9-19-2018

State v. Alberts Appellant's Reply Brief Dckt. 45243

Electronically Filed
9/19/2018 12:56 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45243**
	)	
v.	)	**ADA COUNTY NO. CR-FE-2016-2213**
	)	
JOSHUA JAMES ALBERTS,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

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

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

ERIK R. LEHTINEN
Chief, Appellate Unit
ISB #6247

MAYA P. WALDRON
Deputy State Appellate Public Defender
I.S.B. #9582
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

The district court committed fundamental error by instructing the jury that Joshua Alberts could not claim self-defense if he intentionally put himself where he knew or believed he would have to act in self-defense. In response, the State has asserted that this issue is not properly before this Court and that Mr. Alberts has failed to show fundamental error. Those arguments are unavailing. The State's attempts to bar this Court from reaching the merits of this issue rest on its misunderstanding of the fundamental error and invited error doctrines and would require this Court to depart from well-established Idaho appellate court precedent. As for the merits, the State is unable to square the instruction at issue with Idaho Code, Idaho case law, or the common law. Because the instruction amounted to fundamental error, this Court should vacate Mr. Alberts' judgment of conviction and remand this case to the district court for a new trial.

ISSUE

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?

ARGUMENT

The District Court Committed 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

A. Introduction

The district court committed fundamental error when it instructed 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, and the State's arguments to the contrary are without merit. First, the State's novel suggestions that an instruction which was objected to on other grounds below cannot be raised as fundamental error, and relatedly that an instruction which was requested by the State, but objected to and revised at the defendant's request, is invited error, misunderstand the fundamental error and invited error doctrines and conflict with the Idaho Supreme Court's precedents. Second, the State's assertion that Mr. Alberts has failed to show fundamental error rests on its faulty explanation of the interaction between the Idaho Code and the common law, its mistaken belief that the instruction is consistent with the common law, and its misapplication of this Court's precedents. Because the instruction amounts to fundamental error, this Court should vacate Mr. Alberts' conviction and remand this case to the district court for a new trial.

B. Because Mr. Alberts Has Properly Raised This Issue, This Court Should Reach Its Merits

The State has asserted two procedural bars to Mr. Alberts' argument that the district court committed fundamental error when it instructed 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. To begin, the State claims that "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." (Resp. Br., p.12 (formatting altered).) This argument ignores numerous cases from the Idaho appellate courts, including *State v. Perry*, 150 Idaho 209, 214 (2010), rests on an incorrectly-decided Court of Appeals case, *State v. Briggs*, 162 Idaho 736 (Ct. App. 2017),[1] and provides no principled reason for this Court to create a third category of cases in which defense counsel's objection on other grounds precludes this Court from reviewing an unobjected-to constitutional error. Next, the State argues that Mr. Alberts invited the error because, even though the State requested the self-defense instruction and Mr. Alberts objected to it, he eventually conceded (mistakenly so) that the instruction correctly stated the law. (Resp. Br., pp.16–17.) This argument relies on an incomplete account of what took place below and would require an unprecedented extension of the invited error doctrine. The State's attempts to preclude this Court from reaching the merits of Mr. Alberts' claim are thus meritless.

1. Mr. Alberts' Claim Is Properly Reviewed As Fundamental Error

Contrary to the State's assertion, Mr. Albert properly challenged the self-defense instruction as fundamental error, regardless of the fact that he objected to the instruction at issue on other grounds. In *Perry*, the Supreme Court recounted the history of the then-existing standards of review for preserved and unpreserved errors, and then articulated the standards applicable to all alleged errors from then on. It held:

> [W]here a defendant alleges that an error occurred at trial, appellate courts in Idaho will engage in the following analysis:
>
> (1) If the alleged error was followed by a contemporaneous objection at trial, appellate courts shall employ the harmless error test articulated in *Chapman*. Where the defendant meets his initial burden of showing that a violation occurred,

[1] Although the State does not cite it, the Court of Appeals reached a similar conclusion in *State v. Diaz*, 163 Idaho 165 (2017).

