COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Adams District Court Honorable C. Vincent Phelps Case Number 06CR3398	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Corey Dean Wagner Defendant-Appellant	♦ COURT USE ONLY ♦
Douglas K. Wilson, Colorado State Public Defender NED R. JAECKLE, #10952 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 08CA1178
REPLY BRIEF OF DEFENDANT-APPELLANT	

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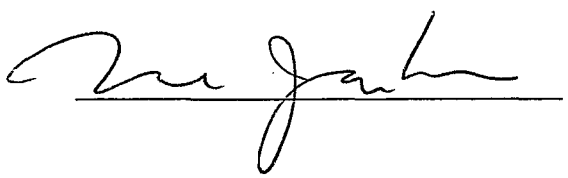
CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that: The reply brief complies with C.A.R. 28(g). Choose one: ☒ It contains 5,122 words. ☐ It does not exceed 18 pages.



In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

1. Contrary to the State, not only was a multiple assailants instruction "needed", Mr. Wagner was *entitled* to it, and the trial court was *required* to give it.[1]

Multiple witnesses confirmed that Mr. Lucero – the person whom Mr. Wagner claimed he defended – was the target and focal point of a large brawl that involved "every guy in the house", looked like "a big pile" and consisted of "a bunch of bodies swinging and kicking people." Op. Br. at 11 citing the record. Indeed, the State concedes that "sufficient evidence" existed to suggest that Mr. Lucero was "being attacked by multiple assailants." Ans.Br. at 7.

Accordingly, Mr. Wagner asked the court to instruct the jury that in determining whether he used a reasonable degree of force it must consider the totality of the circumstances, including the number of persons reasonably appearing to pose a

[1] To the extent that the State implies that the standard of review for this issue is abuse of discretion, the State is wrong. The error is reviewed under a harmless error standard. *People v. Garcia*, 28 P.3d 340, 348 (Colo. 2001) (because defendant requested a no duty to retreat before using self-defense instruction "we apply a harmless error standard..."); see also *People v. Riley*, 240 P.3d 334, 340 (Colo.App. 2009) (reviewing court's refusal to give multiple assailants instruction under harmless error standard).

threat. (v1 p93). Under these facts, Mr. Wagner argued that the court was required to so instruct the jury because "the totality of the circumstances, including the number of persons reasonably appearing to be threatening the accused ***must be considered by the trier of fact in evaluating the reasonableness***" of the accused's defensive actions. Op. Br. at 15, quoting *People v. Jones*, 675 P.2d 9 (Colo. 1984) (emphasis added).

The State does not dispute that the jury is *required* to consider the totality of the circumstances in evaluating the reasonableness of the accused's defensive actions. Nor does the State dispute that in evaluating reasonableness, the jury must consider the number of persons posing a threat. The State's only asserts that the jury did "not need[]" to be instructed of this requirement. Ans. Br. at 6. According to the State, the instruction was "not needed" because the court's "use of deadly force instruction" did not prevent the jury from considering the effect of multiple assailants. Ans. Br. at 11. For a number of reasons, the State's assertion is wrong.

First, the State's analysis – that there is no error so long as the instructions do not *forbid* the jury from considering the effect of multiple assailants – turns the well-settled law of self-defense on its head. The court is *required* to instruct the jury to consider the effect of multiple assailants, not merely refrain from telling them that they may not. *E.g. People v. Riley*, 240 P.3d 334, 339-340 (Colo.App. 2009). And when,

as here, there is evidence of multiple assailants, the defendant is *entitled* to an instruction informing the jury they must consider that factor. *Id.* (noting the still authoritative holding in *Jones* "*requiring* the trial court to instruct the jury to consider the totality of the circumstances, including [multiple assailants]" and holding that because the evidence there suggested multiple assailants the "defendant was *entitled* to an instruction on multiple assailants") (emphasis added). Merely refraining from instructing the jury to the contrary does not expiate the trial court's error in failing to give a tendered multiple assailants instruction warranted by the evidence.

