supports Dobbs' testimony and claim of self-defense .

Also under prior self-defense law, the District Court reversed the finding of guilt in *Thompson v. State*, 552 So. 2d 264 (Fla. 2d DCA 1989), when the defendant shot an unarmed adversary, who was accompanied by two friends, that approached and threatened Thompson. In this case, Blanco and companions approached Dobbs vehicle, and exerted physical force against Dobbs. The justifiable use of force by Dobbs on Gotay and Troy was not sufficiently rebutted in the State's case in chief. *Thompson* held the State failed to rebut a prima facie case of self-defense and found the deadly force was justifiable if retreat would have been futile. The State asserted that leaving the scene after the incident indicates that Dobbs knew he killed someone. Washington testified Dobbs indicated when leaving the area he might have stabbed someone in his defense. However, in both *Fowler* and *Thompson*, the defendants fled the area and did not contact police. The *Fowler* court found departure from the scene by the defendant after a death, without contacting police, only shows poor judgment and panic after an attack and despite such facts, does not serve to negate a claim of

self-defense.

If this Honorable Court finds the State presented sufficient evidence to rebut Dobbs self defense claim beyond a reasonable doubt, appellant asserts in the alternative, that the State's evidence was insufficient to make a prima facie case for second degree murder. In *Williams v. State*, 674 So. 2d 177 (Fla. 2d DCA 1996), the jury found Williams guilty of second degree murder and the district court reduced Williams conviction to manslaughter when the defendant's use of a knife against a single unarmed roommate. In *Williams*, the stabbing occurred after the defendant summoned the police to his residence, in order to stop the victim from harassing Williams. Police visited the residence, and after they left the confrontation between Williams and the victim resumed, and the defendant shot the annoying victim. In this case, while the state categorized Dobbs as "angry," the evidence does not support a depraved mind since the testimony established Dobbs and William Troy did not know each other, were only seated in different areas of the same club for thirty minutes, experienced minimal contact with each other and no or little words were exchanged before or during the fight. (T 161, 169, 184, 187, 197, Vol. I; T 203, 226, Vol. II; T 288, Vol. III)

In *Light v. State*, 841 So. 2d 623 (Fla. 2d DCA 2003), the court completed an in depth analysis of second-degree murder and in reducing the charge from

second degree murder to manslaughter noted it 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, resulting in eventual death. In reducing the conviction, the court held for the offense of second-degree murder, hatred, spite, evil intent, or ill will usually require more than an instant to develop.

WHEREFORE, Appellant respectfully requests this Honorable Court find the evidence presented is insufficient to rebut Dobbs prima facie case of self-defense beyond a reasonable doubt or the guilty verdict is not supported by competent, substantial evidence and reverse the judgment and sentence entered below. In the alternative, Appellant requests this Honorable Court find the evidence is insufficient, as a matter of law, to establish second degree murder in the death of William Troy and remand to the trial court to be resentenced with a corrected scoresheet.

ISSUE II

THE TRIAL COURT ERRED TO ISSUE, OVER DEFENSE COUNSEL'S OBJECTION, THE PROVOCATION EXCEPTION INSTRUCTION AND FUNDAMENTALLY ERRED WHEN THIS INSTRUCTION MISSTATED THE SELF-DEFENSE LAW, CONFUSED JURORS AND NEGATED APPELLANT'S ONLY DEFENSE.

The giving of the provocation/aggressor portion of the forcible felony exclusionary charge, as part of the standard self-defense jury instruction, without the commission of an independent forcible felony, was abuse of discretion and fundamental error. The forcible felony statute[8] and the applicable jury instruction are intended to prevent a defendant from asserting self defense when they initiate violence and engage in commission of felonious acts.

Dobbs asserts that by giving the instruction the court confused the jurors and negated Dobbs' only defense. In the charge conference, Judge Munyon voiced her concerns and declined to issue the first part of the forcible felony instruction on self-defense as Dobbs was not charged with an independent forcible felony.

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[8] Section 776.041, Florida Statutes; and optional jury instructions included in Sections 3.6(f) and 3.6(g) of the self-defense instructions.

