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7/17/2018 1:39 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45243**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR-FE-2016-2213**
	)	
JOSHUA JAMES ALBERTS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MELISSA MOODY
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Joshua James Alberts appeals from his conviction for second-degree murder.

Statement Of The Facts And Course Of The Proceedings

Alberts met Brianna Bliss in April of 2015. (Tr., p.897, L.24 – p.898, L.1.) They happened to work together at Saint Alphonsus hospital and started dating, and eventually ended up in a relationship. (Tr., p.892, L.17 – p.893, L.1; p.898, L.8 – p.899, L. 16.) Both had been involved in prior relationships; Alberts had very recently divorced (after some "overlap" with Bliss), and Bliss had two children from a former marriage. (Tr., p.897, L. 10 – p.898, L.7; p.898, Ls.18-24; p.900, Ls.2-3; p.1078, L.16 – p.1079, L.6.) Bliss's ex-husband was Joshua Warren, and Bliss and Warren shared custody of their children.[1] (Tr., p.900, Ls.2-3; p.1078, L.16 – p.1079, L.24.)

Alberts did not like Warren. (See, e.g., Tr., p.908, Ls.1-8.) Alberts thought Warren was a "bad dude" because, among other things, Alberts had heard that Warren was abusive towards Bliss. (Tr., p.904, L.21 – p.911, L.3.) Alberts testified that Warren left Bliss threatening voicemails and text messages, and had twice threatened and yelled at Alberts on the phone. (Tr., p.911, L.4 – p.916, L.6; p.1067, Ls.2-9.) Alberts also testified that one time—during their only physical interaction prior to Alberts killing Warren—Warren banged on Bliss's apartment door while Alberts was there, and

[1] This briefing refers to the victim Joshua Warren simply as "Warren," to avoid any confusion with appellant Alberts, whose first name is also Joshua.

appeared to be trying to get inside, until Alberts called 911. (Tr., p.917, L.7 – p.920, L.19; p.1067, Ls.2-9.) But Alberts also testified that he only "assumed" the things that happened between Warren and Bliss were true, because he was not there to see them. (Tr., p.903, L.23 – p.904, L.20.) Bliss testified that, while her and Warren had physically fought in the past, they had not had a physical fight in the last five or six years. (Tr., p.1082, Ls.1-21.) Bliss also maintained that Warren "was a good Dad" who would have done anything for his sons. (Tr., p.1087, Ls.20-23.)

On or about Valentine's Day, about a week before the shooting, Alberts got into an intoxicated argument with Bliss; Alberts accused Bliss of still wanting to be with Warren, and later told Bliss he was "disgusted with [her]." (Tr., p.1084, L.20 – p.1086, L.2.) That was around the same time Bliss was planning to go on a vacation with Alberts—because for months, Alberts had been telling her that they would be leaving for Maui on February 20, 2016. (Tr., p.924, Ls.4-15; p.998, L.5 – p.999, L.2; p.1086, Ls.3-8.)

This was a lie. Unbeknownst to Bliss, Alberts had changed his mind and decided not to go on the trip, and never made any reservations. (Tr., p.999, L.3 – p.1002, L.24; p.1051, L.14 – p.1053, L.9.) But Alberts maintained they were going to Hawaii—supplying fictional details about what kind of rental car he had reserved, and about which floor of the Marriott hotel they would be staying at—so Bliss accordingly bought new luggage, did her hair, and got a spray tan. (Tr., p.1086, L.3 – p.1087, L.13.) A final piece of trip arranging was that Warren was going to have custody of the kids that week. (Tr., p.1087, Ls.14-19.)

Warren agreed that he would go to Bliss's apartment on February 20th to pick up the children. (Tr., p.1005, Ls.5-7; p.1006, Ls.12-17.) On the day before, February 19th, Alberts spent part of his day at the shooting range. (Tr., p.1056, L.22 – p.1057, L.8.) Afterwards Alberts drove to Bliss's apartment; at some point he left his Glock 9 millimeter handgun, two full magazines, and a third magazine loaded with hollow-point bullets in his car. (Tr., p.1042, Ls.7-9; p.1058, L.8 – p.1060, L.3; p.1068, Ls.7-13.)[2]

That evening brought an unexpected change of plans: Warren informed Bliss that he wanted the children at 6:00 instead, and now wanted Bliss to bring the children to him. (Tr., p.1004, L.9 – p.1005, L.2.) To preserve the original agreement, and original schedule, Alberts had an idea: he suggested they offer $100 cash for Warren to come to Bliss's apartment at noon on February 20th.[3] (Tr., p.1004, Ls.9-12; p.1005, Ls.13-18.) Warren agreed. (Tr., p.1007, Ls.6-15.) Alberts spent the night of February 19th at Bliss's apartment. (Tr., p.1056, Ls.10-15.)

Alberts testified that on the morning of February 20 he decided to confront Warren. (Tr., p.1007, L.23 – p.1008, L.2.) Alberts knew that Warren was coming to

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[2] Alberts later testified he was leaving his gun in his car more often than usual "for protection," based on his interactions with and purported fear of Warren. (Tr., p.922, L.11 – p.924, L.3.)

[3] Alberts testified that offering cash for Warren to come at the originally scheduled time had nothing to do with the decision to later confront Warren. (Tr., p.1009, Ls.19-25.) Alberts testified that he had already decided to offer the $100 on February 19th, before he made up his mind to confront Warren on February 20th. (Tr., p.1004, Ls.7-12; p p.1007, L.16 – p.1008, L.2.) The state drew the alternative inference from the facts in its closing argument: that it made no sense for Alberts to offer Warren $100 just to come over at the originally scheduled time, unless Alberts had already concluded he would confront Warren, and wanted to control the time and setting in which the confrontation occurred. (See p.1161, p.1161, L.13 – p. 1162, L.9; p.1202, Ls.3-16.)

Bliss's apartment at noon, and as he later put it, "I suppose it was a plan to go and confront him and try to put my foot down." (Tr., p.1010, Ls.15-22; p.1011, L.15 – p.1012, L.7.) When asked about "planning this confrontation" Alberts purported to be "[a]bsolutely" concerned about his safety; so, he figured he would bring his gun and "certainly felt a little more protected having it." (Tr., p.1012, Ls.8-22.) Alberts figured that—worst-case scenario—"that if I had to use [the gun], if it absolutely came down to it, then I would fire one round and just hit him in the gut," which "at least that would maim him, but it wouldn't have killed him." (Tr., p.1014, Ls.3-8.)

At around 9:45 that morning Alberts lied to Bliss and told her that he was going to RC Willey to run an errand. (Tr., p.1020, L.14 – p.1021, L.1.) In fact, Alberts was headed out "to go and confront [Warren]." (Tr., p.1021, Ls.8-12.) So Alberts drove to Warren's parents' house, where he thought Warren might be, and waited. (Tr., p.1021, L.22 – p.1022, L.18.) After Warren did not appear, Alberts drove back to Bliss's apartment complex, where he waited for Warren in the parking lot near the leasing office. (Tr., p.1022, Ls.22-23; p.1026, Ls.7-16.)

