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

RAY CURTIS GREENLAW,

Appellant,

vs. CASE NO. 5D15-1444

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

STEVEN N. GOSNEY
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0180830
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
gosney.steve@pd7.org

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE

The Appellant, Mr. Ray Curtis Greenlaw, was charged by indictment with first degree murder (victim Brian Leverett) and attempted first degree murder (victim Justin Riley) and shooting into a building. (III 474-475)[1]

Before trial, Mr. Greenlaw presented a "Stand Your Ground Motion," providing evidence to the Court that he had acted justifiably in self defense or defense of his brother, Wayne. (III 492-498) The lower court conducted two days of hearings on the motion; first on March 22, 2013, and then on December 2, 2013. (I 9-200; II 201-339; III 492-498; SUPP XXVI-XXVIII) After a hearing, the lower court denied Mr. Greenlaw's motion by written order dated January 6, 2014. (III 567-580) The Court's order on the use of stand your ground for purposes of immunity was taken to the Fifth District Court of Appeal on a writ of prohibition in case number 2011-036247-CFAES and this Court denied the petition. The facts as found by the lower court are contained fully within the January 6, 2014, Order. (III 567-580)

---

[1] In the brief the following symbols will be used: "I" will denote volume one of the record on appeal, of which there are twenty eight (28). For example, (1 54) would denote the first volume page 54 of the record on appeal and (II 255) references page two hundred and fifty five of the second volume. The Supplementals will be designated as (SUPP XXVI #).

The case was tried by a jury before the Honorable Judge M. Hudson from January 30, 2015 to February 9, 2015. The prosecutor was J. Ryan Will. James Valerino and Joshua Mott represented Mr. Ray Greenlaw (who was tried concurrently with his brother, Wayne). (V 863)

Jury Selection. During jury selection, the following dialog occurred relevant to the present appeal:

> THE COURT: Sorry. Forty-nine. Thank you. Please stand. And where do you think you heard something about the case?
> VENIREWOMAN NO. 49: On Facebook.
> THE COURT: On Facebook?
> 12 VENIREWOMAN NO. 49: Yes.
> THE COURT: Is there anything about what you on Facebook that you think would influence your decision if you were selected as a juror in this case?
> VENIREWOMAN NO. 49: Yes.
> THE COURT: And can you tell us, without the specifics, why you think you are influenced by what you read?
> VENIREWOMAN NO. 49: That it, more or less, proved to me that --
> THE COURT: I'm sorry. I can't hear you. Could you speak up a little bit?
> VENIREWOMAN NO. 49: It, more or less, proved to me that they did it, without a doubt.

(SUPP XIX 3282-3283)

The defense moved to strike the entire panel, arguing that it had been tainted by the comments of Venirewoman No. 49. (SUPP XIX 3347-3350) The trial court denied the defense motion. (SUPP XIX 3350) Later, after some for-

cause strikes, the trial court addressed the panel as follows:

> THE COURT: Okay. Anyone else? All right. There was a juror earlier today who responded in a different question, response to a different question, that she had read something on Facebook, and based on that, she would make her decision based on that. First of all, I need to ask those of you that are here, do you believe that anything on Facebook is evidence?
> THE VENIRE: No (collectively).
> THE COURT: Is there anybody that thinks what they read on Facebook should be considered as evidence in this case?
> THE VENIRE: No (collectively).
> THE COURT: So please raise your hand. We need to know that at this time. No one. All right. Is there anybody here in the courtroom now that, either because you heard that potential juror say that or I have reminded you that that juror said that, that you would be influenced by the fact that another juror would be interested in what Facebook said about this case? Is there anybody that would be influenced by what she said?
> THE VENIRE: No (collectively).

(XIX 3394-3395)

The prosecutor stated the following during jury selection:

> Okay. The jury is here, you're the finders of fact. It's your function to determine what happened from the evidence presented in court, as best you can, and come up with a verdict of either guilty or not guilty based upon that evidence. Does everybody understand that?
> As parents, you have the same responsibility when your kids fight. Very often you'll be called into a room to deal with a situation that you hadn't seen, you'll have two opposing views, and you'll have to sort out what happened. If you're comfortable enough to do it at home, is there anybody that thinks that they can't do it here? It's a different kind of conflict, but it's just the same rules. Everybody think they can do it?

(SUPP XX 3544)

Also during jury selection, the prosecutor emphasized a person's "duty to call 9-1-1" theme:

> Okay. Has anybody ever had a conversation with a friend where maybe you told your friend or your friend told you about something really terrible that you did, something that you weren't proud of, something they weren't proud of? Anybody ever had that situation where they came to you and confided in you something that they had done? I see a couple of heads shaking yes. If it rose to the level of a crime, would you feel a duty to report it if that were the situation? Yes?
> VENIREMAN NO. 38: Yes.
> MR. WILL: Is there anybody who wouldn't report it? Does it kind of depend upon the severity of the circumstance and the severity of the crime? It does; right?
> THE VENIRE: Yes (collectively).

(SUPP XX 3552)

The prosecutor continued this line of questioning with the jury panel regarding a duty to call 9-1-1. (SUPP XX 3585-3600; SUPP XXI 3601-3670; SUPP XXIV 4214-4274) Although none of the statements were objected to, the judge later characterized the entire jury selection process as "totally inappropriate." (SUPP XXIV 4382-4383)

In jury selection, the prosecutor emphasized a recurring theme about a personal "home protection plan." (SUPP XXI 3624; SUPP XXIV 3214, 4222, 4231, 4233, 4237, 4239, 4243, 4244, 4259) For example, the prosecutor asked a

panelist,

> does your protection plan ever include violence by you?"

(SUPP XXI 3624)

The prosecutor characterized the jury's role in a criminal trial as follows:

> It's your job to determine the guilt and innocence of the two people before you on trial. As parents, you're called upon in this role just about every day. You have two competing sides. Your kids are fighting. You didn't see what happened. You're called into the room and you're supposed to determine what happened, who's responsible, and who should be punished. If you can do it at home, is there anybody who thinks that they can't do it here?

(SUPP XXIII 4193)

The parties ultimately agreed on a jury panel containing several jurors from panel one. (SUPP XVIII 3196 - SUPP XXV 4525 *passim*; SUPP XXIV 4498-4499, 4501-4503, 4511)

Opening statement. During the opening statement, the prosecutor stated,

> But the only house from which 9-1-1 was never called was the defendants', not before, when there was an argument, not during the seven minutes of silence, and not after, to report the discharge of the weapon or the death of this human being.

(V 941)

> The only reason that we're having a trial is because the victim died with a shotgun in his hand.

(V 941)

> And when you take a look at the personal safety plan and home protection plan that Wayne Greenlaw and Ray Greenlaw had in place, you will find that it includes hunting their neighbors with machetes and semiautomatic weapons. We have a phrase for that kind of violence in this country, and it isn't self-defense. It isn't stand your ground. We call that murder.

(V 944)

Trial testimony. During the Ray Greenlaw interrogation, the investigator stated:

> INVESTIGATOR LEE: Okay? Just because they're out there harassing you, you could have stepped back in the door and called 9-1-1. But, instead, you and your brother armed yourselves, you walked out the door.