The lower court stated:

> **THE COURT:** The next paragraphs are two possibilities. One would not apply because the defendant is not charged with an independent, forcible felony aside from this altercation, so I don't want to have a circular instruction and commit fundamental error as some others have done. So I would delete one unless somebody can come up with an independent forcible felony that the defendant is alleged to have been committing. No? Okay. Is either the State or the Defense requesting two?
> **MS. VICKERS:** No, Your Honor.
> **THE COURT:** State?
> **MS. LASKOFF:** I would.
> **THE COURT:** All right. Then I will give - - I will delete the two, the number, the number two. I will place this, make it one paragraph.
> **MS. VICKERS:** Just for the record, the defense objects to 2B.
> **THE COURT:** Okay. Do you have specific legal objection?
> **MS. VICKERS:** Yes, because it is not supported by the evidence, the facts in evidence during this trial. Also says the defendant initially provoked the use of force against the defendant.
> **THE COURT:** It would read better if it was against himself.
> **MS. VICKERS:** That is what it says in the standard jury instructions.
> (T 654-656, Vol. V)

In review of justifiable use of non-deadly force instructions, defense counsel restated her objections on the same instruction for justifiable use of deadly force:

THE COURT: ...And then we get to the use of non-deadly force is not justifiable if you find - - and we have already established that the defendant is not accused of any independent forcible felonies, so one did not apply. State, are you requesting two?
MS. LASKOFF: Yes, your honor.
THE COURT: Defense, you're objecting.
MS. VICKERS: Yes, your Honor.
THE COURT: All right. I will give it.
(T 658, Vol. V)

The trial court overruled Dobbs' objections and overruled the renewal of said objections, read the instructions, including the provocation exclusionary instruction in both the justifiable use of non-deadly and deadly force instructions. (R 330-332, 334-336, 338-340, 343-345, Vol. II; T 655, 658, 666, 669, Vol. V; T 766, Vol.. VI) In both standard jury instructions for justifiable use of non-deadly and deadly force in Sections 3.6(f) and 3.6(g) respectively, the relevant portion of the latter provides:

However, the use of deadly force is not justifiable if you find:

Give only if the defendant is charged with more than one forcible felony. See Giles v. State, 831 So. 2d 1263 (Fla. 4th DCA 2002).

1. (Defendant) was attempting to commit, committing, or escaping after the commission of (applicable forcible felony) or;

2. (Defendant) initially provoked the use of force against [himself] [herself], unless:

a. The force asserted toward the defendant was so great that [he] [she] reasonably believed that [he]

> [she] was in imminent danger of death or great bodily harm and had exhausted every reasonable means to escape the danger, other than using deadly force on (assailant).
>
> b. In good faith, the defendant withdrew from physical contact with (assailant) and clearly indicated to (assailant) that [he][she] wanted to withdraw and stop the use of deadly force, but (assailant) continued or resumed the use of force.

The forcible felony exclusion to assert self-defense is to be given only when the accused is charged with at least two offenses, the one for which the accused claims self-defense, as well as a separate other forcible felony. *Giles v. State*, 831 So. 2d 1263 (Fla. 4th DCA 2002). This issue was preserved for appeal when defense counsel objected to the instruction for lack of evidence. While not specifically stated, Dobbs asserts the trial court was aware of potential problems in this instruction and the objection for lack of evidence of an independent forcible felony was preserved for appellate review. (T 655-658, 666, 669, Vol. V; T 766, Vol. VI)

The forcible felony exception to self defense is applicable only in circumstances where the person claiming self-defense is engaged in another independent forcible felony at the time. To avoid reversible error, the trial court declined to issue the forcible felony exception to self-defense because Dobbs was

not charged with an independent forcible felony outside the altercation. The trial court clearly stated, "one would not apply", and indicated her intention not to commit fundamental error by issuing the instruction. Dobbs asserts that the court was under a false impression that only section one would not apply without an independent forcible felony.

The use of force by an initial aggressor exception instruction in Section 776.041(2), like Section 776.041(1), is not applicable absent an independent forcible felony. Within the standard jury instruction, trial courts are provided guidance through italicized "notes to the Judge" to assist in instructing juries. At the time of trial, the notes for both the use of deadly and non-deadly force provided above the forcible felony and aggressor sections read, "Give only if the defendant is charged with more than one forcible felony". *See Giles v. State*, 831 So. 2d 1263 (Fla. 4th DCA 2002). While the District Courts analyses have been limited to the first half of the forcible felony instruction, the independent forcible felony requirement is not limited to only the forcible felony portion. When a defendant asserts a justification under self-defense, the self-defense law is clearly set forth in jury instructions and Florida Statutes. The application of this "exception instruction" has repeatedly confused courts and jurors, negated self-defense claims and resulted in numerous reversals due to inaccurate instructions.