While parked near the leasing office, Alberts noticed one of Bliss's sons outside walking the dog. (Tr., p.1027, Ls.10-20.) Alberts moved his car, later explaining "instantly, I'm like, this is why I didn't want to have this confrontation here." (Tr., p.1027, Ls.20-24.) After seeing "that [Bliss's son] had walked back" and was no longer nearby, Alberts parked near the entrance to the parking lot, and waited some more. (Tr., p.1027, L.24 – p.1028, L.14.)

Warren eventually arrived and drove into the parking lot. (Tr., p.1028, L.22 – p.1029, L.3.) Alberts got out of his car, loaded gun holstered at his hip, and flagged

Warren down as he walked towards Warren's car. (Tr., p.1029, L.6 – p.1030, L.13.) Alberts testified that Warren, still in his car, rolled his window down and said something flippant, and "motion[ed] as if to go to undo his seatbelt." (Tr., p.1030, Ls.13-21.) So Alberts shot Warren 14 times, killing him. (Tr., p.884, L.24 – p.885, L.19; p.1030, L.13 – p.1032, L.11; p.1034, Ls.11-14; p.1065, Ls.11-13.) Officers later found Warren's body in his car with "[n]umerous gunshot[] wounds" (Tr,. p.726, Ls.1-24), and an autopsy revealed hollow-point bullet wounds in Warren's head, chest, neck, shoulder, and back (Tr., p.854, L.5 – p.884, L.20.) Officers found no weapons inside Warren's vehicle and noted that Warren was still seatbelted into his seat. (Tr., p.709, L.14 – p.710, L.9; p.726, Ls.1-22.)

After emptying his clip into Warren, Alberts went to go find Bliss in her apartment. (Tr., p.1036, L.11 – p.1038, L.25.) Eyewitnesses who saw the shooting and aftermath from their apartment windows later remarked how calm and casual Alberts seemed. (Tr., p.484, L.6 – p.485, L.15 (describing Alberts's demeanor while shooting as "[t]otally calm, just like it didn't even phase him"); p.492, Ls.1-9; p.508, L.25 – p.511, L.23 (describing Alberts's demeanor as "relatively calm, precise. Honestly, my initial reaction before the multiple gunshots was, was this a police officer, just because of the way the gentleman approached the vehicle, the calmness of the situation, how things were handled," and describing Alberts's walk back to his car as "[s]ame situation, I mean, it was just as casual as could be").

Once Alberts found Brianna he told her that Warren would not be coming for the kids, and assured her that "You don't have to worry about him anymore." (Tr., p.1039, Ls.1-9.)

When interviewed by police Alberts admitted, among other things, that he shot and killed Warren, whom he referred to as "worthless." (State's Ex. 54, Audio 1, 10:02 – 10:12.) When asked why he kept shooting Warren after the first shot, Alberts told police that "once I pulled the trigger that first time I don't know what the hell happened," and reiterated that the original plan was that "I just wanted to talk to him, I just wanted to scare him." (State's Ex. 54, Audio 1, 14:06 – 14:32; 30:36 – 30:43.) When asked again why Alberts did not stop after the first shot, Alberts responded, "Rage? I mean I can't really say for sure." (State's Ex. 54, Audio 1, 37:48 – 37:07.) The officers who interviewed Alberts, and who responded to the scene of the crime, uniformly remarked how calm and polite Alberts seemed in the aftermath of the shooting. (See, e.g., p.558, Ls.20-25; p.617, Ls.5-19; p.747, Ls.19-25.)

Alberts was charged by information with first degree murder. (R., pp.40-41.) At trial, Alberts testified that he did not see Warren with a gun, or see anything resembling a weapon in Warren's car (Tr., p.1035, Ls.10-13; p.1065, Ls.3-8); rather, Alberts testified that he "assumed [Warren] was going for his seatbelt, not a weapon" (Tr., p.1065, Ls.3-5).

Alberts elaborated that his concern was Warren "was going for the seatbelt to go out," and that "[i]f he could have gotten ahold of me and then struggle for my gun, then it wouldn't have worked out so well." (Tr., p.1033, Ls.14-24.) When asked why he needed to shoot Warren so many times to defend himself—given that Warren was unarmed, and Alberts could have presumably "control[led] the situation" with his gun—Alberts gave the following testimony:

> Q [from defense counsel]. Okay. Can you explain why you shot him 14 times?
>
> A. I don't know. I don't know. It—you can have the best of intentions, not like that's the best of intentions, but I don't know. I suppose it's trying to figure out how to be rational in an irrational situation. I don't know what happened.
>
> Yeah. I—if I had to use it, again, I would have only wanted to shoot him once, not even to—not even lethally, just enough to maim him so he doesn't come at me. And, once I pulled the gun out and pulled the trigger, it just—I mean, it was over in seconds.
>
> Q. Okay. Just a couple more questions.
>
> And you testified that Mr. Warren—you didn't see a weapon or anything like that?
>
> A. No.
>
> Q. Okay. And, again, just with your plan and with the benefit of hindsight, understanding how you felt about Mr. Warren, but you were the guy with the gun; right?
>
> A. Right.
>
> Q. Okay. Do you have any explanation for why you just didn't use the power that the firearm gave you and just control the situation without having to resort to shooting him?
>
> A. That I don't know. Like I said, I just wanted to have a conversation. That was my intention.

(Tr., p.1034, L.21 – p.1035, L.25.) When asked why Alberts did not just leave his gun "pointed at Mr. Warren, tell him to stay in the car," Alberts testified "I don't know." (Tr., p.1033, Ls.2-8.)

Prior to closing arguments, the district court reviewed the proposed jury instructions with the parties. (Tr., p.1088, L. 23 – p.1113, L.25.) The discussion turned to Jury Instruction 29,[4] relating to Alberts's ability to claim self-defense:

> THE COURT: Instruction No. [29] is the instruction proposed by the State. It is not an ICJI instruction. The comment cites Idaho Code 18-4009(3), the case of State v. Jurko, J-u-r-k-o, 42 Idaho 319, and State v. Lyons, L-y-o-n-s, 7 Idaho 530. Has the defense had an opportunity to look at the State's request for this instruction?
>
> [Defense counsel] MR. ROLFSEN: Yes, Your Honor.
>
> THE COURT: Do you object to this instruction?
>
> MR. ROLFSEN: Judge, we do. It's not ICJI and seems to be somewhat superfluous to some of the other instructions.
>
> THE COURT: Do you believe that it is an incorrect statement of the law?
>
> MR. ROLFSEN: Judge, I do think it can confuse the issue of where the burden of proof is placed here. I just think it confuses the situation and is somewhat superfluous.
>
> THE COURT: So a correct statement of the law could, nevertheless, have the potential to confuse the jury. And I'll definitely want to hear more on that question. But, just as a preliminary matter, do you believe that it is an incorrect statement of the law?
>
> MR. ROLFSEN: I'm concerned about possible burden shifting. That is the burden on the State to prove that it's not self-defense. And I think that—I think it would be incorrect to say you cannot claim the benefits of self-defense.

(Tr., p.1100, L.25 – p.1102, L.6.)

[4] The instruction at issue on appeal was originally denoted as "Jury Instruction 30." (See Tr., p.1100, L.25 – p.1101, L.5.) Because an unrelated prior instruction was stricken (See Tr., p.1095, L.20 – p.1096, L.6; R. p.223), Jury Instruction was renumbered and ultimately given to the jury as "Jury Instruction 29." (Tr., p.1130, L.17 – p.1131, L.9; R., p.226.) To avoid confusion this brief will simply refer to the instruction at issue as "Jury Instruction 29."