(XII 2390)

> INVESTIGATOR LEE: You know the rules of self-defense. Rules of self-defense stop at No. 9. Okay? I'm not -- I'm not going to sit here and let you blow smoke up my backside either.

(XII 2391)

The defense moved for judgment of acquittal pursuant to Rule 3.380, Florida Rules of Criminal Procedure at the close of the prosecution's case. (XIV 2631-2653) The lower court denied the defense motions. (XIV 2653-2654) The defense motions were renewed at the close of all evidence and again denied. (XIV 2746-2748)

Closing arguments. During the closing argument, the prosecutor stated:

> And it goes on to say that if they're in a place where they have a right to be when they are attacked, they have no duty to retreat. Well, they weren't in a place where they had the right to be.

(XV 2993-2994)

During the rebuttal closing argument, the prosecutor stated:

> The defendants become the aggressors and are not permitted to the use of deadly force the moment that they arm themselves and walk out into the neighborhood. I read you guys the instruction a little while ago. I found it in there. You can too. The moment that they armed themselves, they have to do everything that they can not to.

(XVI 3087)

> You know, the strange thing about this entire scenario is that Brian Leverett is the only person who's permitted to act with deadly force because he had been attacked and his friends had been attacked with violent action, with a weapon. [...] Brian Leverett [VIC] is the only person in the entire scenario that's allowed to use deadly force under the law.

(XVI 3088)

> During the interview, both men were asked, they were asked why didn't they just stay inside and call the police. Over and over they said that they were sorry for what they had done. Ray Greenlaw said that he made bad decisions and that he should have stayed inside the house. Wayne Greenlaw agreed that he should have stayed inside the house and he should have called the police and that, under the circumstances, it would have been the best thing to do.

(XVI 3090)

Jury instructions. At trial, the trial court instructed the jury consistent with Florida's Per your recent request, please find the Initial Brief filed by Ryan Thomas Truskoski on behalf of your brother, Wayne. "stand your ground" law. (XV 2936-2938)

The lower court read the body of the jury instructions prior to closing arguments and there were no objections to the jury instructions as read. (XV 2893, 2919-2965) The were no significant objections to the jury instructions during the Friday jury charge conference. (XIV 2765-2800; XV 2801-2906) The jury returned a verdict of guilty of first degree murder for count I and guilty of the lesser charge of attempted manslaughter by act for count II, with special finding of weapon possession, and guilty of shooting into a building as toPer your recent request, please find the Initial Brief filed by Ryan Thomas Truskoski on behalf of your brother, Wayne. count III. (XVI 3113-3114) The court then immediately sentenced Mr. Greenlaw to mandatory life in prison for the first degree murder charge, concurrent fifteen years on the attempted manslaughter by act with the weapon enhancement, and concurrent fifteen years on the shooting into a building. (XVI 3119-3121) A notice of appeal was filed on April 27, 2015. (V 855) This appeal follows.

STATEMENT OF THE FACTS

JURY TRIAL

The joint jury trial occurred January 30, 2015 to February 9, 2015. (V 862-XVI 3126) The co-defendant, tried at the same time, was Mr. Greenlaw's brother, Wayne Greenlaw. The facts are greatly shortened for the purposes of appeal.[2]

Factual Summary. Brothers Ray and Wayne Greenlaw lived at 9 Aspen Street. During the early morning of October 29, 2011, two persons, Brian Leverett and Justin Riley entered the Greenlaw house at 9 Aspen, but were soon ejected, with Ray Greenlaw stating emphatically, "This is not you F-ing house." (VI 1161-1166, 1179-1187, 1179-1180, 1183-1184, 1187, 1191) While still on the Greenlaw's property at 9 Aspen[3], Mr. Riley was struck in the arm by a machete wielded by Ray Greenlaw.

Mr. Riley testified that after he and Mr. Leverett exited the Greenlaw residence, Ray Greenlaw exited behind him holding a machete, swinging it with both hands at Mr. Riley. (VIII 1449-1450, 1495-1496) The machete struck Mr.

---

[2] *Cf.* 2 Fla. Prac., Appellate Practice § 16:16 (2015 ed.) (Although the statement of facts should be comprehensive, it should not contain extraneous facts that are unrelated to the issues.) Fla. R. App. P. 9.210(a)(5)

[3] There is a factual dispute as to whether Mr. Leverett and Mr. Riley first left and then returned, or had just been ejected when the machete strike occurred. This dispute of fact is not determinative.

Riley in the left arm, severing a bone and causing a deep laceration and loss of blood. (VIII 1450-1452) As Mr. Leverett and Mr. Riley fled, the two groups traded threats: *i.e*. "I have a .45," and a response of "I do too." (VI 1166, 1184)

The Greenlaws then went into their house and armed themselves – Ray with a 9mm semiautomatic handgun and Wayne with a Ruger Mini-14 rifle. Mr. Scott Searles testified that he witnessed Ray and Wayne Greenlaw arming themselves with one of them stating, "Let's go kill this motherfucker." (VIII 1569-1575; IX 1626, 1669-1673) The two Greenlaw brothers then exited the house, traveling into the roadway in front of 13 Aspen – two doors down from their own residence at 9 Aspen with the firearms after firing a couple of warning shots in front of their residence. (VIII 1573-1574; IX 1622-1623, 1639, 1670)

At around the same time, Brian Leverett ran by Witness Kirk Matteson stating, "They tried to chop my friend in half." (VII 1387; VIII 1401, 1403, 1416) Brian Leverett then traveled on foot to his home, coming back out a few minutes later with a shotgun, telling Mr. Matteson to "call 911." (VII 1388-1390; VIII 1403-1404, 1407-1408, 1416) Mr. Leverett's shotgun had a capacity of three rounds. (XIV 2675-2676) In order to retrieve the shotgun at his residence and return to the scene of the shooting at 13 Aspen, Mr. Leverett traveled much further distance than the Greenlaws to arrive at 13 Aspen. (XIV 2736-2744) When

traveling back to the Greenlaw house with his loaded shotgun, Mr. Leverett then stated that he was going to "shoot that motherfucker" or possibly "brothers." (VII 1317-1322, 1370-1371, 1379) Brian Leverett was intoxicated, yelling, and holding a flashlight and shotgun in his hand when he walked back to the Greenlaw house. (VII 1222-1225, 1246-1253, 1256-1257)

The fatal encounter occurred when Mr. Leverett walked up the driveway of 13 Aspen towards the roadway with his shotgun. (VII 1290-1295, 1316, 1322) Mr. Leverett pointed his shotgun around between some houses, then pointed his shotgun at the Greenlaws, with Mr. Leverett pointing his gun first. (VII 1389-1391; VIII 1411-1419) The muzzle of Mr. Leverett's shotgun was sweeping the street with the flashlight at this time. (VII 1292-1293, 1309-1310, 1322-1323, 1325-1326) The sweeping motion stopped on a point. (VII 1326-1327, 1331, 1352) Mr. Wayne Greenlaw then said, "I'm not fucking playing, I'll shoot you" or possibly "I'll shoot you." (VII 1290-1295, 1316, 1322, 1327, 1331-1332; 1351-1352, 1369) Mr. Leverett then yelled, "Put the gun down."[4] (VII 1296-1298, 1327-1328, 1331-1332, 1369, 1379) Shots were fired from two different guns within seconds after Mr. Leverett made that statement. (VII 1298-1302, 1339-1340,