The issuance of these two sections of the instruction are intended for rare and special circumstances involving the commission of a separate forcible felony. This instruction has been overused by trial courts who operate in the fast paced world of jury trials and moving the docket without proper attention to the detailed notes to judge or a full understanding of those limited situations when the exception to self-defense instruction is warranted. In each charge, Dobbs asserted self-defense. As shown in the fundamental error argument, the provocation exception instruction is not proper and misstates the law of self-defense by requiring a duty to retreat and negates Dobbs' simple claim of self-defense, which permits the right to stand your ground to meet force with force.

The Florida Supreme Court recently considered this question, prior to the commencement of Dobbs' trial on February 26, 2007, trial. In re STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, 947 So. 2d 1159 (Fla. Jan. 25, 2007), the Florida Supreme Court approved and published the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, proposed recommended changes to the justifiable use of Non-Deadly Force. The recommended proposed amendments adopted the recommendations of Judge Angel Cortinas who suggested that the aggressor portion of the justifiable use of non-deadly force should be clarified to advise the trial judge that this portion

should only be given when the defendant has been charged with an independent forcible felony other than the one for which the defendant claims self-defense. The amendment inserted the same instruction over this instruction in the justifiable use of non-deadly force, "Give only if the defendant is charged with more than one forcible felony", and cited *Giles*.

This authorization by the Florida Supreme Court supports Dobbs' argument that despite the trial court's honest intentions, the issuance of the aggressor instruction in both non-deadly and deadly force instructions, without evidence of an independent forcible felony, was abuse of discretion and error.

FUNDAMENTAL ERROR

Without waiver of any other arguments set forth herein, if this court does not find the trial court abused it's discretion to issue the provocation portion of the forcible felony exception instruction or that the objection raised below was not preserved, the giving of this instruction is fundamental error.

Section (a) of the initial aggressor exception to self-defense specifically contradicts Dobbs' right to stand his ground, as set forth in Section 776.013(3), Florida Statutes (2005). The relevant part of the non-deadly force instruction in the second degree murder charge provides:

The use of non-deadly force is not justified if you

find:

2. 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 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, other than using non-deadly force on William Troy.

(R 332, Vol. I)

This instruction was issued eight times, in both non-deadly and deadly force, to the jurors. (R 330, 332, 334-336, 338-340, 343-345, Vol. I) On October 25, 2006, Dobbs was confronted with an escalation in the force used against him when three more individuals voluntarily entered the altercation independently without provocation and punched at Dobbs. However, section (a) in the instructions require Dobbs to use every reasonable means to escape each of the additional attackers and contradicts Dobbs' right of self-defense, at the time of the offense, to stand his ground from the additional attacks. This instruction is confusing, misleading to jurors and effectively negated Dobbs' self-defense claim in each count.

Dobbs has been unable to locate Florida case law on point to address this specific jury instruction and with the recent changes in the self-defense law

believes this might be a case of first impression. Dobbs contends the instruction does not properly instruct the jury on self-defense under the present facts and respectfully requests this Honorable Court to consider whether this instruction, as written, is compatible with Section 776.013(3), Florida Statutes (2005).

In *Thomas v. State*, 918 So. 2d 327 (Fla. 1st DCA 2005), the court found the evidence was not reasonably susceptible to differing views and held, based on the evidence presented, the defendant was not entitled to jury instruction on self-defense at the time of the incident. The facts in *Thomas* stemmed from a 2002 incident and the initial aggressor instruction had not been amended or changed with the legislative amendments to reflect the current state of self-defense law. Operating under the pre-amendment self-defense law, the *Thomas* court declined to reach the question on whether the instruction rose to fundamental error, but relied on section(a) in the initial aggressor instruction to find that Thomas did not exhaust every reasonable means to escape the perceived danger.

Appellant's counsel acknowledges and recognizes whether fundamental error occurred in giving the forcible felony instruction is pending before the Florida Supreme Court. Seemingly contrary to their previous holding[9], the Third

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[9] The District Court in *Grier v. State*, 928 So. 2d 368 (Fla. 3d DCA 2006), found fundamental error to issue the forcible felony instruction when the instruction negates the defendant's only defense.

District Court in *Martinez v. State*, 933 So. 2d 1155 (Fla. 3d DCA 2006), *review granted*, 959 So. 2d 717 (Fla. 2007) concluded, the giving of both portions of the forcible felony and provocation instruction was not fundamental error. The majority cited self-defense was not the sole defense and the evidence presented of wounds inflicted to the victim were inconsistent with the defendant's theory of self-defense. *Martinez* is distinguishable as self-defense is Dobbs only claimed defense and his testimony at trial, and the physical evidence, support a self-defense claim. Also, *Martinez* challenged the forcible felony instruction while the instruction challenged here is section (a) of the initial aggressor half of the instruction.