Based on defense counsel's stated objections to the jury instruction, the district court proposed modifying it, which defense counsel indicated would make it a correct statement of law:

> THE COURT: So it sounds like you're saying, yes, [Jury Instruction 29] is an incorrect statement of the law because it does not recite that the burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable? Is that your position?
>
> [Defense counsel] MR. ROLFSEN: Yes.
>
> THE COURT: And so that language, the burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable, occurs in Jury Instruction No. 26. It occurs again in Jury Instruction No. 27. And I could read that same language for a third time in Jury Instruction No. [29], if there's some potential that the jury could be confused.
>
> MR. ROLFSEN: That would make it better, yes.
>
> THE COURT: Well, would it make it a correct statement of the law? That's what I'm going for here, is to make sure that it is a correct statement of the law.
>
> MR. ROLFSEN: Yes, Your Honor.
>
> THE COURT: All right. So I would include—and I recognize that I'm reading this three times to the jury—that, "The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable. If there is a reasonable doubt whether the homicide was justifiable, you must find the defendant not guilty."

(Tr., p.1102, L.7 – p.1103, L.11.) Jury Instruction 29, as modified, was given to the jury. (Tr., p.1130, L.17 – p.1131, L.9; R., p.226.)

The jury acquitted Alberts of first degree murder, but returned a guilty verdict for second degree murder. (Tr., p.1239, L.8 – p.1243, L.12; R., pp.201-02.) The district court sentenced Alberts to life imprisonment with 30 years fixed. (Tr., p.1288, Ls.11-24; R., p.252.) He timely appeals from the judgment of conviction. (R., pp.251-54, 258-61.)

ISSUE

Alberts states the issue on appeal as:

> Did the district court commit fundamental error when it instructed the jury that Mr. Alberts could not have acted in self-defense if he intentionally put himself in a situation where he knew or believed he would have to act in self-defense?

(Appellant's brief, p.13)

The state rephrases the issue as:

Has Alberts failed to show there was an unobjected-to error that was not invited by him; or even if he has, has he failed to show fundamental error?

ARGUMENT

Alberts Has Not Preserved His Claim For Appellate Review Because He Fails To Show The Purported Error Was Unobjected-To, And Fails To Show That He Did Not Invite The Purported Error; Alternatively, Even If This Claim Has Been Preserved, Alberts Fails To Show Fundamental Error

A. Introduction

Alberts claims that the district court committed fundamental error "in instructing the jury that Mr. Alberts could not claim self-defense if he intentionally put himself in a situation where he knew, or believed, he would have to invoke its aid." (Appellant's brief, p.14.) He claims, for the first time on appeal, that Jury Instruction 29, "derived from language in an old Idaho Supreme Court case,[5]" misstates the law because "[t]he controlling statute contains no exception for those individuals who seek out a meeting with someone, knowing or believing that that meeting could end badly." (Appellant's brief, p.14.) Alberts never made this claim below, but now claims the error is reviewable fundamental error. (Appellant's brief, pp.15-30.)

However, the threshold question for a fundamental error analysis is whether the purported error was *unobjected-to* error. (State v. Briggs, 162 Idaho 736, 738-39, 404 P.3d 1287, 1289-90 (2017).) It was not. Alberts himself concedes "the record reveals that defense counsel actually objected to the instruction in question, albeit on different grounds than those asserted on appeal." (Appellant's brief, p.25 (citing Tr., p.1100, L.25 – p.1105, L.8).) Because Alberts objected to the purported error below—but did so on completely different grounds—his reinvented claim on appeal has not been preserved for review.

[5] This is a reference to State v. Jurko, 245 P. 685 (1926).

Furthermore, Alberts has failed to show that the purported error was not invited by him. When the district court asked Alberts's counsel whether the now-challenged instruction was a correct statement of the law, counsel indicated that it was. (Tr., p.1102, L.7 – p.1103, L.11.) Any instructional error was therefore invited by Alberts and is not preserved for review.

Finally, even assuming that Alberts has preserved this claim on appeal, he fails to show the district court erred by instructing the jury on self-defense—much less show fundamental error on appeal.

B. Standard Of Review

Idaho's appellate courts freely review "whether a jury was given proper instructions." State v. Severson, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009).

C. There Was No Unobjected-To Error Because Alberts Actually Objected To The Jury Instructions On Different Grounds Below; Alberts Therefore Fails, As A Threshold Matter, To Show That His Claim Can Be Analyzed For Fundamental Error

As a general matter, "Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010); Briggs, 162 Idaho at 738, 404 P.3d at 1289. Appellate courts will review claims of unobjected-to error, when, as set forth in Perry, those claims constitute fundamental error. Perry at 226, 245 P.3d at 978.

But fundamental error analysis is "not a right of review"—it "is simply a standard created and utilized by [Idaho's] appellate courts for appellate review." Briggs, 162 Idaho at 739, 404 P.3d at 1290, n.2. As a threshold matter, because only claims of unobjected-to error qualify for fundamental error analysis, appellate courts "[do] not

apply *Perry* factors unless [they] first determine a trial contained an unobjected-to error." Briggs, 162 Idaho at 739, 404 P.3d 1290.

For example, "[i]t is not unobjected-to error when a party articulates a specific basis to admit evidence, receives a ruling, and then fails to offer a different basis on which to admit the evidence." Id. That was precisely what happened in Briggs:

> Here, the actions of Briggs's trial attorney did not qualify as unobjected-to error. Trial counsel filed a motion in limine, arguing a very specific ground on which the district court should admit evidence of the victims' sexual history, which the district court denied. When the evidence was excluded, trial counsel did not offer a different basis for its admission. *Thus, this is not a case where trial counsel failed to object; instead, this is a case where trial counsel failed to offer a basis upon which the evidence could be admitted.* Briggs's claim on appeal is not that the State or the district court made an error to which no objection was made. *Rather, Briggs is claiming his attorney failed to argue a particular basis on which to admit the evidence*, thus constituting "unobjected-to error." *Here, however, there was no error to which trial counsel could object because he could not object to his own inaction. This is not the type of circumstance of "unobjected-to error" contemplated by the Perry opinion. The failure to offer a specific evidence rule as a basis to admit or exclude evidence is not unobjected-to error for purposes of a fundamental error analysis.*

Id. (footnote omitted, emphasis added). The Briggs Court concluded that "[b]ecause this case did not involve an unobjected-to error, the standard for unobjected-to error does not apply." Id.

Here too, the claimed error was not unobjected-to error. Alberts admits that "defense counsel actually objected to the instruction in question, albeit on different grounds than those asserted on appeal." (Appellant's brief, p.25.) This is correct, as the transcript reflects:

> THE COURT: Instruction No. 30 is the instruction proposed by the State. It is not an ICJI instruction. The comment cites Idaho Code 18-4009(3), the case of State v. Jurko, J-u-r-k-o, 42 Idaho 319, and State v. Lyons, L-y-o-n-s, 7 Idaho 530.