[4] The location of Mr. Leverett at this time was marked by the witness on Defense Exhibit 23. (IV 676-678; VII 1332-1333)

1352) Mr. Medow, who was positioned directly behind Mr. Leverett, saw Brian Leverett fire his shotgun just before being shot. (VII 1336-1341)

At the time of the Leverett shooting, Mr. Ray Greenlaw and Mr. Wayne Greenlaw were located in the roadway firing into the garage area of 13 Aspen, without impacting a vehicle parked in the driveway. (X 1849-1861, 1948-1949, 1954-1955; XI 2018-2033) The body of Mr. Leverett was found lying face down in the garage, with a partially loaded 12-gauge Winchester pump action shotgun lying just above his head, along with a broken DeWalt flashlight. (X 1861-1865, 1878-1879, 1987-1988) The shotgun was loaded with two shells, with one in the chamber and the safety off. (X 1866-1867, 1955-1956, 1959-1967) Two extremely helpful illustrations were introduced into evidence showing the locations of the shell casings, the trajectories of the projectiles, and the location of the body of Mr. Leverett and his shotgun. (III 541-542) Mr. Leverett had four gunshot wounds and died of a gunshot wound to the back. (XIII 2593-2600; 2601-2608) The crime scene forensics could not exclude the possibility that Mr. Leverett was maneuvering to a defensive cover position within the garage when shot. (X 1950-1955; XI 2042)

Facts presented at trial - The Ray Greenlaw statement. Investigator Bryan Ford interviewed the Greenlaws on October 29, 2011. (XII 2206, XII 2251-

XIII 2442) During the interrogation, Mr. Ray Greenlaw stated that when Mr. Riley and Mr. Leverett were at the Greenlaw residence, he ordered them out. (XII *passim*) Once outside, Mr Riley and Mr. Leverett tried to force their way back in the house. (XII 2277, 2293-2294; XIII 2438) Mr. Ray Greenlaw stated he feared that they were going to hurt him or his mother, beat or rob him, and that he was afraid for his life. (XII 2277-2278, 2381-2383, 2396-2398; XIII 2438-2439) Mr. Ray Greenlaw then armed himself with a machete, which he swung at Mr. Riley after being attacked. (XII 2280-2282, 2294-2295, 2317, 2346-2347, 2363-2364, 2370-2372, 2382, 2394; XIII 2401, 2420, 2430, 2440-2441) Mr. Ray Greenlaw stated in the interview that the machete strike occurred on the porch next to the front door. (XII 2336-2338, 2394-2395; XIII 2440)

The Greenlaw brothers then confronted Mr. Leverett in the street, ordering him to freeze. (XII 2287-2288, 2291-2292, 2297-2300, 2310-2311, 2314-2315, 2365-2367, 2379, 2385; XIII 2418) Mr. Wayne Greenlaw was armed with a rifle. (XII 2286-2288, 2348, XIII 2414) Mr. Ray Greenlaw initially denied having a firearm. (XII 2289, 2322, 2348-2350, 2356) Later, he admitted that Wayne gave him a 9mm and that he fired it into the garage in response to his brother's firing. (XII 2360-2362, 2364-2366, 2379-2380; XIII 2414-2417) During the interview, Mr. Greenlaw did not know if Mr. Riley or Mr. Leverett were armed. (XII 2320,

2324) Ray Greenlaw did express a fear that the two were coming back and that they may have guns or some kind of weapon and were going to attack them. (XII 2352-2353, 2375-2377, 2384-2387; XIII 2405, 2415-2416) Throughout the interview, Mr. Ray Greenlaw expressed his fear of Mr. Riley and Mr. Leverett. (XII *Passim*)

Facts presented at trial - The Wayne Greenlaw statement. The prosecution then played the interrogation of Mr. Wayne Greenlaw. (XIII 2449-2531) Mr. Wayne Greenlaw stated that the two entered his home to sell drugs, which he refused. (XIII 2462-2463, 2466, 2471, 2481, 2503, 2512-2513, 2526) One of the individuals may have had a gun and they became aggressive. (XIII 2456, 2463, 2465-2466, 2471-2472, 2477, 2481-2482, 2527) The two were asked to leave. (XIII 2471-2472, 2482-2483) He fired warning shots into the air to scare them off. (XIII 2476, 2486-2490, 2502, 2514-2515, 2528) He may have saw a gun or they said they had guns, and he fired at Mr. Leverett. (XIII 2478-2479, 2484, 2490, 2497, 2499-2501, 2516-2517) Mr. Wayne Greenlaw fired because he felt threatened, and he thought he had been fired upon. (XIII 2467, 2483, 2486, 2491, 2497, 2510-2511-2512, 2518-2526)

The first issue in the case was whether Mr. Greenlaw was justified in using deadly force against the trespasser Mr. Riley. The second issue in the case was

whether Mr. Greenlaw, while standing in the roadway in front of the house at 13 Aspen, was justified in his use of deadly force against Mr. Leverett.

SUMMARY OF ARGUMENTS

The only contested issue at trial was whether Ray Greenlaw acted in self defense. The prosecutor's repeated misstatements of the law amounted to fundamental error and deprived Mr. Greenlaw of a fair trial. The misstatements revolved around several issues: 1) that Mr. Greenlaw had a duty to call 9-1-1; 2) the imaginary assertion that the Greenlaws had a home protection plan that included hunting their neighbors; 3) improper instructions to the jury about their role; 4) improper comment on the right to a jury trial; 5) improper comments that Mr. Greenlaw did not have a right to act in self defense; and 6) repeated misstatements of law regarding the right of self defense. Because these misstatements were directed at the sole contested issue in the case (whether Mr. Greenlaw was acting in self defense), there is a reasonable probability that improper comments affected the verdict.

Florida's standard jury instruction 3.6(f) provides conflicting instructions regarding the duty to retreat. This legal confusion deprived Mr. Greenlaw of his right to stand your ground defense.

The trial court erred by denying the defense motion to strike the first jury panel when it was tainted by a panel member's comments during jury selection.

The trial court erred in its legal conclusion that Mr. Greenlaw was not entitle to stand your ground immunity as to both the initial attempted manslaughter by act against Justin Riley and the murder of Mr. Leverett.

ARGUMENTS

MERIT POINT ONE

THE STATE'S IMPROPER STATEMENTS AND ARGUMENTS AMOUNTED TO FUNDAMENTAL ERROR.

Standard of review. In a criminal case, fundamental error in closing argument takes place when "the prejudicial conduct, in its collective import, is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." *Caraballo v. State*, 762 So. 2d 542, 547-48 (Fla. 5th DCA 2000). In determining whether fundamental error is present, the standard is whether the error was "so prejudicial as to vitiate the entire trial." *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984). A "harmless error" result is inappropriate where there is a reasonable probability that improper comments affected the verdict. *McGirth v. State*, 48 So. 3d 777, 789-90 (Fla. 2010), *cert. den*., 131 S. Ct. 2100 (2011).