In *Granberry v. State*[10], – So. 2d – , 32 Fla. L. Weekly D 2603 (Fla. 5th DCA Nov. 2, 2007), this Honorable Court found it was fundamental error to instruct the jury on the forcible felony exception to self-defense because to do so involves circular reasoning and essentially negates the defense and certified conflict with *Martinez*. Also, this court sitting en banc in *Sloss v. State*, (Fla. 5th DCA 2007), held to give the forcible felony instruction was fundamental error

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[10] In *Carter v. State*, 889 So. 2d 937 (Fla. 5th DCA 2004), *review denied*, 903 So. 2d 190 (Fla. 2005), this court held to give the forcible felony instruction absent an independent forcible felony is error.

and presented a certified question to the Florida Supreme Court[11].

Jury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred. *State v. Weaver*, 957 So. 2d 586 (Fla. 2007). A defendant is entitled to a specific, correct and accurate jury instruction on the law applicable to his theory of defense if any evidence supports that theory and that theory is valid under Florida law. *Hudson v. State*, 408 So. 2d 224, 225 (Fla. 4th DCA 1981). In all counts, Dobbs asserted self-defense as his only defense. The applicable right to stand your ground, as set forth in Section 776.013(3), Florida Statutes, effective October 1, 2005, provides:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

A fundamental error with respect to jury instructions occurs only when an omission from an instruction is pertinent or material to what the jury must

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[11] Appellant has intentionally excluded cases by this Honorable Court with the same certified question of great public importance.

consider in order to convict. *Torrence v. State*, 440 So. 2d 392 (Fla. 5th DCA 1983). The only material issue for the jury in this self-defense claim was whether the elements of the charged offense were committed by the accused in self-defense or if Dobbs was justified in his use of force against four attacking males in a parking lot. The jury instructions given did not allow that issue to be clearly presented to the jury under the existing law of self-defense.

The Florida Supreme Court in *Motley v. State*, 155 Fla. 545, 20 So. 2d 798 (1945), refused to analyze the trial court's erroneous self-defense jury instruction under the harmless error statute in effect and found fundamental error. In it's reasoning, the Motley court stated:

> We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and the failure to do so, the charge is necessarily prejudicial to the accused and misleading. **The same would necessarily be true when the same character of error is committed while charging on the law relative to the defense.** We have not failed to consider the harmless error statute. This is not a case where the court failed to neglected to charge on some phase of the evidence which placed the burden on the defendant to request a more complete charge. This goes to the essence and entirety of the defense.

Id. At 800 (citations omitted)(emphasis added)

Sloss claimed self-defense to an aggravated battery with a deadly weapon charge that arose in February, 2003. The self-defense law in effect at the time of Sloss's criminal conduct included a duty to retreat, in most circumstances, before the use of deadly force. This Honorable Court noted the portion of the forcible felony instruction dealing with provocation and retreat is acceptable. Section (a) in the provocation instruction has not been amended since the new self-defense law became effective. Although compatible with the prior self-defense law, Dobbs respectfully request this Honorable Court revisit this instruction and this Honorable Court's position under the current self-defense law, and Dobbs' right to stand his ground under the present facts against Blanco, Gotay and Troy.

In dicta, the *Martinez* majority wrote 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. *See Davis v. State*, 886 So. 2d 332 (Fla. 5th DCA 2004).

The State relied on this erroneous instruction and reminded jurors throughout the trial that Mr. Dobbs could have and should have avoided the fight if he left before the fight started. (T 148-150, 152, Vol. I; T 708, 711, 715, Vol. VI) To argue, in hindsight, that Mr. Dobbs should have left before investigating what Blanco wanted is common sense, but such a duty was not required at that

point in time under prior self-defense law or Section 776.013(3), Florida Statutes (2005). No legal authority to support this argument, coupled with section (a) of the provocation instruction that imposes a duty to use all reasonable means to escape the danger, permitted jurors to find that because Dobbs did not leave the area when he entered the Acura, he failed to exhaust all reasonable attempts.