> Has the defense had an opportunity to look at the State's request for this instruction?
>
> [Defense counsel] MR. ROLFSEN: Yes, your Honor.
>
> THE COURT: Do you object to this instruction?
>
> MR. ROLFSEN: Judge, we do. It's not ICJI and seems to be somewhat superfluous to some of the other instructions.
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> THE COURT: Do you believe that it is an incorrect statement of the law?
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> MR. ROLFSEN: Judge, I do think it can confuse the issue of where the burden of proof is placed here. I just think it confuses the situation and is somewhat superfluous.
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> THE COURT: So a correct statement of the law could, nevertheless, have the potential to confuse the jury. And I'll definitely want to hear more on that question.
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> MR. ROLFSEN: I'm concerned about possible burden shifting. That is the burden on the State to prove that it's no self-defense. And I think that—I think it would be incorrect to say you cannot claim the benefits of self-defense.
>
> THE COURT: So it sounds like you're saying, yes, it is an incorrect statement of the law because it does not recite that the burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable? Is that your position?
>
> MR. ROLFSEN: Yes.

(Tr., p.1100, L.25 – p.1102, L.13.)

Alberts's legal theory, summarized by the court, was that the instruction did "not recite that the burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable." (Trial Tr., p.1102, Ls.9-12.) Alberts never mentioned, however, the litany of arguments he now rolls out on appeal: that the instruction

misstated the law because it deviated from the plain language of the self-defense statute (Appellant's brief, pp.15-16); that the instruction erroneously relied on State v. Jurko, 245 P. 685 (1926), which itself is erroneously premised on Oregon law, "wholly untethered from any Idaho justifiable homicide statute" (Appellant's brief, p.18); that State v. Jurko's holding addressed a different issue (Appellant's brief, p.19) and/or was *sub rosa* overruled or otherwise neutered by State v. Livesay, 71 Idaho 442, 447, 233 P.2d 432, 434-35 (1951) (Appellant's brief, p.19); or, to the extent Jurko is good law, it is applicable only to a first-aggressor paradigm (Appellant's brief, p.20). In sum, the smorgasbord of legal arguments Alberts has assembled on appeal was never the basis for his objection below.

This is therefore "not a case where trial counsel failed to object"—this is a case where trial counsel objected and articulated a specific legal theory for correcting the jury instruction. See Briggs, 162 Idaho at 739, 404 P.3d at 1290. And "there was no error to which trial counsel could object because he could not object to his own inaction"—that is, his own inaction of not mentioning all the additional theories and supporting caselaw he now belatedly brings up. See id. Failing to "offer a specific evidence rule as a basis to admit or exclude evidence is not unobjected-to error" and by the same logic, failing to offer a specific legal basis to strike a jury instruction is not unobjected-to error. Id. (footnote omitted.)

Because Alberts fails to show that the purported error was unobjected-to error, he fails, as a threshold matter, to show he is entitled to fundamental error analysis on appeal.

D. Alberts Invited Any Instructional Error When He Affirmed That The Instruction Was A Correct Statement Of Law

"The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error." State v. Norton, 151 Idaho 176, 187, 254 P.3d 77, 88 (Ct. App. 2011) (citing State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993)). It seeks to prevent a party who "caused or played an important role in prompting a trial court" to make a particular decision from "later challenging that decision on appeal." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). "One may not complain of errors one has consented to or acquiesced in." Norton, 151 Idaho at 187, 254 P.3d at 88 (citing State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Lee, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998)).

If Jury Instruction 29 contained any errors they were plainly invited by Alberts. Prior to closing arguments, the trial court reviewed the proposed jury instructions with the parties. (Tr., p.1089, L.3 – p.1113, L.16.) When Jury Instruction 29 came up, Alberts made his erstwhile objection to it (Tr., p.1101, L.9 – p.1102, L.13), and the trial court suggested rewriting the instruction in order to address his objection:

> THE COURT: So it sounds like you're saying, yes, it is an incorrect statement of the law because it does not recite that the burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable? Is that your position?
>
> MR. ROLFSEN: Yes.
>
> THE COURT: And so that language, the burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable, occurs in Jury Instruction No. 26. It occurs again in Jury Instruction No. 27. And I could read that same language for a third

> time in Jury Instruction No. 30, if there's some potential that the jury could be confused.
>
> MR. ROLFSEN: That would make it better, yes.
>
> THE COURT: *Well, would it make it a correct statement of the law? That's what I'm going for here, is to make sure that it is a correct statement of the law.*
>
> MR. ROLFSEN: *Yes, Your Honor.*
>
> THE COURT: *All right.* So I would include—and I realize that I'm reading this three times to the jury—that, "The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable. If there is a reasonable doubt whether the homicide was justifiable, you must find the defendant not guilty."

(Tr., p.1102, L.7 – p.1103, L.11 (emphasis added).)

If there was any error at all, Alberts invited it. When asked whether the modifications—done specifically at his behest—would make the instruction "a correct statement of the law," defense counsel responded "Yes, Your Honor." (Tr., p.1102, L.22 – p.1103, L.3.) And on appeal, Alberts agrees that trial counsel "conceded his mistaken belief that that change rendered the instruction an accurate statement of the law." (Appellant's brief, pp.25-26.)

Trial counsel's concession therefore goes far beyond sandbagging the court—"i.e., "remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in his favor." Perry, 150 Idaho at 224, 245 P.3d at 976. Here, trial counsel was not silent at all—he was instrumental in helping modify the instruction, and indicated to the court that the finalized instruction was a correct statement of the law. Alberts now claims the exact opposite: that the jury instruction "is a misstatement of law."

(Appellant's brief, p.14.) If there was any error it was unmistakably invited by Alberts below—and he accordingly cannot raise this claim of error on appeal.

E. Alternatively, Even Assuming Alberts's Claims Have Been Preserved, He Fails To Show Fundamental Error

Alberts claims Jury Instruction 29 misstated Idaho's law of self-defense as set forth in I.C. § 18-4009. (Appellant's brief, pp.15-17.) While he acknowledges the "challenged instruction was derived from a 1926 Idaho Supreme Court case"—State v. Jurko—he claims that the "reliance on *Jurko* in crafting the challenged instruction in this case was incorrect" because it is inapplicable here, for several reasons. (Appellant's brief, pp.18-20.)

Because these claims are made for the first time on appeal, Alberts is required to show fundamental error. Perry, 150 Idaho at 226, 245 P.3d at 978. To establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980.

Even if Alberts has met his threshold burden to show that fundamental error analysis would apply here, and even if he has shown that he did not invite any error, Alberts fails to show the trial court erred in giving Jury Instruction 29, much less committed fundamental error entitling him to a review of this unpreserved claim.

1. Alberts Fails To Show The Jury Instruction Even Implicated His Constitutional Rights, Much Less That It Misstated The Law

Alberts cannot meet the first prong of Perry and show a violation of an unwaived constitutional right. Jury instruction 29 did not implicate Alberts's constitutional rights, because it is not a constitutional violation "when a jury instruction merely diminishes the State's burden of disproving a defendant's affirmative defense." State v. Jimenez, 159 Idaho 466, 471, 362 P.3d 541, 546 (Ct. App. 2015). Moreover, even if the jury instruction here did implicate Alberts's constitutional rights, it did not misstate the law of self-defense. Pursuant to Idaho Supreme Court precedent, and well-settled common law, a defendant may not claim self-defense after intentionally seeking out and provoking a confrontation.