Defense theory of the case supporting self defense. The first issue in the trial should have been whether Mr. Greenlaw was justified in using deadly force against the trespasser Mr. Riley. This factual question should have revolved around whether Mr. Riley was charging Mr. Greenlaw on his porch when he was struck by the machete, or whether he was in the yard by the roadway being stuck

while on the ground. Based on the facts presented at trial, the jury could have found that 54 year old Ray Greenlaw had been attacked on his porch by 29 year old Mr. Justin Riley, who had been ejected from the property and then returned without permission. In response to the attacking trespasser, Mr. Greenlaw swung a machete one time at a charging Mr. Riley in self defense. A trespasser attacking a resident on their own porch is presumed to be acting with the intent to commit an unlawful act involving force or violence. Section 776.013(4), Florida Statutes.

The second issue in the case should have been whether Mr. Greenlaw, while standing in the roadway in front of the house at 13 Aspen, was justified in his use of deadly force in defense of himself or his brother. This factual question should have revolved around whether Mr. Leverett was taking cover after pointing and firing his shotgun when the fatal shots occurred, or whether he was fleeing the situation. Based on the facts presented at trial, the jury could have found that after the machete incident, Mr. Leverett ran to his residence where he retrieved a loaded shotgun. Mr. Leverett then returned, running towards the Greenlaw residence with the express intent to "kill those brothers." The Greenlaws were standing in the public road where they had a right to be when confronted by Mr. Leverett. Mr. Leverett pointed his shotgun at the Greenlaws, possibly discharging it before running for cover behind a parked vehicle parked in the driveway, possibly to

pump his shotgun and take another shot. The Greenlaws returned fire at Mr. Leverett in lawful self defense. The defense argued this scenario to the jury, and that Mr. Greenlaw justifiably shot Mr. Leverett, and acted in justifiable self defense or defense of his brother. Because of the prosecutor's improper statements and arguments to the jury, the jury was misled and Mr. Greenlaw was deprived of a fair trial on these factual points.

Argument. The only contested issue at trial was whether Ray Greenlaw acted in self defense. The prosecutor's repeated misstatements throughout the trial amounted to fundamental error and deprived Mr. Greenlaw of a fair trial. The misstatements revolved around six issues: 1) that Mr. Greenlaw had a duty to call 9-1-1; 2) that the Greenlaws had a home protection plan that included hunting their neighbors; 3) improper statements to the jury panelists about their role; 4) an improper comment on the right to a jury trial; 5) improper comments that Mr. Greenlaw did not have a right to act in self defense as a matter of law when he was outside his residence; and 6) repeated misstatements of law regarding the right of self defense. There is a reasonable probability that improper comments affected the verdict because all of these erroneous statements were directed at the sole contested issue in the case – whether Mr. Greenlaw was acting in self defense.

The "Duty to Call 9-1-1." There is no legal duty for a person to call 9-1-1, and in fact a citizen has a Constitutional right to remain silent. Further, whether someone calls 9-1-1 is irrelevant to whether they acted in self defense. To argue otherwise shifts the burden away from the State to prove its case to the defense to show why they did not act. The entire prosecutorial theme of "duty to call 9-1-1" was misleading and erroneous, and this theme ran from beginning to end of the prosecution's case, tainting the entire trial.

The prosecutor repeatedly emphasized the "duty to call 9-1-1" theme during jury selection process. (SUPP XX 3585-3600; SUPP XXI 3601-3670; SUPP XXIV 4214-4274) For example, the prosecutor stated:

> Okay. Has anybody ever had a conversation with a friend where maybe you told your friend or your friend told you about something really terrible that you did, something that you weren't proud of, something they weren't proud of? Anybody ever had that situation where they came to you and confided in you something that they had done? I see a couple of heads shaking yes. If it rose to the level of a crime, would you feel a duty to report it if that were the situation? Yes?
> VENIREMAN NO. 38: Yes.
> MR. WILL: Is there anybody who wouldn't report it? Does it kind of depend upon the severity of the circumstance and the severity of the crime? It does; right?
> THE VENIRE: Yes (collectively).

(SUPP XX 3552)

The prosecutor used his jury selection questioning to set up his later improper

arguments by questioning the jury on factual scenarios very close to the actual case facts. The prosecutor continually encouraged the panelists to speculate as to why a person would not call 9-1-1. The prosecutor also inquired as to each panelist's home protection plan, and whether they felt it reasonable for them to exit their home before using deadly force, or whether they would retreat (an improper theme discussed further below). Although none of the statements were objected to, the judge later characterized the entire jury selection as "totally inappropriate." (SUPP XXIV 4382-4383) Given the closeness of the questioning by the prosecutor to the facts of the case, the jury selection essentially turned into one big golden rule violation by encouraging the jurors to place themselves in hypothetical situations close to the actual facts and envision what they would do in a similar situation. The prosecutor was essentially inviting the jurors to speculate as to why Mr. Greenlaw did not speak. These jury selection tactics emphasized the later misstatements of law that Mr. Greenlaw had a duty to call 9-1-1.

After jury selection, the prosecutor, in his opening statement, implied that Mr. Greenlaw had a duty to call 911.

> But the only house from which 9-1-1 was never called was the defendants', not before, when there was an argument, not during the seven minutes of silence, and not after, to report the discharge of the weapon or the death of this human being.

(V 941)

This improper opening statement was echoed by law enforcement testimony during the case in chief. For example, in the Ray Greenlaw interrogation played for the jury, the investigator stated,

> INVESTIGATOR LEE: Okay? Just because they're out there harassing you, you could have stepped back in the door and called 9-1-1. But, instead, you and your brother armed yourselves, you walked out the door.

(XII 2390)

Thus, law enforcement statements buttressed and reiterated the wrongful prosecutorial suggestion that Mr. Greenlaw had a duty to call 911. The prosecutor went back to the non-existent duty to call 9-1-1 in his rebuttal closing:

> During the interview, both men were asked, they were asked why didn't they just stay inside and call the police. Over and over they said that they were sorry for what they had done. Ray Greenlaw said that he made bad decisions and that he should have stayed inside the house. Wayne Greenlaw agreed that he should have stayed inside the house and he should have called the police and that, under the circumstances, it would have been the best thing to do.

(XVI 3090)

To imply that Mr. Greenlaw should have called 9-1-1 is an incorrect statement of law, an improper comment on the right to remain silent, and improperly shifted the burden of proof from the State to the defense. In *Warmington v. State*, 149 So. 3d

648, 649 (Fla. 2014), the Florida Supreme Court held that the State's questioning of the lead detective assigned to investigate the defendant's case constituted impermissible burden shifting because the testimony commented on the defendant's failure to produce exculpatory evidence, which he had no legal duty to produce. Similarly, the consistent emphasis by the prosecutor in the present case that Mr. Greenlaw did not call 9-1-1 was an improper comment on Mr. Greenlaw's Constitutional silence. Not calling 9-1-1 was simply Mr. Greenlaw exercising his right to remain silent. Whether someone called 9-1-1 after an incident is irrelevant to whether they acted in self defense during the incident. This improper theme woven throughout the case wrongfully and erroneously shifted the burden to the defense in a close self-defense case.