> the State then has the burden of demonstrating to the appellate court beyond a reasonable doubt that the constitutional violation did not contribute to the jury's verdict. There are two exceptions to this standard:
>
> a. Where the error in question is a constitutional violation found to constitute a structural defect, affecting the base structure of the trial to the point that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, the appellate court shall automatically vacate and remand.
>
> b. Where the jury reached its verdict based upon erroneous instruction an appellate court shall generally vacate and remand the decision of the lower court. However, in the limited instance where the jury received proper instruction on all but one element of an offense, and "[w]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *State v. Lovelace*, 140 Idaho 73, 79 (2004). If a rational jury could have found that the state failed to prove the omitted element then the appellate court shall vacate and remand.
>
> (2) If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine. Such review includes a three-prong inquiry wherein 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. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.
>
> We find that this analytical approach clarifies our standard of review while adhering to the historic principles underlying Idaho's harmless error and fundamental error doctrines.

150 Idaho at 227–28 (internal citation omitted). Conspicuously absent from this comprehensive proclamation is any mention of the State's newly-minted third category of claims in which defense counsel's unsuccessful objection on other grounds below bars review of a defendant's unpreserved constitutional claim. To be sure, post-*Perry*, both the Supreme Court and the Court of Appeals have analyzed claims under fundamental error when a defendant objected to the

district court's ruling on other grounds. *See, e.g.*, *State v. Easley*, 156 Idaho 214, 221 (2014) (in which Easley objected to "the process conferring on the Twin Falls County prosecutor the ability to prevent the district court from considering her for mental health court" below, argued for the first time on appeal that the prosecutorial veto violates Idaho's separation of powers doctrine and thus amounts to fundamental error, and the Court agreed); *State v. Adamcik*, 152 Idaho 445, 446–50 (2012) (in which Adamcik objected to jury instructions 14 and 15 on other grounds below, challenged those two instructions as fundamental error on appeal, and the Court decided the merits of Adamcik's fundamental error claim); *State v. Riggins*, 160 Idaho 723, 724 (Ct. App. 2016) (in which "Riggins objected to the motion to reconsider, but not on the grounds advanced on appeal," he argued on appeal "that the district court's reconsideration and reversal of its order granting withdrawal of his guilty plea was fundamental error," and the Court of Appeals analyzed his fundamental error claim); *State v. Conner*, 161 Idaho 502, 504–06 (Ct. App. 2016) (in which Conner sought to admit statements under Idaho Rule of Evidence 803(3) and 803(24), he argued for the first time on appeal that the district court's decision to exclude those statements violated his constitutional right to present a defense, and the Court of Appeals addressed that constitutional claim under fundamental error).

Overlooking this Court's clear articulation of these standards of review in *Perry*, the State relies on *Briggs* to argue that an unpreserved constitutional violation is *unreviewable* under the fundamental error doctrine if defense counsel objected to the court's ruling on other grounds. (Resp. Br., pp.12–15.) *Briggs* is inconsistent with *Perry*, its logic is flawed, and it was thus wrongly decided.

In *Briggs*, the defendant sought to admit evidence of his alleged victims' sexual histories under Idaho Rule of Evidence 412, in order to show the victims' motive to lie. *Briggs*,

162 Idaho at 738. The district court excluded the evidence, concluding that it was inadmissible under Rule 412. *Id.* On appeal, Briggs argued that the district court committed fundamental error by excluding the evidence in violation of his Sixth Amendment right to confront the witnesses against him. *Id.* at 740. The Court of Appeals held that, because there was no unobjected-to error, Briggs could not raise his claim as fundamental error. *Id.* at 739. It explained:

> It 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. . . .
>
> 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 *Perr*y 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. (emphasis added).

Although *Briggs* appears to superficially distinguish itself from *Perry* by explaining that Briggs's attorney failed to provide the basis to *admit* the evidence, the *Briggs* Court overlooked that the end result is the same: Whether the district court excludes evidence, admits evidence, or makes any other ruling, a ruling which violates a defendant's constitutional rights is reviewable under the fundamental error doctrine. *See Perry*, 150 Idaho at 227–28. Contrary to *Briggs*' reasoning, then, the error that went unobjected-to in *Briggs* was not defense counsel's "own

inaction"—that could be said in any case, as defense counsel's failure to raise the grounds asserted on appeal is a necessary precursor to fundamental error review. *Briggs*, 162 Idaho at 739. Instead, the error was the violation of Briggs' constitutional rights in excluding the evidence. Such a ruling is reviewable as fundamental error regardless of whether defense counsel argues against that ruling on some other grounds.