"When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law." Jimenez, 159 Idaho at 469, 362 P.3d at 544 (citing State v. Bowman, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993)). Alleged instructional errors relieving the state of its burden to prove an element present a constitutional issue. (See State v. Parsons, 153 Idaho 666, 669, 289 P.3d 1059, 1062 (Ct. App. 2012).) This is because "[i]n a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." Jimenez, 159 Idaho at 470, 362 P.3d at 545 (quoting Middleton v. McNeil, 541 U.S. 433, 437 (2004)).

However, "there can be no violation of the United States Constitution or the Idaho Constitution when a jury instruction merely diminishes the State's burden of disproving a defendant's affirmative defense." Jimenez, 159 Idaho at 471, 362 P.3d at 546; see also

State v. Mubita, 145 Idaho 925, 942, 188 P.3d 867, 884 (2008), abrogated in part on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011) ("Further, the instruction here did not pertain to an element of the offense. Rather, the instruction pertained to Mubita's affirmative defense. Mubita cites no authority for the proposition that requiring a defendant to bear the burden of proving his affirmative defense violates due process. Relevant authority tends to the contrary …. Thus, even assuming the instruction did in fact shift the burden of persuasion, Mubita has not demonstrated this violated his right to due process.").

In Jimenez, the defendant argued the district court committed fundamental error "by instructing the jury that self-defense is only available where the defendant acts in response to the danger presented and 'not for any other motivation.'" 159 Idaho at 470, 362 P.3d at 545. This purported error "merely diminishe[d] the State's burden of disproving a defendant's affirmative defense," which the Jimenez Court found could not amount to a constitutional violation. Id. at 470-71, 362 P.3d at 545-46. The Jimenez Court therefore found that Jimenez failed to meet his burden under the first prong of Perry.

Likewise, Alberts cannot meet the first prong of Perry and show a violation of a constitutional right. Alberts's claim is that the instructional error lowered the state's burden of proof and violated his due process (Appellant's brief, p.15-24); but, we know from Jimenez "that there can be no violation of the United States Constitution or the Idaho Constitution when a jury instruction merely diminishes the State's burden of disproving a defendant's affirmative defense." 159 Idaho at 471, 362 P.3d at 546. Because Alberts's only claim is that the jury instructions misstated the law of self-

defense, and therefore lowered the state's burden to disprove his defense, he has failed to show that any error violated his constitutional rights.

Mindful that Jimenez controls his fate here, Alberts asserts that it was wrongly decided. (See Appellant's brief, pp.21-21-24.) But he gives no compelling reason to think that that is so. Citing to Idaho's pattern jury instructions, Alberts's argument is that "if a defendant in a homicide prosecution presents *prima facie* evidence of self-defense, it then becomes the State's burden to disprove, beyond a reasonable doubt, the allegation that the killing was justified and, therefore, lawful." (Appellant's brief, p.21 (citing ICJI 1514 & cmt.).)

But Alberts fails to cite to any authority holding that as a *constitutional* matter the state of Idaho has the burden of disproving self-defense. (See Appellant's brief, p.21.) And Martin v. Ohio, which Jimenez relies on, affirms it does not:

> As we noted in Patterson, the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. "This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified." Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense. We are aware that all but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant. *But the question remains whether those States are in violation of the Constitution;* and, as we observed in Patterson, that question is not answered by cataloging the practices of other States. *We are no more convinced that the Ohio practice of requiring self-defense to be proved by the defendant is unconstitutional than we are that the Constitution requires the prosecution to prove the sanity of a defendant who pleads not guilty by reason of insanity.* We have had the opportunity to depart from Leland v. Oregon, but have refused to do so. These cases were important to the Patterson decision and they, along with Patterson, are authority for our decision today.

Martin v. Ohio, 480 U.S. 228, 235-36 (1987) (internal citations omitted). Alberts fails to show that as a constitutional matter the state is required to disprove a defendant's claim of self-defense, and fails to show that Jimenez does not control here. Because Jimenez does control, Alberts fails to show the purported error affected his constitutional rights.

Furthermore—even if the instruction at issue did affect his constitutional rights—Alberts nevertheless fails to show error. A review of all the legal standards shows that Jury Instruction 30 correctly stated the law of self-defense.

At the time of the killing, Idaho Code § 18-4009 provided that,[6]

> Homicide is also justifiable when committed by any person in either of the following cases:
>
> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person;
>
> 2. When committed in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein;
>
> 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or
>
> 4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

I.C. § 18-4009.

[6] Idaho Code 18-4009 has been amended since this incident; the version in effect at the date of incident is thus reproduced here.

In addition to this statutory framework, there is a longstanding common-law limitation on a defendant's ability to claim self-defense. Along with many other jurisdictions, Idaho has limited defendants' ability to claim self-defense where the defendant seeks out a meeting for the purpose of provoking the confrontation. See Jurko, 245 P. at 688-89. State v. Jurko examined this limitation in a case with strikingly similar facts.

In Jurko, the defendant "and the deceased had been business associates," co-operating a billiard parlor, before their relationship soured over Jurko's belief that the victim was having sex with Jurko's wife. Id. at 686. One night, Jurko and his wife were seen walking towards the billiard parlor "and [Jurko's] wife made several attempts to get her hand" in Jurko's overcoat pocket, but he pushed her away. Id. Jurko entered the billiard parlor and called out to the victim: "'Come here, I want you to tell me what you said about my wife.'"

> [Jurko] then walked toward the end of the bar near the card table where the deceased and three others were playing cards. There was a man sitting on a bench on the opposite side of the room and another standing near the bar, the latter of whom stepped behind the appellant as he walked towards the card table. [Jurko] again addressed the deceased, who had not spoken, "I came in here to make you take back what you said about my wife." Thereupon deceased got up from his chair and answered that he had not said anything about anybody, and did not want any fuss or trouble in there, and ordered the appellant out, motioning towards the door with his right hand. [Jurko] then said, in substance, "I came here to make you prove what you said to my neighbors, that you were having sexual intercourse with my wife." After the deceased denied that he had said anything about appellant's wife, and requested him to go on out, appellant drew a gun and began shooting into the body of the deceased, who moved slightly forward, his weight resting upon the edge of the table, and gradually sank to the floor, where he died shortly thereafter. The appellant thereupon made the remark, substantially, that there was no man could say he had been having sexual intercourse with his wife and get by with it.

Id.

When asked why he shot the victim, Jurko replied "Well, he was threatening my life and coming between me and my wife. I was afraid when he made so many threats on me, and then he says he was going to fix me, and throwed his right hand on his hip pocket; I was afraid he would pull his gun and shoot me." Id. The evidence, on the other hand, showed that playing cards "were removed from both of [the deceased's] hands," which witnesses affirmed. Id. It was also reported that after Jurko shot the victim, Jurko began walking "in the direction of the county jail" to turn himself in, remarking about the deceased, "[h]e won't bother me anymore.'" Id.