The prosecutor's fictitious "home protection plan." The prosecutor in the jury selection emphasized a recurring theme about a personal "home protection plan." (SUPP XXI 3624; SUPP XXIV 3214, 4222, 4231, 4233, 4237, 4239, 4243, 4244, 4259) This inquiry was directed at practically every juror, and was asked by the prosecutor to get them to prejudge the case by asking what they (the juror) would do in a particular circumstance. For example, the prosecutor asked a panelist, "does your protection plan ever include violence by you?" (SUPP XXI 3624) This theme set up another improper and argumentative theme in opening

statement:

> And when you take a look at the personal safety plan and home protection plan that Wayne Greenlaw and Ray Greenlaw had in place, you will find that it includes hunting their neighbors with machetes and semiautomatic weapons.

(V 944)

While this quote was uttered during the opening statements, it was actually an improper argument – it happened to be made in the opening statement. There was no evidence of any kind presented in the case that substantiated this prosecutor's assertion. No mention was made by any witness of the Greenlaws' home protection plan – it sprang purely and completely out of the imagination of the prosecutor.

"Misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." [...] For similar reasons, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. [...] This is particularly true when a prosecutor misrepresents evidence because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000) *internal citations omitted.*

In *State v. Cutler*, 785 So. 2d 1288, 1289-90 (Fla. 5th DCA 2001), this Court reversed a conviction based on speculations of a prosecutor that were never adduced at trial. *See State v. Cutler*, 785 So. 2d 1288 (Fla. 5th DCA 2001). Similarly, this trial contained no evidence at all of any sort of home protection plan, much less one that included such prejudicial details as hunting neighbors. In *Robinson v. State*, 989 So. 2d 747, at 30 (Fla. 2d DCA 2008), a prosecutor's improper argument – a false characterization of the testimony when there was no competent evidence supporting the statements -- was reversible when the mischaracterization went directly to the heart of the defense. As in the *Robinson* case, the present case presents circumstantial evidence of intent on the part of Mr. Greenlaw, but it was hardly of the same force as the "evidence" argued by the prosecutor that they had a home protection plan in place to hunt their neighbors with the very weapons that were used. This unsupported idea of pre-planning, if believed by the jury, would completely undercut the defense that Mr. Greenlaw was reacting in self defense to Mr. Leverett pointing a shotgun at them.

Additionally, the comment was an improper comment on Mr. Greenlaw's right to remain silent. The comment alludes to information the prosecutor had that the jury was otherwise not allowed to hear. "The power and force of the government tend to impart an implicit stamp of believability to what the

prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty." *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999) *citing Hall v. United States*, 419 F.2d 582, 583–84 (5th Cir. 1969). Rather than reflecting inside knowledge, this statement was pure fantasy and speculation on the part of the prosecutor and unfairly prejudiced the jury as to the actual evidence in the case. Unfortunately, the jury was not in a position to know this.

Misstatement of the Role of the Jury. The prosecutor misstated the law regarding the role of the jury during jury selection.

> Okay. The jury is here, you're the finders of fact. It's your function to determine what happened from the evidence presented in court, as best you can, and come up with a verdict of either guilty or not guilty based upon that evidence. Does everybody understand that?
>
> As parents, you have the same responsibility when your kids fight. Very often you'll be called into a room to deal with a situation that you hadn't seen, you'll have two opposing views, and you'll have to sort out what happened. If you're comfortable enough to do it at home, is there anybody that thinks that they can't do it here? It's a different kind of conflict, but it's just the same rules. Everybody think they can do it?

(SUPP XX 3544)

The idea that a jury will be presented two opposing views, and the jury has to sort out what happened implies a duty for the defense to present an opposing view. Again, this is an improper burden shift. *See Freeman v. State*, 717 So. 2d 105, 106 (Fla. 5th DCA 1998) (finding that the prosecutor impermissibly shifted the burden of proof when he told the jurors that if they believed the police officers instead of Freeman, then they should find Freeman guilty and that "the question" was who they wanted to believe). The prosecutor wrongfully stated that the same rules apply to a jury fact finder situation as present in a parenting situation. But unlike in a parenting situation, the defense in a criminal trial has no duty to present an opposing view. The prosecutor continued to repeat this incorrect analogy to the jurors.

> It's your job to determine the guilt and innocence of the two people before you on trial. As parents, you're called upon in this role just about every day. You have two competing sides. Your kids are fighting. You didn't see what happened. You're called into the room and you're supposed to determine what happened, who's responsible, and who should be punished. If you can do it at home, is there anybody who thinks that they can't do it here?

(SUPP XXIII 4193)

This analogy was extremely harmful misstatement of law, as it required the defense to "present a side," relieving the state of its burden to prove guilt beyond a reasonable doubt. The State may not make comments that mislead the jury as to

the burden of proof. *Cf. Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008) (burden shift in a closing argument context is reversible error). The idea that the jury's role is to determine "who's responsible" is completely at odds with the role of a jury and the law.

Improper Comment on the Right to a Jury Trial. The prosecutor improperly commented on the defendant's right to a jury trial.

> The only reason that we're having a trial is because the victim died with a shotgun in his hand.

(V 941)

By this statement, the prosecutor was implying, "If the defendant wasn't guilty, he wouldn't be here." This type of argument has been soundly rejected by courts. *Ruiz v. State*, 743 So. 2d 1, 5 (Fla. 1999). In finding the statement "we try to prosecute only the guilty" indefensible, the Court in *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969), explained, "This statement takes guilt as a pre-determined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them. Or, arguably it may be construed to mean that as a pretrial administrative matter the defendant has been found guilty as charged else he would not have been prosecuted, and that the administrative level

determination is either binding upon the jury or else highly persuasive to it. Appellant's trial was held and the jury impaneled to pass on his guilt or innocence, and he was clothed in the presumption of innocence. The prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial not sit as a thirteenth juror."

The prosecutor's comment implied that there is an expectation of a plea when in fact and in law, the burden remains with the State to prove its case before a jury. In *Bouley v. State*, 132 So. 3d 1232 (Fla. 1st DCA 2014), the prosecutor in his closing told the jury: "We're here because this defendant exercised his Constitutional right to a jury trial. It doesn't mean it's a close call. It doesn't mean the evidence is thin. It just means that he's exercised his Constitutional rights." Judge Makar, concurring, noted that this comment was highly improper, and denigrated the fundamental right to a jury trial. *See also Bell v. State*, 723 So. 2d 896, 897 (Fla. 2d DCA 1998) (Error for prosecutor to comment that "only one reason we're here" was because Bell had a right to a jury trial). Thus, the prosecutor's comment was an improper and erroneous comment on Mr. Greenlaw's Constitutional right to a jury trial.

Misstatement of law regarding the law of self defense. An insidious and thematic misstatement of self defense law was consistently transmitted to the jury,

effectively defeating Mr. Greenlaw's legitimate self defense claim. Misstatements of law by a prosecutor are reversible error. *See Charriez v. State,* 96 So. 3d 1127, 1128 (Fla. 5th DCA 2012); *Servis v. State,* 855 So. 2d 1190, 1195 (Fla. 5th DCA 2003); *Cf. Fullmer v. State*, 790 So. 2d 480, 482 (Fla. 5th DCA 2001).

First, the interrogating officer make a wrongful statement of the law of self defense during the video interrogation of Ray Greenlaw, played for the jury.