Finally, the State has offered no principled reason why claims in which no objection was made are reviewable under fundamental error, while claims in which an objection was made, albeit on other grounds, are unreviewable. And for good reason—there is none. Recognizing that "every defendant has a Fourteenth Amendment right to due process and it is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process," the fundamental error doctrine serves as an exception to the general rule that Idaho appellate courts will not consider arguments made for the first time on appeal. *Perry*, 150 Idaho at 224 (internal citations, quotation marks, and alterations omitted); *see also State v. Manzanares*, 152 Idaho 410, 420–21 (2012) ("As a general rule, we will not consider arguments made for the first time on appeal. When the alleged error constitutes a fundamental error, however, review on appeal is permissible.") (quoting *State v. Severson*, 147 Idaho 694, 715–16 (2009)). Therefore, when a defendant is deprived of a constitutional right at trial, he is entitled to appellate review of that violation, regardless of whether he preserved the issue and regardless of whether he objected on some other grounds. *Perry*, 150 Idaho at 222, 227–28. The State's suggestion that defense counsel can deprive a defendant of appellate review of the most important types of claims—those involving his constitutional rights—by objecting on other grounds flies in the face of the reasoning behind the fundamental error doctrine.

This Court should flatly reject the State's invitation to revisit this Court's pronouncement of the various standards of review in *Perry* and create a third category of constitutional violations which Idaho's appellate courts have no authority to review simply because defense counsel objected to the ruling on other grounds. Mr. Alberts properly challenged the instruction as fundamental error.

2. Mr. Alberts Did Not Invite The Erroneous Instruction

The State contends that "[i]f Jury Instruction 29 contained any errors they were plainly invited by Alberts" because Mr. Alberts "was instrumental in helping modify the instruction" and eventually conceded that the modified instruction correctly stated the law. (Resp. Br., pp.16–18.) The State is wrong.

First, the State's analysis omits a large portion of the parties' discussion about this instruction, instead focusing only on defense counsel's eventual concession that the instruction, as modified by the court, correctly stated the law. (Resp. Br., pp.16–17.) To be clear, *the State requested the instruction* and defense counsel objected to it on various grounds. (Tr., p.1100, L.25–p.1102, L.13.) Defense counsel said "it's not ICJI," it "seems to be somewhat superfluous to some of the other instructions," and "it can confuse the issue of where the burden of proof is placed," and thus incorrectly stated the law. (Tr., p.1100, L.25–p.1102, L.13.) After the court modified the instruction to address defense counsel's concern that it misstated the law with respect to the burden of proof, the court said: "the parties have preserved their objections already lodged on the record—any additional objections or concerns?" and defense counsel responded, "[w]e'll defer to the Court, Your Honor." (Tr., p.1102, L.14–p.1107, L.15.) But then co-counsel interrupted, saying that part of the proposed instruction—which said that "[t]he circumstances justifying a homicide must be such as to render it unavoidable"—conflicted with

the other self-defense instructions. (Tr., p.1107, L.16–p.1108, L.15.) The Court deleted that phrase from the instruction, read the instruction into the record "so everyone knows what it will say," and moved on. (Tr., p.1108, L.16–p.1111, L.19.) In short, by conceding that the modified instruction correctly stated the law, defense counsel did not waive his other objections to the instruction, nor did he turn an about-face and say that he actually *wanted* the court to give the modified instruction.