At trial, Jurko testified, and admitted the homicide, but argued "he was justified in taking the life of the deceased in self-defense." Id. at 687. And on appeal Jurko claimed the following familiar jury instruction was erroneous:

> I further instruct you, in relation to the law of self-defense, that one cannot claim its benefits after he has intentionally put himself where he knows or believes he will have to invoke its aid. The circumstances justifying an assault, in the law of self-defense, must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that the defendant sought a meeting with the deceased for the purpose of provoking a difficulty with said deceased, or with the intent to take the life of the said deceased or to do him such serious bodily injury as might result in death, then he would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own defense. The law says that, if you invoke the law of self-defense, you must show that you were without fault in bringing about the necessity for the killing.

Id. at 688. Jurko argued the instruction was objectionable because "it advises the jury that the plea of self-defense could not be maintained if the appellant was first the aggressor, even though he should thereafter have been compelled to act in self-defense."

Id. For this argument, Jurko relied on the case of State v. Dunlap, 235 P. 432 (1925), in which a similar jury instruction was given, but the judgment was reversed on appeal.

But the Jurko Court concluded that the jury instructions did not misstate the law of self-defense. Id. at 688-89. First, the Court noted that Dunlap was factually distinguishable. Id. at 688. There, the deceased "was a man of violent temper" who, in the culmination of an ongoing dispute, "rode up to the appellant and the appellant's wife" and threatened their lives. Dunlap, 235 P. at 432. The deceased in that case "was the aggressor and brought upon the difficulty," and the defendant Dunlap "was not called upon under the facts either to give up the cattle or retreat into the house or elsewhere, but had a right to defend himself." Jurko, 245 P. at 688.

Jurko, on the other hand, "was the aggressor and brought on the affray." Id. And there was "no evidence that would warrant the jury in finding the deceased, after [Jurko] provoked the affray, became the aggressor." Id. Moreover, the Jurko Court found that the instruction at issue did not "advise the jury that the plea of self-defense could not be maintained if appellant was the first aggressor, even though he thereafter was compelled to act in self-defense"; instead, the instruction, taken together with all of the jury instruction was proper. Id. The Jurko Court therefore concluded, *"[c]onsidering all of the instructions together*, given upon the point complained of, we are of the opinion that *it was not only improbable but also impossible for the jury to have been misled as to the law of self-defense.*" Id. at 688–89 (emphasis added).

Jurko controls the outcome here. Per Jurko, jury instructions do not misstate the law of self-defense by estopping a defendant from claiming self-defense when he intentionally seeks out and intends to provoke a conflict. See id. The jury instructions at

issue here were patterned, essentially verbatim, on those given in Jurko. (Compare R., p. 226 with Jurko, 245 P. at 688.)

Moreover, after swapping the apartment complex for the billiard hall, and the seatbelt for the playing cards, Jurko and this case are indistinguishable on the relevant facts: in both cases the defendant gunned down an unarmed victim who was reaching for a non-weapon; in both cases the defendant later complained of safety fears and purported desire to protect a loved one; but in both cases the defendant clearly sought out the meeting and provoked the confrontation. Because the Jurko Court concluded, under remarkably similar facts, the instructions correctly stated the law of self-defense, that same conclusion invariably applies here.

On appeal, Alberts does not even attempt to distinguish Jurko on the facts, nor could he, given its similarity to this case. (See generally Appellant's brief.) Instead he attempts to show that Jurko is inapplicable as a matter of law or was wrongly decided. (Appellant's brief, pp. 18-20.) Those attempts fail.

Alberts's first error is how he frames the issue. Alberts narrowly focuses on the prefatory clause of Jury Instruction 29, which states that "[o]ne cannot claim the benefits of self-defense if he intentionally put himself where he knew or believed he would have to invoke its aid." (See e.g. Appellant's brief, pp. 13, 16, 18.) Alberts limits his analysis to this phrase, and the effect of this reductionist reading expands the exception to all "those who seek out a meeting with someone, knowing or believing that that meeting could end badly." (See e.g., Appellant's brief, p. 14.)

But jury instructions are required to be read together (see Jimenez, 159 Idaho at 469, 362 P.3d at 544), and the second clause, which Alberts glosses over, makes it clear

that merely meeting someone, thinking it could end badly, is not what triggers the exception: the jury was additionally instructed "[i]f you believe from the evidence, and beyond a reasonable doubt, that the Defendant sought a meeting with the deceased *for the purpose of provoking a difficulty with the deceased, or with the intent to take the life of the deceased or to do him such serious bodily injury as might result in death*, then the Defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own defense…." (R., p.226) (emphasis added).)

Read in context, the exception to claiming self-defense applies not simply where a defendant places himself in a situation where he might have to claim self-defense; it applies where the defendant seeks such a meeting for the purpose of provoking a confrontation with the defendant. (See R., p.226.) This is a far smaller category of persons, and one that Alberts clearly falls within; and this was the language that the Jurko Court concluded correctly stated the law of self-defense. (Compare R., p.226 with Jurko, 245 P. at 688.)

As for State v. Jurko, Alberts brushes it off as an "old Idaho Supreme Court case," claiming that "*Jurko* reveals that the instruction at issue apparently has its roots in Oregon's common law," is "untethered from any Idaho justifiable homicide statute past or present," and therefore "has no bearing on the propriety" of the jury instruction here. (Appellant's brief, p.18.)

This claim fails. First, regardless of where the "roots of the instruction" stem from, the Jurko Court concluded that jury instructions do not misstate the law of self-defense by estopping a defendant from claiming self-defense when he intentionally seeks

out the conflict. See Jurko, 245 P. at 688-89. This unquestionably bears on the propriety of the nearly-identical instruction here. "*Stare decisis* requires that this Court follows controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Owens, 158 Idaho 1, 4-5, 343 P.3d 30, 33-34 (2015) (citing State v. Grant, 154 Idaho 281, 287, 297 P.3d 244, 250 (2013)).

And an "old Idaho Supreme Court case," as Alberts calls it, is by definition controlling precedent. Alberts has not argued or shown that Jurko is manifestly wrong, unjust or unwise, or should be overruled for any reason. (See generally Appellant's brief.) Nor did the Court's decision in Jurko conflict with the self-defense statute, which does not specifically address whether a defendant who intentionally seeks out and provokes the conflict can claim he was "resisting" an attempt to do great bodily injury or acted "in defense" or in "lawful defense" of himself or others. See I.C. § 18-4009. Insofar as Jurko itself establishes that the jury instruction is a correct statement of the law, the origin of the instruction is beside the point.

But even if the Jurko did not itself establish that the jury instruction was correct, this self-defense doctrine has already been incorporated into Idaho law. By statute, the Idaho Code incorporates "[t]he common law of England" so long as it is not inconsistent with Idaho statutes and the Idaho Constitution. I.C. § 73-116.[7] And the doctrine here—

[7] For example, Idaho's appellate courts have noted the common-law roots of the defense-of-others claim in interpreting the state statutes at issue there. See State v. Young, 157 Idaho 280, 285, 335 P.3d 620, 625 (Ct. App. 2014); see also State v. McNeil, 141 Idaho 383, 386, 109 P.3d 1125, 1128 (Ct. App. 2005).

estopping a defendant from claiming self-defense after seeking out and provoking a confrontation—has common-law roots that go much deeper than 20th-century Oregon.