> INVESTIGATOR LEE: You know the rules of self-defense. Rules of self-defense stop at No. 9. Okay? I'm not -- I'm not going to sit here and let you blow smoke up my backside either.

(XII 2391)

Did Mr. Greenlaw have the right to defend himself outside of his residence? The answer to that question is clearly yes. Yet, the officer stated falsely that the rules of self-defense stop at No. 9 [the Greenlaw residence]. While generally an interrogating officer can use deception during an interrogation, this tactic becomes problematic when the error is not only uncorrected, but amplified to the jury by the prosecutor. The statement that the "rules of self-defense stop at No. 9" (9 Aspen was the Greenlaw residence) was a misstatement of self defense law and was repeated to the jury by the prosecutor in his closing argument.

> And it goes on to say that if they're in a place where they have a right to be when they are attacked, they have no duty to retreat. Well, they weren't in a place where they had the right to be.

(XV 2993-2994)

All of the evidence in the case established that the Greenlaws were on the public road, just in front of the residence at 13 Aspen, when the gunfire erupted. Did Mr. Greenlaw have a right to be in the public street? The answer to that question is unequivocally yes. Yet, the prosecutor stated falsely that "the Greenlaws weren't in a place where they had the right to be." Ray Greenlaw had a right to be in the public roadway. Thus, the prosecutor's assertion that Ray Greenlaw did not have a right to be in the public street was an absolute misstatement of the law. This misstatement was even more harmful because it echoed the earlier incorrect statements of law by the officer during the interrogation video. If this misstatement of law was believed by the jury, then Mr. Greenlaw's assertion of self defense would be utterly defeated before they ever reached the real factual dispute in the case. By combining the misstatement by the law enforcement officer that 'the rules of self-defense stop at No. 9' with the prosecutor's statement that 'the Greenlaws weren't in a place where they had the right to be', the legitimate self defense scenario presented by Ray Greenlaw was rendered meaningless.

This misstatement of law continued into the rebuttal closing argument by the prosecutor:

The defendants become the aggressors and are not permitted to the

> use of deadly force the moment that they arm themselves and walk out into the neighborhood. I read you guys the instruction a little while ago. I found it in there. You can too. The moment that they armed themselves, they have to do everything that they can not to.

(XVI 3087)

The law allows the use of deadly force outside of the home in certain circumstances. As the jury instructions stated, "If the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat." (XV 2933) Yet, the prosecutor stated falsely that "The defendants become the aggressors and are not permitted to the use of deadly force **the moment that they arm themselves and walk out into the neighborhood.**" [emphasis added] Mr. Greenlaw was entitled to used deadly force the moment that he armed himself and walked out into the neighborhood under certain circumstances – circumstances that were argued by the defense. Yet the prosecutor stated that the law categorically did not allow it. The prosecutor even dressed up his misstatements by asserting that he was reading directly from the jury instructions. This was especially harmful given that the actual jury instructions were read by the judge before the closing arguments. The prosecutor bookended this comment with the misstatement of law, "The moment that they armed themselves, they have to do everything that they can not to." *Compare* Fla. Std.

Jury Inst. (Crim.) 3.6(f). If Mr. Greenlaw lost his right to defend himself from an armed attacker the moment he arms himself, then in no circumstance would he be allowed to use deadly force. Again, this misstatement of law, if believed by the jury, would short circuit the jury process of fact finding. The prosecutor's misstatement of the law made in front of the jury on this key question of self defense is fundamental error.

The prosecutor continued his mischaracterizations of the law:

> You know, the strange thing about this entire scenario is that Brian Leverett is the only person who's permitted to act with deadly force because he had been attacked and his friends had been attacked with violent action, with a weapon. [...] Brian Leverett [VIC] is the only person in the entire scenario that's allowed to use deadly force under the law.

(XVI 3088)

Again the prosecutor mischaracterized the law on the sole point of contention. By stating "Brian Leverett is the only person in the entire scenario that's allowed to use deadly force under the law" he was also saying that Ray Greenlaw was not allowed to use deadly force under the law. This erroneous argument transformed what was a jury fact question into a direction that the law dictated a particular jury finding. And again, if this misstatement of law was believed by the jury, it would render meaningless the defense position and the jury would never reach the actual

factual dispute in the case.

All of these statements were self-reinforcing and added up to an improper but consistent theme that any use of force by Mr. Greenlaw was not allowed outside Mr. Greenlaw's home **as a matter of law**. This is especially troubling given that this prosecutor is a 'serial offender' in regards to improper trial tactics. *Compare Crew v. State*, 146 So. 3d 101 (Fla. 5th DCA 2014); *Brooks v. State*, 762 So. 2d 879, 901 (Fla. 2000); *Dorsey v. State*, 942 So. 2d 983, 986 (Fla. 5th DCA 2006). "[T]he remarks of the prosecutor were not provoked by irritations or proddings by the defense counsel. They were not mere casual innocuous observations made during an impassioned appeal. The record here suggests that the objectionable arguments were tendered calmly and in a fashion calculated" to intercept the defense's justifiable use of force arguments before they reached the jury, and therefore require reversal. *See Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000) *citing Pait v. State*, 112 So. 2d 380 (Fla. 1959). These thematic errors resulted in an unfair trail for Mr. Greenlaw.

Fundamental error. Defense counsel did not generally object to the improper statements outline below. Given the lack of an objection, the question is whether fundamental error exists. Relief from conviction is warranted on a fundamental-error basis when the State's argument was plainly calculated to

"impai[r] a calm and dispassionate consideration of the evidence...by the jury." *See Caraballo v. State*, 762 So. 2d 542 (Fla. 5th DCA 2000); *Servis v. State*, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003).

In the present case, the scope and nature of the improprieties were so egregious that they deprived the defendant of the right to due process of law, protected by the federal and Florida constitutions. *See Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000) (granting federal habeas relief where prosecutor mischaracterized significant evidence and emphasized defendant's bad character); *cf. Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (denying federal relief, noting that the State's questioned argument "did not manipulate or misstate the evidence.") Because of the closeness of the evidence and the fact that the improper argument directly concerned the principal evidence of guilt, the prosecutorial misconduct goes to the very core of the conviction and operated to deny defendant a fair trial and is the equivalent of a denial of due process. *See Barnes v. State*, 743 So. 2d 1105, 1109 (Fla. 4th DCA 1999).

Applying the applicable standard of review, the multiple, erroneous themes woven throughout the trial by the prosecutor were "so prejudicial as to vitiate the entire trial." Further, "harmless error" is inappropriate here because there is a reasonable probability that improper comments affected the verdict because if any

of the erroneous themes were believed by the jury, Mr. Greenlaw would be deprived of his sole defense.

Cumulative Error. Even if a particular argument outlined above does not result in reversible error, the cumulative effect of the State's improper comments combine to deprive Mr. Greenlaw of a fair trial, requiring a new trial. *See Brinson v. State*, 153 So. 3d 972, 980 (Fla. 5th DCA 2015); *Redish v. State*, 525 So. 2d 928, 931 (Fla. 1st DCA 1988). Improper comments are not reviewed in isolation, but must be examined with the totality of errors in mind to determine whether the cumulative effect of the numerous improprieties deprived the defendant of a fair trial. *See Braddy v. State*, 111 So. 3d 810, 843 (Fla. 2012) "Where multiple errors are found, even if deemed harmless, 'the cumulative effect of such errors' may 'deny to defendant the fair and impartial trial that is the inalienable right of all litigants.'" *Braddy v. State*, 111 So. 3d 810, 860 (Fla. 2012) *quoting Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) *and Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005) (Brooks II).