Second, the State's suggestion that a party invites an erroneous jury instruction under these circumstances is unprecedented. "The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to give or not give an instruction from later challenging that decision on appeal." *State v. Blake*, 133 Idaho 237, 240 (1999). Therefore, the invited error doctrine bars a party from challenging an instruction on appeal when the party specifically requested the instruction below. *State v. Skunkcap*, 157 Idaho 221, 232 (2014) (holding that "[w]here the error is the giving of a jury instruction *proposed* by the defendant, that matter should be resolved in post-conviction relief proceedings") (emphasis added). On the other hand, a party's failure to object to an instruction, even when the court explicitly asks if there are any objections, does not amount to invited error. *Blake*, 133 Idaho at 240 (in which defense counsel stating "we would concur. We have nothing to say on the record at this time," to the court's proposed instruction was not invited error).

This Court's resolution of the invited error argument in *Adamcik* is directly on point. It explained:

> In *Blake*, the district court provided the appellant with the proposed jury instructions, and his counsel stated "[y]our honor, we would concur. We have nothing to say on the record at this time." The State argued that this statement caused or prompted the district court to give the disputed instructions and that, therefore, the invited error doctrine should preclude the appellant from challenging these instructions on appeal. This Court disagreed,

> finding that the district court was merely giving the parties the opportunity to object to the instructions on the record, after having already decided which instructions to provide, and that the appellant had, therefore, not invited any error by failing to object.
>
> In *State v. Caudill*, the appellant, Caudill, argued that testimony offered by a detective regarding a conversation the detective had previously had with the Caudill's codefendant violated Caudill's Sixth Amendment right of confrontation. 109 Idaho 222, 225 (1985). This Court found that, although the testimony in question would have constituted a violation of Caudill's right to confrontation, the testimony had been brought out by the question of Caudill's counsel, not the State. Therefore, the doctrine of invited error precluded reversal on those grounds.
>
> Here, Adamcik's counsel *did object* to the proposed jury instructions as they pertained to malice, *though not on the grounds raised here*. This was not identical to the situation in *Blake*, as *some minor alterations were made to the jury instructions as a result of Adamcik's objections*, so it cannot be said that the trial court had already reached an absolute determination as to the exact instructions that would be offered. However, unlike the appellant in *Blake*, *Adamcik did not state that he concurred with the Court's proposed instructions, nor did he himself request the instructions* . . . . Thus, we hold that Adamcik is not precluded by the invited error doctrine from raising this issue on appeal, as he did not encourage the district court to offer the specific malice instructions given, but merely failed to object.

152 Idaho at 476–77 (emphasis added, internal citations omitted or reformatted).

This case presents the same circumstances as *Adamcik*. Mr. Alberts did not request the instruction at issue, nor did he fail to object when prompted by the court. *See* Tr., p.1100, L.25–p.1111, L.19; *Blake*, 133 Idaho at 240; *Skunkcap*, 157 Idaho at 232. Instead, he objected to the instruction on various grounds, later conceding that the modified instruction incorrectly stated the law. Tr., p.1100, L.25–p.1111, L.19; *Adamcik*, 152 Idaho at 476–77. He never withdrew his other objections or said that the court should give the instruction. *See* Tr., p.1100, L.25–p.1111, L.19; *Adamcik*, 152 Idaho at 476–77. Further, the error that he now alleges on appeal is that the instruction *as a whole* should not have been given because it incorrectly stated the law; he does not argue that the modifications that he requested are what rendered the instruction erroneous.

(App. Br., pp.15–20.) Just as in *Adamcik*, Mr. Alberts did not invite the court to give the erroneous instruction. Therefore, this Court should decide the merits of his claim.

C. The District Court Committed 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

On the merits of Mr. Alberts' argument, the State argues that the instruction correctly stated the law, and that any error is not fundamental. The State is mistaken. First, the State's assertion that the instruction correctly states the common law, and that common law does not conflict with the self-defense statutes, glosses over the way in which statutes and common law interact with one another and misconstrues both the self-defense statutes and the common law. Second, the State, like the district court, misguidedly relies on *State v. Jurko*, 245 P. 685 (1926), in an attempt to justify the instruction. Because the instruction misstated the law and amounted to fundamental error, this Court should vacate Mr. Alberts' judgment of conviction and remand this case for a new trial.