Courts around the country variably refer to this doctrine as "produc[ing] the occasion in order to have a pretext for killing [an] adversary," State v. Domingue, 118 So. 46, 48 (La. 1928); or "seek[ing] or induc[ing] the quarrel which leads to the necessity" State v. Ballou, 40 A. 861, 863 (R.I. 1898); or as "intentionally provok[ing] a difficulty in order to have a pretext to kill." State v. Millett, 273 A.2d 504, 510 (Me. 1971). By any name, the doctrine is well-known and long-lived enough to have made an appearance in the model penal code:

> *When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct*, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

§ 3.02. Justification Generally: Choice of Evils, Model Penal Code § 3.02 (emphasis added).

And by the state's count, at least six other state high courts, other than the Idaho Supreme Court and Oregon Supreme Court, have recognized this common-law doctrine. Domingue, 118 So. 46, 48; ("Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life, the law wisely imputes to him his own wrong. He will not be permitted to avail himself of a necessity which he willfully has brought about….'if the slayer provoked the combat, *or produced the occasion in order to have a pretext for killing his adversary*, or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat.'"); Gibson v. State, 8 So. 98, 100 (Ala. 1890) ("It

was unquestionably the law, as charged by the court, that if the defendant Ben Gibson *sought the difficulty with the deceased for the purpose of chastising or beating him* on account of the alleged abuse of defendants' father, or other like reason, *and in pursuance of such purpose armed himself with a pistol to be used in the event it became necessary*, and he did use it, and killed deceased with the weapon, pursuant to such purpose, then this would be murder, although it was necessary to use the pistol in order to save his own life, or his body from great harm."); People v. Holt, 153 P.2d 21, 25 (Cal. 1944) ("*In other words, when a defendant seeks or induces the quarrel* which leads to the necessity for killing his adversary, the right to stand his ground is not immediately available to him, but, instead, he must first decline to carry on the affray and must honestly endeavor to escape from it. Only when he has done so will the law justify him in thereafter standing his ground and killing his antagonist." Ballou, 40 A. 861, 863 ("In other words, … *a man has no right to provoke a quarrel, and take advantage of it, and then justify the homicide.*"); Adams v. People, 47 Ill. 376, 379-80 (1868) ("And the twentieth instruction was also proper. It was as follows: The defendant cannot avail himself of necessary self-defense, if the necessity of that defense was brought on by the deliberate and lawless acts of the defendant, *or his bantering Bostic to a fight for the purpose of taking his life*, or committing a bodily harm upon him, and in which he killed Bostic by the use of a deadly weapon."); Millett, 273 A.2d 504, 510 ("But the defense of self-defense is lost *where one intentionally provokes a difficulty in order to have a pretext to kill or injure another*, even though it finally becomes necessary to kill in order to save his own life.") (emphases added).

The roots go deeper. At common-law, the same fundamental principle was in existence in England by at least the late thirteenth century:

> The result of these authorities seems to be that, in the end of the thirteenth and the beginning of the fourteenth centuries, juries were bound in cases of trials for homicide, where the defence was misadventure or self-defense, to find specifically that such was the case, upon which the king was bound to grant his pardon. Probably he would do so upon terms as to fines and forfeitures *which would depend on the degree of blame which might be considered to attach to the defendant by reason of the avoidable nature of the necessity under which he had killed the deceased, if the case was one of self-defence;* or the amount of carelessness he had shown if the case was one of accident.

3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 37 (Cambridge University Press 2014) (1883).

To the extent the King of England was limiting ancient pardons for self-defense claims on the "reason of the avoidable nature of the necessity," this doctrine is not so easily written off as a misguided recent vintage, errantly concocted in Oregon and uncorked by Jurko.[8] To the contrary, estopping a defendant from seeking out and

[8] And while not common law, one can find an even older 4th-century reference to an analogous concept in Justinian's Code:

> Whoever has heard or caught or seized a sorcerer in the act of sorcery, shall immediately drag him forth to light and bring such enemy of the public safely into court. *But if a charioteer or any other person attempts to violate this interdict, or destroy a sorcerer, even though plainly guilty of practicing the sorcerer's art, by secret methods, he shall not escape the penalty of death, for he is subject to the two-fold suspicion,* that he kept the public enemy from the due severity of the law, and from torture in order that the latter might not divulge his associates in the crime *or that he willfully destroyed a personal enemy under the pretense of avenging (the crime of sorcery).*

CODE JUST. 9.18.9 (Valentinian, Theodosius & Arcadius to Albinus, 389) (emphasis added). Wizards and charioteers aside, it is evident that pretextual killings, done under

provoking a situation where he will need to claim self-defense is well-established common law, consistent with Idaho's self-defense statute, incorporated into Idaho law by I.C. § 73-116.[9] Even if the Jurko Court itself was not expressly adopting this doctrine, it nevertheless correctly concluded that these jury instructions, reflecting incorporated common law, did not misstate the law of self-defense.

Alberts additionally contends that Jurko is inapplicable because it did not squarely address the jury instruction at issue here. (Appellant's brief, p.19.) He alleges that in Jurko, the appellant challenged the instructions with particular regard to the "first aggressor" language, and the Court therefore "did not directly address the propriety of the language that is relevant here—the part which spoke of self-defense being unavailable where the defendant knew or believed he would have to invoke its aid." (Appellant's brief, p.19.)

This argument fails because the Jurko Court specifically articulated that it was "[c]onsidering *all of the instructions taken together*" when it concluded it was

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guise of a lawful excuse, concerned jurists long before 20th-century Oregonians decided to weigh in on the issue.

[9] Alberts argues otherwise, conceding that the common law fills in "gaps in the Idaho code," but contending it would not do so here, because "Idaho's justifiable homicide statute … does not limit a defendant's ability to claim self-defense if he knowingly put himself in a situation in which he might need to invoke its aid." (Appellant's brief, p.18.) But to be clear, the statute "does not limit" this ability insofar as it does not specifically incorporate it. See I.C. § 18-4009. The statute neither expressly grants, nor expressly limits, an ability to claim self-defense in this scenario, and it says nothing about the result of provoking a conflict. There is, in other words, a gap. Because the statute is silent on whether a sought-after confrontation is a valid necessity, the common law fills this gap with an answer: it is not.

"impossible" for the jury to have been misled about the law of self-defense. 245 P. 688-89 (emphasis added). This conclusion forecloses the possibility that the Court was not considering the particular language at issue here, and necessarily shows the particular instruction at issue did not misstate the law of self-defense.

Finally, Alberts maintains that State v. Livesay, 71 Idaho 442, 233 P.2d 432 (1951), as opposed to Jurko, should control the outcome here. (Appellant's brief, p.19.) In Livesay, the appellant successfully challenged a similar instruction, which "in effect told the jury that if the defendant intentionally put herself where she knew or believed she would have to invoke the aid of self defense, then she could not claim self defense irrespective of what circumstances may or might have intervened." 71 Idaho at 447, 233 P.3d at 434-45.