Cumulative effect of multiple harmless errors do not amount to fundamental error where the errors shared three decisive factors: (1) none of the errors were fundamental; (2) none went to the heart of the state's case; and (3) the jury would have still heard substantial evidence in support of the defendant's guilt. *See*

Braddy v. State, 111 So. 3d 810, 860 (Fla. 2012) Here, the only question for the jury to resolve was whether or not Ray Greenlaw acted in lawful self defense or defense of his brother. Each of the errors pointed out above go to the heart of the case, and many if not all of the complained of errors are fundamental. Therefore, the cumulative effect of multiple errors amount to fundamental error.

The "win at all costs" attitude of the prosecutor here runs contrary to the underpinnings of the criminal justice system. "A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence." *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999); *Brinson v. State*, 153 So. 3d 972, 980 (Fla. 5th DCA 2015); *Singletary v. State*, 483 So. 2d 8 (Fla. 2d DCA 1985). There was a legitimate factual dispute for the jury to resolve in the present case. The prosecutor's actions here completely swamped the actual factual disputes with numerous incorrect themes and assertions. The record of this case reflects a reasonable probability that the comments affected the verdict. *e.g., McGirth v. State*, 48 So. 3d 777, 789-90 (Fla. 2010) Given that there was a reasonable scenario of justifiable use of deadly force that was supported by the evidence in this case, the evidence of guilt was not so overwhelming as to render the prejudice

insignificant. *See Singletary v. State*, 483 So. 2d 8, 9 (Fla. 2d DCA 1985). Because the Mr. Greenlaw's right to a fair trial was undermined by the actions of this prosecutor, Mr. Greenlaw is entitled to a new, fair trial.

MERIT POINT TWO

FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 3.6(f) PROVIDES CONFLICTING INSTRUCTIONS AS TO THE DUTY TO RETREAT.

Standard of Review. The standard of review for fundamental error is *de novo*. *Williams v. State*, 145 So. 3d 997, 1002 (Fla. 1st DCA 2014), *citing Elliot v. State*, 49 So. 3d 269, 270 (Fla. 1st DCA 2010). Furthermore, the standard of review for whether a jury instruction is a correct statement of law is *de novo*. *United States v. Hill*, 643 F.3d 807, 850 (11th Cir. 2011), *citing United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir. 1993).

Argument. This Court should follow the First District Court of Appeal in *Floyd v. State*, 151 So. 3d 452, 454 (Fla. 1st DCA 2014), *reh'g denied* (Aug. 26, 2014), *review granted,* 168 So. 3d 229 (Fla. 2014); *disagreed with by Cruz v. State*, 40 Fla. L. Weekly D1172 (Fla. 4th DCA May 20, 2015)[5] As the First

[5]A review of the Supreme Court's docket, under case number SC14-2162, reveals that oral argument on the issue is set for November, 2015.

District Court of Appeal held, Florida Standard Jury Instruction (Criminal) 3.6(f) provides conflicting instructions as to the duty to retreat. At trial, when instructing the jury, the trial court stated the following (consistent with Florida's "stand your ground" law):

> If Ray Greenlaw was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or another to prevent the commission of attempted murder or deadly weapon.

(XV 2936).

However, the trial court also gave the following instruction to the jury:

> If you find that Ray Greenlaw, who, because of threats or prior difficulties with Brian Leverett, had reasonable grounds to believe that he was in danger of death or great bodily harm at the hands of Brian Leverett, then the defendant had the right to arm himself. However, Ray Greenlaw cannot justify the use of deadly force if, after arming himself, he renewed his difficulty with Brian Leverett when he could have avoided the difficulty; although, as previously explained, if the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat.

(XV 2938).

Thus, on the one hand, the jury was told that Mr. Greenlaw had no duty to retreat, but on the other hand, the jury was told that Mr. Greenlaw had a duty to "avoid the

difficulty." The First District Court of Appeal correctly held that these conflicting jury instructions amounted to fundamental error because the instructions negated Mr. Greenlaw's self defense/defense of others defense (his sole defense at trial). The instructions, as read in this case, instruct the jury that a person has a duty to retreat and at the same time, does not have a duty to retreat.

In the context of a trial, it is of the utmost importance that the jury be properly instructed. *See Robles v. State*, 188 So. 2d 789, 794 (Fla. 1966). The due process clauses of both the Florida and United States Constitutions protect the right to accurate jury instructions in criminal cases, as to the elements of the charged offense and as to the theory of defense. *Henderson v. State*, 20 So. 2d 649, 651 (Fla. 1945); *Motley v. State*, 20 So. 2d 798, 800 (Fla. 1945). The rights to trial by jury and due process of law, in the context of incorrect instructions, are interrelated. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

This case is an example of how the jury could have been confused by the instruction. The jury could have found Mr. Greenlaw did nothing unlawful, yet had a duty to avoid the "difficulty." They could have found that Leverett's action of walking into the street was a "renewal of the difficulty" when in fact he had every right to walk into the street. Thus, the jury would be in a quandary. They could find Mr. Greenlaw did nothing unlawful, but did provoke Mr. Leverett's

attack. That finding would require the jury to find Mr. Greenlaw exhausted all means to escape. However, they are later told, Mr. Greenlaw had no duty to retreat if he did nothing unlawful. Thus, the confusion of whether or not he had to retreat. As stated by Judge Wells in *Wyche v State*, ___ So. 3d ___ (Fla. 3d DCA 2015) (*concurrence*), Standard Jury Instruction in Criminal Cases 3.6(f) is a repetitive, confusing morass.

The confusing and contradictory nature of the self defense instruction negated Mr. Greenlaw's only defense. Therefore, he is entitled to a new trial. *See Carter v. State*, 469 So. 2d 194, 196 (Fla. 2d DCA 1985) ("where, as here, a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant."). Therefore, Mr. Greenlaw is entitled to a new trial based upon this error in the instruction.

If this Court does not find reversible error and disagrees with the First District's decision in *Floyd*, Mr. Greenlaw respectfully requests this Court to certify conflict with *Floyd.*

MERIT POINT THREE

THE TRIAL COURT ERRED BY DENYING DEFENSE MOTION TO STRIKE JURY PANEL WHEN IT WAS TAINTED BY PANEL MEMBER COMMENTS DURING JURY SELECTION.

Standard of Review. "It is within the discretion of the trial court to determine whether remarks made by veniremen during the examination of the panel are prejudicial; and the trial court's decision not to quash the panel will not be disturbed absent an abuse of that discretion." *Reppert v. State*, 86 So. 3d 525, 526 (Fla. 2d DCA 2012) However, when a prospective juror comments on a defendant's criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the jury panel. *See Reppert v. State*, 86 So. 3d 525, 526 (Fla. 2d DCA 2012) *citing Richardson v. State*, 666 So. 2d 223, 224 (Fla. 2d DCA 1995); *Wilding v. State*, 427 So. 2d 1069, 1069 (Fla. 2d DCA 1983).