1. The Instruction Conflicts With Section 18-4009, Not To Mention The Common Law, And Thus Misstates The Law

The State claims that "[i]n addition to [the self-defense] statutory framework, there is a longstanding common-law limitation on a defendant's ability to claim self-defense" as provided in the instruction (Resp. Br., p.23), and that the instruction does not "conflict with the self-defense statute, which does not specifically address whether a defendant who intentionally seeks out and provokes the conflict can claim" self-defense (Resp. Br., p.28; *see also* Resp. Br., p.32, n.9). Not so.

This Court interprets a statute beginning with "the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed

as a whole." *Verska v. Saint Alphonus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011); *see also* I.C. § 73-113(1) ("The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction."). If the statute is unambiguous, this Court "simply follows the law as written." *Verska*, 151 Idaho at 893 (internal citation and quotation marks omitted). Further, Idaho courts only apply common law standards to gaps in the Idaho Code; they do not apply the common law to matters covered by statutory law. I.C. § 73-116 ("The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases *not provided for* in these compiled laws, is the rule of decision in all courts of this state.") (emphasis added).

Section 18-4009 provides:

> Homicide is 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; or,
>
> 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; or,
>
> 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.

By drafting section 18-4009, the Idaho Legislature has spoken on the issue of self-defense and thus there is no "gap" in the Idaho Code for the common law of self-defense to fill. And because section 18-4009 "does not specifically address whether a defendant who intentionally seeks out and provokes the conflict can claim" self-defense, such circumstances are wholly irrelevant to a defendant's claim of self-defense. (Resp. Br., p.28.) To conclude otherwise would require this Court to read something into the statute which simply is not there, plainly at odds with the rules of statutory construction. *See Verska*, 151 Idaho at 893; I.C. §§ 73-113(1), 73-116. The instruction conflicts with the plain language of section 18-4009, and thus it incorrectly states the law.

Further, the State's claim that the instruction embodies "a longstanding common-law limitation on a defendant's ability to claim self-defense" overlooks significant differences between the instruction here and its supposed common law roots. The district court here instructed the jury that:

> One cannot claim the benefits of self-defense if he *intentionally put himself where he knew or believed he would have to invoke its aid*. 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 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).) In other words, this instruction precludes a defendant from claiming self-defense if he merely put himself in a situation where he believes he may need to defend himself or if he sought a verbal confrontation with the deceased.[2] That is a far cry from

[2] The State faults Mr. Alberts for misframing the issue in his appellant's brief. (Resp. Br., pp.26–27.) It claims that Mr. Alberts narrowly focused on one phrase of the instruction—that "one cannot claim its benefits after he has intentionally put himself where he knows or believes he will have to invoke its aid"—and it exalts a latter part of the instruction as drawing "a

the smattering of doctrines on which the State relies. (Resp. Br., pp.29–30.) It is not "produc[ing] the occasion *in order to have a pretext for killing* [an] adversary," *State v. Domingue*, 118 So. 46, 48 (La. 1928) (emphasis added); "intentionally provok[ing] a difficulty *in order to have a pretext to kill*," *State v. Millett*, 273 A.2d 504, 510 (Me. 1971) (emphasis added); seeking "the difficulty with the deceased *for the purpose of chastising or beating him*," *Gibson v. State*, 8 So. 98, 100 (Ala. 1890) (emphasis added); committing "deliberate and *lawless* acts" or "bantering [the victim] to a fight *for the purpose of taking his life*," *Adams v. People*, 47 Ill. 376, 379–80 (1868) (emphasis added); or "provok[ing] a quarrel, *and tak[ing] advantage of it*, and then justify[ing] the homicide," *State v. Ballou*, 40 A. 861, 863 (R.I. 1898) (emphasis added). It is not the same as precluding a claim of self-defense when the defendant "was *reckless or negligent* in bringing about the situation requiring a choice of harms or evils," JUSTIFICATION GENERALLY: CHOICE OF EVILS, Model Penal Code § 3.02 (emphasis added)[3]; or the same as the requirement that a defendant who "seeks or induces the quarrel which leads to the necessity for killing his adversary . . . first decline to carry on the affray and must honestly endeavor to escape from it" in order to raise self-defense, *People v. Holt*, 25 Cal. 2d 59, 66 (1944). In short, the State's discussion of the instruction's supposed common-law roots glosses over the most