This Honorable Court in *Carter v. State*, 889 So. 2d 937, 939 (Fla. 5th DCA 2004), held that fundamental error exists where the inaccurate and misleading instruction negates the defendant's only defense. The immediate entry of three companions into Blanco's fight against Dobbs escalated the force against Dobbs and the instruction provides that to regain the right to self-defense, Dobbs must first exhaust every reasonable means to escape before he can stand his ground against the additional attackers. Even if Dobbs was the initial provoker, in order to exercise self-defense against the attacking Gotay, Troy or Riollano, Dobbs must first exhaust every reasonable methods to escape the danger. This is contrary to the language in Section 776.013, for additional participants who enter the fight and attack. Dobbs is now required to retreat against the escalation in force against him to retain the right to stand his ground and assert self- defense.

These "initial aggressor" instructions improperly intermingled any provocation with Blanco and applied the provocation to all additional individuals

who join in th the fight. As given, jurors are instructed that Dobbs cannot stand his ground despite an escalation in the initial threat by attacks from Gotay, Troy and Riollano[12], who all approached Dobbs and began to throw punches. Although the right to stand your ground in the typical self-defense instruction was given, the initial aggressor portion instruction effectively negates this instruction and creates conflict in the defense instructions that confuses and impermissibly misleads the jury that the initial provocation versus one applies to all. The only provocation to Gotay or Troy , who did not see the first punch thrown, is Dobbs' scuffle with Blanco. This should not serve as a free pass for Gotay, William Troy or any others to commit battery or aggravated battery upon Mr. Dobbs.

The error is not harmless and the instruction issued contradicts the current self-defense law. In the alternative, Dobbs asserts if this misstatement of law is not fundamental, it is ineffective assistance of counsel on the face of the record. The October 1, 2005, self-defense amendment was a dramatic change in the law and counsel's failure to recognize this incorrect statement of law falls below an acceptable standard of conduct. As noted, the State's reliance on this incorrect statement of the law did impact the trial and verdict. Defense counsel's failure to

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[12] Hanzel Holiday drove his vehicle, a deadly weapon, into Dobbs' Acura on the roadway.

object to subsection (a) on these grounds, or to properly preserve such claim, negates Dobbs only claimed defense and is error on the face fo the record. Also, the instruction misstates current self-defense law and counsel further erred in failing to request a specific jury instruction that no duty to retreat exists when retreat would be futile. Dobbs respectfully requests this Honorable Court vacate the judgment and sentence entered below and remand with instruction.

ISSUE III

THE PROSECUTION'S CLOSING ARGUMENT MISLED THE JURY BY OBFUSCATING RELEVANT FACTS, MISSTATED THE LAW AND NEGATED DOBBS' ONLY DEFENSE

The collection of improper prosecutorial remarks in closing denied Dobbs' due process rights to a fair and impartial trial and is fundamental error. Allegedly improper prosecutorial comments are examined on appeal in the context of the entire closing argument to determine whether the cumulative effect of the improprieties alleged deprived the defendant of a fair trial. *Davis v. State*, 928 So. 2d 1089 (Fla. 2005). The State is free to argue to a jury any theory of the crime that is reasonably supported by evidence but may not subvert the truth seeking function of trial by obtaining a conviction or sentences based on deliberate obfuscation of relevant facts. *Garcia v. State*, 622 So. 2d 325 (Fla. 1993).

A central issue in the case was who, between Andre Blanco and John Dobbs, was the aggressor with each accusing the other of initiating the attack. The prosecution's closing argument obscures a material factual determination as to who approached who and where the State believes the altercation began. A conflict in the State's own evidence exists on this question and the prosecution

cleverly concealed and obscured this important fact from jurors. Instead, the State selected pieces of the independent witnesses version of events (without mention of conflict with other testimony in their own case) and blended them into the victim's story and obscured the conflicting evidence on the same point. The complaining witnesses (Blanco, Gotay and Riollano) testified the fight occurred after Dobbs drove to Blanco, exited his car with Deanna Washington and began to attack. (T 161, 176,-177, 179, 182, Vol. I; T 202, 225-226, Vol. II) In opening, where the State indicates the fight occurred at Dobbs' vehicle, and parts of their closing argument, it is apparent the prosecutor trying this case did not believe their own victim's testimony. (T 148-149, Vol. I) If the State believed their own victims testimony, the prosecution could have charged Deanna Washington as a principal. These "victims" version of events were contradicted by the independent witnesses and physical blood evidence.