But Livesay is distinguishable from Jurko and this case on the facts. In Livesay the appellant "was in her own home, where she had a right to be, and the deceased came to the apartment or residence at a time when the defendant was already there." Id. at 447, 233 P.3d at 435. The jury instruction was therefore inapplicable because it "would make the killing unjustifiable if she had an unlawful intent or purpose, *even though there were no overt act on her part to carry it out*." Id. (emphasis added). The court went on to say that the instruction in the abstract could be a correct statement of law, but was simply inapplicable to the facts of that case:

> An instruction which might contain a correct abstract principle of law is erroneous and prejudicial in a case where it has no application to the facts involved. We find the instruction, under the circumstances presented, prejudicial and the error not cured by other instructions given…. *Bare intent and purpose to provoke a difficulty* does not deprive one of the right of self defense. *He must do some act or something at the time of the difficulty that does provoke the same.*

Id. at 447–48, 233 P.2d at 435 (emphasis added).

With that in mind, there are a multitude of facts that distinguish this case from Livesay. Alberts did not have a "bare intent and purpose to provoke a difficulty." Nor was Alberts simply lounging in his own home, minding his own business, taking no overt steps to provoke an encounter, when Warren unexpectedly arrived. To the contrary, Alberts actively sought out and provoked this confrontation: he offered to pay Warren $100 to incentivize Warren to arrive at a particular time and place (Tr., p.1004, Ls.9-12; p.1005, Ls.13-15); stashed his Glock and hollow-point bullets in his car the day before (Tr., p.1058, L.8 – p.1060, L.3); drove to Warren's parents' house to wait for him (Tr., p.1021, Ls.8-12); came back to the apartment complex to continue to wait for him (Tr., p.1022, Ls.22-23; p.1026, Ls.7-16); took steps to ensure others would not see what came next (Tr., p.1027, Ls.20-24); actually described it as "a plan to go and confront" Warren (Tr., p.1011, L.15 – p.1012, L.7); and ultimately walked towards Warren's car with a loaded gun on his hip, flagged Warren down, and killed him. (Tr., p.1029, L.6 – p.1034, L.14.) Insofar as Alberts took action after action to carry out what he said he planned to do—confront Warren—Livesay is distinguishable on the facts, and inapplicable.

Jurko is binding precedent that squarely applies to this case. Based on Jurko the jury was correctly instructed as to the law of self-defense. Because Alberts has failed to show the instruction misstated the law, he has failed to show the instruction violated his constitutional rights.

2. Alberts Fails To Show The Purported Error Is Clear And Obvious From The Record

Alternatively, even assuming Alberts can show a violation of an unwaived constitutional right, he fails to meet Perry's second prong, because he fails to show a violation that is clear and obvious from the record. See Perry, 150 Idaho at 228, 245 P.3d at 980. An appellant alleging fundamental error has the burden under Perry's second prong to show that the error was "clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision." Id. at 226, 245 P.3d at 978.

Here, Alberts fails to show the trial counsel's failure to object was not a tactical decision. Alberts argues that "an attorney's inaction cannot fairly be characterized as 'strategic' when it is based on his ignorance of the law" (Appellant's brief, p.26), citing Kimmelman v. Morrison, 477 U.S. 365 (1986), but that case is readily distinguishable. In Kimmelman, trial counsel failed to file a suppression motion in time, "not due to strategic considerations," but because he was unaware there was a search. Id. at 385. Trial counsel was unaware of the search "because he had conducted no pretrial discovery"; moreover, he failed to conduct discovery not because he forgot to do so, but because he "belie[ved] that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned." Id. This was an epic lawyering failure, "one as to which counsel offered only implausible explanations," which in hindsight was obviously not strategic. Id. at 386.

Here, the record does not establish counsel was ignorant of the law. As already noted, trial counsel *did* object, just not on the specific grounds appellate counsel thinks he should have. (Tr., p.1101, Ls.9-13.) Choice of objection is a tactical decision. See, e.g., Matthews v. State, 130 Idaho 39, 46, 936 P.2d 682, 689 (Ct. App. 1997). Moreover, the district court was bound by State v. Jurko, which the record shows defense counsel was well aware of. (See Tr., p.1101, Ls.2-8.) Insofar as the trial court was bound by Idaho Supreme Court precedent, State v. Clinton, 155 Idaho 271, 272, n.2, 311 P.3d 283, 284 (2013), that was an obvious reason not to object on the grounds appellate counsel now articulates—and it in no way shows that defense counsel's decision not to challenge binding case law was based on ignorance.

Because Alberts has not shown trial counsel's choice of objection was not strategic, he fails to show a clear violation on this record.

3. Alberts Fails To Show Any Error Was Not Harmless

Per Perry's final prong, even assuming clear and obvious error that violated a constitutional right, the defendant has the burden of showing "a reasonable possibility that the error affected the outcome of the trial." State v. Abdullah, 158 Idaho 386, 444, 348 P.3d 1, 59 (2015) (quoting Perry, 150 Idaho at 226, 245 P.3d at 978).

Alberts has failed to show fundamental error, because, even assuming Jury Instruction 29 misstated the law of self-defense, the error would have been harmless. Alberts claims that the "district court effectively took Mr. Alberts' self-defense theory completely off the table." (Appellant's brief, p.14.) It did nothing of the sort. Irrespective of Jury Instruction 29, the jury was also correctly instructed that the purported danger "must have been present and imminent" or must have appeared so to a

reasonable person (R., p.224); and that Alberts would not be "justified in using a degree of force clearly in excess of that apparently necessary and reasonably necessary under the existing facts and circumstances" (R., p.225).

We can therefore be certain Jury Instruction 29 was harmless. Even without the allegedly erroneous instruction, Alberts would not have prevailed on his self-defense theory, insofar as there was no evidence of an imminent danger, and overwhelming evidence that Alberts exacted a "degree of force clearly in excess of that apparently necessary and reasonably necessary under the existing facts and circumstances." (See R., p.225.) While Alberts testified he was afraid of Warren getting out of the car (Tr., p.1033, Ls.20-24), there were no facts to suggest a fear of *imminent* danger at the time he pulled the trigger—because at that point Alberts was standing outside the car, armed, and Warren was inside the car, unarmed, and still seatbelted in (Tr., p.1029, L.6 – p.1034, L.14).

And it would be near-comic to suggest that by shooting Warren 14 times Alberts was deploying a degree of force reasonably necessary to subdue an unarmed, seatbelted individual. By Alberts's own explanation he was not driven by necessity, much less a reasonable one: Alberts told police that "once I pulled the trigger that first time I don't know what the hell happened." (State's Ex. 54, Audio 1, 14:06 – 14:32; see also Tr., p.1030, L.21 – p.1031, L.6; p.1032, L.15 – p.1033, L.1.) Even Alberts could never explain the *degree* of force he used; so of course, no reasonable fact-finder would have disagreed with Alberts and concluded he was acting based on reasonable necessity—as opposed to "[r]age" or some other inexplicable emotional factor—when he emptied his clip into an unarmed man sitting in his car. (See State's Ex. 54, Audio 1, 37:48 – 37:07.)

No reasonable or rational arrangement of the facts showed that Alberts had a present or imminent fear of danger, or that he used a justified or reasonably necessary amount of force. Alberts therefore fails to show the jury—even without Jury Instruction 29—would have found he acted in self-defense. On appeal, even if the district court clearly erred by giving the instruction, Alberts fails to show even a reasonable possibility of a different outcome, and therefore fails to show the error was not harmless. As a result, even if he has shown a clear constitutional violation, Alberts has failed to show fundamental error.

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction.

DATED this 17th day of July, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of July, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorneys listed below by means of iCourt File and Serve:

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