Argument. Article I, section 16, of the Florida Constitution, Rule 3.251, Florida Rules of Criminal Procedure and the due process clauses and the Sixth Amendment to the United States Constitution all require that the verdict in a criminal trial be rendered by a fair and impartial jury. In the present case, during jury selection, the following dialog occurred in front of the entire first jury panel:

THE COURT: Sorry. Forty-nine. Thank you. Please stand. And where

do you think you heard something about the case?
VENIREWOMAN NO. 49: On Facebook.
THE COURT: On Facebook?
12 VENIREWOMAN NO. 49: Yes.
THE COURT: Is there anything about what you on Facebook that you think would influence your decision if you were selected as a juror in this case?
VENIREWOMAN NO. 49: Yes.
THE COURT: And can you tell us, without the specifics, why you think you are influenced by what you read?
VENIREWOMAN NO. 49: That it, more or less, proved to me that --
THE COURT: I'm sorry. I can't hear you. Could you speak up a little bit?
VENIREWOMAN NO. 49: It, more or less, proved to me that they did it, without a doubt.

(SUPP XIX 3282-3283)

The defense moved to strike the entire panel, arguing that it had been tainted by the comments of Venirewoman No. 49. (SUPP XIX 3347-3350) The trial court denied the defense motion. (SUPP XIX 3350) The parties ultimately agreed on a jury panel containing several jurors from panel one. (SUPP XXIV 4498-4499, 4501-4503, 4511)

In *Richardson v. State*, 666 So. 2d 223, 224 (Fla. 2d DCA 1995), the Second District Court of Appeal reversed a conviction when a the court refused to strike an entire jury panel that had been tainted by another panelist who had outside knowledge of the case and the defendant. In the present case, the defense sought to strike the jury panel when one of the panelists opined in open court about outside

information that she had reviewed. Especially damaging was her statement in front of the entire jury panel that the outside information "proved to me that they did it, without a doubt." Under *Richardson*, the trial court erred by not granting the defense motion to strike the panel exposed to this outside information.

MERIT POINT FOUR

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S STAND YOUR GROUND MOTION.

Standard of Review. When reviewing a trial court's order on a motion claiming Stand Your Ground immunity, the trial court's findings of fact must be supported by competent substantial evidence, while conclusions of law are subject to de novo review. *Mederos v. State*, 102 So. 3d 7, 11 (Fla. 1st DCA 2012); *Hair v. State*, 17 So. 3d 804 (Fla. 1st DCA 2009)

Argument. The facts relevant to this Merit Point are contained within the trial court's written order dated January 6, 2014. (III 567-580)

As to the first incident with Mr. Riley, there is no question that Mr. Riley was ejected from the Greenlaw residence prior to being hit with the machete. The trespassers declared that "we have guns." Despite being ejected, the two trespassers returned to the Greenlaw residence. Mr. Greenlaw had removed

another person [Mr. Riley] against their will from their residence, and was therefore presumed to have a reasonable fear of imminent death or great bodily harm. *Cf.* Section 776.013(1)(a), Florida Statutes; *Dorsey v State*, 74 So. 3d 521, 525-56 (Fla. 4th DCA 2011). With this in mind, Mr. Riley "charged him with his fists raised and wearing a look of rage." Therefore, when Mr. Greenlaw confronted Mr. Riley, he acted lawfully in using deadly force. The trial court erred by considering the fact that Mr. Greenlaw initially retreated into his home to retrieve the machete, and in concluding that this action relinquished Mr. Greenlaw's entitlement to Stand Your Ground protection. (III 575) Nowhere in law does initial retreat abandon one's stand your ground immunity. This conclusion of law was erroneous and the facts, as determined by the trial court absent this consideration, require reversal and the imposition of immunity.

As to the second incident involving Mr. Leverett, there is no question in the present case that armed men faced off in the public street. One person was shot dead while the others survived. Is it always true that the survivor is the aggressor? The law must be able to provide a clear answer other than the survivor gets charged. Otherwise, we are back to warped legal decision making similar to a trial by ordeal where the survivor is always in the wrong. In contrast to this, the law actually provides that the original aggressor is the at-fault party, regardless of who

is the survivor. *Cf.* Fla. Std. Jury Instr. 3.6(f) In the present case, the uncontested facts show that Mr. Leverett traveled to his place of residence where he retrieved a loaded shotgun. He then traveled back towards the Greenlaw residence with the express intent to "kill those brothers." Exiting the garage of 13 Aspen, he scanned the street with his shotgun and flashlight, focusing in on the Greenlaws with the point of his shotgun. After firing his shotgun[6], he then ducked for cover behind a parked car in the driveway.

In its Order, the trial court concluded that the "initial threat of imminent death or great bodily harm [...] had dissipated." (III 579) Erroneously, the trial court did not address the immediate threat posed by a murderous Mr. Leverett pointing a shotgun at Mr. Greenlaw in the street. In such a circumstance, retreat is not required[7]. Even under the common law rule, where retreat would be futile, deadly force is justifiable. *See Dorsey v. State*, 74 So. 3d 521, 526 (Fla. 4th DCA

---

[6] Note that while the defense position (supported by witness testimony) was that Mr. Leverett fired his shotgun, it is not determinative of the immunity question. Even if he did not fire the shotgun, simply pointing a loaded shotgun at Mr. Greenlaw would be sufficient for Mr. Greenlaw to fire his firearm in justifiable defense.

[7] Analogously, would a police officer who shot a man ducking for cover while holding a loaded shotgun even have been charged? Would such a charging decision have even be in question when the evidence showed that the shotgun toting man had armed himself with the specific intent to murder?

2011) *citing Thompson v. State*, 552 So. 2d 264, 266 (Fla. 2d DCA 1989); *State v. Rivera*, 719 So. 2d 335, 338 (Fla. 5th DCA 1998). The legislature's creation of Section 776.013, Florida Statutes in 2005 "expanded the right of self-defense and abolished the common law duty to retreat when a person uses deadly force in self-defense to prevent imminent great bodily harm or death." *Dorsey v. State*, 74 So. 3d 521, 526 (Fla. 4th DCA 2011). Because Mr. Leverett, with murderous intent, pointed a shotgun at Mr. Greenlaw in the public street presented a threat of imminent great bodily harm or death, Mr. Greenlaw had no duty to retreat and was permitted to use deadly force in defense of himself or his brother. Appellant asserts that in the case the law requires immunization under Florida's Stand Your Ground law and that the trial court erred in denying the Defendant's Motion to Dismiss.

CONCLUSION

Appellant has shown that this Honorable Court must reverse his convictions, and remand for a new trial.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ *Steven N. Gosney*
STEVEN N. GOSNEY
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0180830
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
gosney.steve@pd7.org

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14-point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purpose of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and gosney.steve@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically with the Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32114, at https://edca.5dca.org; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Mr. Ray Curtis Greenlaw, Inmate #V23528, D1113L, Mayo Correctional Institution, 8784 U.S. Highway 27 West, Mayo, Florida 32066-3458, on this 28th day of September, 2015.

/s/ Steven N. Gosney
STEVEN N. GOSNEY
ASSISTANT PUBLIC DEFENDER