The independent witnesses, Idle, Westfall and location of the circumstantial blood evidence indicates Dobb never drove his car before the fight, all of the victims went to Dobbs and his vehicle, where the fight began. (T 255, 268-269, 271, 279-280, 288, 301, 307, Vol. III) In closing the prosecutor stated, "The defendant goes to his car. Deanna Washington gets in the passenger side. The defendant gets in his side as well. Then you have the dead victim, William

Troy, his two friends that are stabbed, Francisco and Andre and Anthony Riollano." The State continued, "Now, there's some - - it's not quite clear from the folks that come out on the scene whether or not the defendant had initially driven by and parked his car, but the three guys are quite clear the defendant and his girlfriend are leaving. They are getting out of there. But when they heard the words, the defendant parks. He parks six spots away from the deceased victim and his friends. Defendant gets out of his car. He walks around and Andre Blanco is walking over." (T 684-685, Vol. VI)

The independent witness statements were crystal clear that Dobbs did not move or drive the vehicle before Blanco arrived. The State conceals their own inconsistency in the evidence with inaccurate description of the testimony. In their rebuttal, the state conceals this very relevant conflict in their case, "There is no conflict in the evidence that this man is the one that cut him, sliced him up. .." (T 704, Vol. VI)

Dobbs testimony that he was approached by the victims and the fight at the Acura supports the defense while diminishing the State's theory of Dobbs being angry and advancing to the victims. In closing, the prosecution blends part of the independent witnesses version that Dobbs was in his car and quickly jumps to the victim's theory that Dobbs exited his vehicle and engaged in an unprovoked

attack on Blanco. The prosecutor conceals and avoids that Blanco and three friends walked away from the Club, past their car, and toward Dobbs.

The second prosecutorial misconduct is a misstatement of the law. *Quaggin v. State*, 752 So. 2d 19, 25-26 (Fla. 5th DCA 2000). Rather than alert jurors to the inconsistency and explain why Blanco walked towards Dobbs, the State concealed this fact from jurors and improperly asserted Dobbs failure to leave can negate his self-defense claim as outlined in Point II. The prosecutor stated, "It wasn't self-defense. Okay? He could have left. He should have left and he didn't." (T 715, Vol. VI) This duty to leave, asserted by the State, is a misstatement of the law in an effort to vitiate Dobbs right to stand his ground under Section 776.013(3), Florida Statutes (2005). The prosecutor improperly implies Dobbs had a duty or opportunity to escape the situation before exiting the Acura. This repeated argument deprives Dobbs of his sole defense and is fundamental error. (T 148-152, Vol. I; T 708, 711, 715, Vol. VI)

Any comment or remark in closing to avoid a trial court's rulings is highly improper. *Caraballo v. State*, 762 So. 2d 542, fn 1, 6 (Fla. 5th DCA 2000) The State argued, "He gets out of the car and attacks the first guy with a knife. It's not excusable what he did. It wasn't an accident. It wasn't misfortune. *He wasn't doing an lawful act.* He intentionally got out of the car with a knife and

attacked them one by one." (T 711, Vol. VI)

Similar to giving the forcible felony instruction when no independent forcible felony occurred, the State's comment, which negates the self-defense right to stand his ground, is error for the same reasons applied in *Giles v. State*, 831 So. 2d 1263 (Fla. 4th DCA 2002). Such violation usually occurs from a motion to suppress or motion in liming. This misstatement of the law contrary to the trial court's previous ruling when Judge Munyon stated in refusing the forcible felony instruction, "I don't want to have a circular instruction and commit fundamental error as some others have done the court remarked." (T 654, Vol. V) The comment by the prosecutor negated Dobbs' sole defense and was a circumvention of the trial court's prior ruling in the charge conference.

Throughout her closing argument, the prosecutor testified with personal opinion that Dobbs actions were not justifiable or were not self-defense. Prosecutor's may not issue their own personal opinions of guilt. *Sempier v. State*, 907 So. 2d 1277 (Fla. 5th DCA 2005). Also, the opinions were matters to be resolved by the jury and invaded the juries province. (T 684, 705-706, 710, 713, 715, Vol. VI) These comments were highly improper, prejudicial to the outcome and the cumulative effect of the prosecutorial misconduct throughout amounts to fundamental error. *Caraballo,* 762 So. 2d 542 (Fla. 5th DCA 2000).

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, aggravated assault and release Dobbs from custody. If this Court does not deem it proper to grant initial relief requested, Dobbs requests this Honorable Court vacate all judgment and sentences entered below and remand to the trial court for a new trial with instructions. In the alternative, undersigned counsel respectfully requests this Honorable Court reduce the second degree murder conviction to manslaughter and remand to be resentenced.

Respectfully submitted,

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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 4th day of December, 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