---

far smaller category of persons" which Mr. Alberts falls within—those defendants who "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." (*Id.*) This is a misrepresentation of Mr. Alberts' argument, as he specifically challenged the "sought a meeting" clause of the instruction. (*See, e.g.*, App. Br., p.20.) Further, far from saving the instruction, this clause is in fact a death knell. Merely *seeking a meeting to provoke a difficulty* does not take self-defense off of the table under Idaho law or common law. *See* I.C. § 18-4009; *infra*, pp.15–17.

[3] Regardless, the more relevant provision of the Model Penal Code, titled "Use of Force in Self-Protection," does not preclude a claim of self-defense when the defendant either sought out a verbal confrontation or placed himself in the situation requiring that he defend himself. Model Penal Code § 3.04.

axiomatic distinction between the instruction here and the authorities on which the State relies: the district court instructed the jury that Mr. Alberts could not claim self-defense if he simply put himself in a situation where he believed he would need to act in self-defense or sought *a confrontation*, verbal or otherwise, with Mr. Warren. (R., p.226.) The instruction is inconsistent with both the common law and section 18-4009, and thus incorrectly stated the law.

2. The *Jurko* Decision Does Not Justify The District Court's Decision To Give The Instruction

In response to Mr. Alberts' argument that the district court mistakenly relied on *State v. Jurko*, 245 P. 685 (1926), when deciding to give the instruction at issue (App. Br., pp.18–19), the State asserts that Mr. Alberts has not argued or shown that *Jurko* should be overruled as manifestly incorrect (Resp. Br., p.28). Although Mr. Alberts did not explicitly ask this Court to overrule *Jurko*, he opened his discussion by explaining that the district court incorrectly relied on that decision because *Jurko* looked to an Oregon case, not Idaho Code, when condoning the instruction. (App. Br., p.18.) Therefore, *Jurko* does not control here. Instead, this Court's decision in *State v. Livesay*, 71 Idaho 442, 446 (1951), dictates the outcome in this case. There, the Idaho Supreme Court rejected a similar instruction after Livesay argued that the instruction erroneously precluded her from claiming self-defense if she intentionally put herself where she knew or believed she would need to act in self-defense. (App. Br., p.19.) Likewise, the district court here erroneously instructed the jury that Mr. Alberts could not claim self-defense if he merely put himself in a situation where he believed he may need to defend himself or if he sought a verbal confrontation with the deceased. (R., p.226.)

Relatedly, the State takes issue with Mr. Alberts' argument that *Jurko* does not apply here because Jurko argued that the instruction misstated the first aggressor rule and did not challenge

the language which takes self-defense off of the table if the defendant seeks a confrontation or intentionally puts himself in a position where he may need to defend himself. (Resp. Br., pp.32–33.) The State asserts that, because the Court explicitly considered all of the instructions together when concluding the instruction was proper, that "necessarily shows the particular instruction at issue did not misstate the law of self-defense." (Resp. Br., p.33.) The State is incorrect. Had the *Jurko* Court actually considered the argument Mr. Alberts has made here, it very well could have reached the same conclusion that it reached twenty-five years after *Jurko* in *Livesay*: "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." 71 Idaho at 448.

In sum, the district court misstated the law when it instructed the jury that individuals who seek out a meeting with someone, knowing or believing that that meeting could end badly, cannot claim self-defense. The instruction amounted to fundamental error because it lowered the State's burden of proof and thus violated Mr. Alberts' unwaived constitutional right to due process, the error is plain on the face of the record, and there is a reasonable possibility that the error affected the outcome of the trial.

CONCLUSION

For the reasons detailed above and in his appellant's brief, Mr. Alberts respectfully asks that this Court vacate his judgment of conviction and remand his case to the district court for a new trial.

DATED this 19th day of September, 2018.

/s/ Erik R. Lehtinen
ERIK R. LEHTINEN
Chief, Appellate Unit

/s/ Maya P. Waldron
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of September, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

MPW/eas