Second, as the State notes, the claim that he was defending Lucero against the threat posed by multiple assailants was Mr. Wagner's primary theory of defense. Ans. Br. at 12 ("...Wagner argued his multiple assailants theory of defense to the jury..."). This is a second reason why the trial court was *required* to give the tendered instruction. Mr. Wagner was *entitled* to it. *People v. Garcia*, 28 P.3d 340, 347 (Colo. 2001) ("An instruction embodying a defendant's theory of the case *must be given* by the trial court if the record contains any evidence to support the theory...") (emphasis added).

Third, to the extent that the State is suggesting that the other instructions were adequate to apprise the jury of the law of self-defense, the State is wrong. Indeed, the "deadly force" instruction did not even inform the jury that in the first instance, Mr.

Wagner had a fundamental right of self-defense. The "deadly physical force" instruction never told the jury that a person is justified in using physical force in order to defend himself or another from the imminent use of unlawful physical force by another person or persons. § 18-1-704 (1), C.R.S. Rather, the instruction serves only to limit the right of self-defense. By naming the two conditions that must be met for the use of deadly physical force, this instruction limits the defensive use of force. It never instructs the jury in the first instance that the right of self-defense exists.

Instead of merely informing the jury of the limitations on Mr. Wagner's right of self-defense, he was entitled "to have a lucid, accurate and comprehensive statement by the court to the jury of the law on the subject of self-defense from his standpoint." *Young v. People*, 107 P. 274, 275 (Colo. 1910); see also *Idrogo v. People*, 818 P.2d 752, 754 (Colo. 1991) (defendant entitled to instructions that "apprise the jury of the law of self-defense from the standpoint of the defendant."). Here, the instructions served only to inform the jury of the limits placed on Mr. Wagner's exercise of the right. *C.f. People v. Vasquez*, 148 P.3d 326, 330 (Colo.App. 2006) (giving only deadly physical force instruction erroneously limited the jury's consideration of self-defense principles).

Fourth, the State's implication that the self-defense instruction did not "limit in any way the availability of the defense to an attack by a single attacker" is, at best,

misleading, if not entirely wrong. The State is correct only to the extent that the deadly force clause of instruction 16 does not refer to a singular victim. *C.f. People v. Auldridge*, 724 P.2d 87, 88 (Colo.App. 1986). But, as argued in the Opening Brief, two clauses of the same instruction that immediately follow expressly instruct the jury to consider various aspects of the defendant's defensive acts *vis a vis* the threat posed by only one assailant; using the singular word "person". Op. Br. at 16-17 citing the "provocation clause": (defendant not justified in using force if he provoked use of unlawful force by *that person*) and the initial aggressor clause: (defendant not justified in using force unless, *inter alia*, he tells *other person* he withdraws and *other person* continues or threatens to use unlawful force) (Jury Inst. 16, v1 p124-125). The multiple uses of the singular word "person" in the *only* instruction the jury received on Mr. Wagner's right of self-defense underscores the necessity of informing the jury that they *must* consider the effect of multiple assailants.

Indeed, the State's citation to *People v. Whittaker*[2] in support of this part of its argument is particularly inapposite. In *Whittaker*, unlike here, the affirmative defense instruction referred to defending against the use of "unlawful physical force by the victim, *and/or another he reasonably believes is acting in concert with the victim*". *Whittaker*, 181 P.3d at 276. And in *Whittaker*, unlike here, the court instructed the jury it must assess

[2] *People v. Whittiker*, 181 P.3d 264, 276 (Colo.App.,2006).

and consider the defendant's defensive acts against "the joint action of one or more *persons*." *Id.* Rather than demonstrating the absence of an error, *Whittaker* serves to highlight the error here.

Fifth, the State's argument that there was no error in refusing to give the requested multiple assailants instruction because defense counsel was nevertheless allowed to argue about it is without merit. As stated above, Mr. Wagner was *entitled* to the instruction based both on his right to have the jury apprised of the law of self-defense and to have an instruction embodying his theory of the defense given to the jury. And argument by counsel is not an adequate substitute. *E.g. United States v. Serawop*, 410 F.3d 656, 669 fn.9 (10th Cir. 2005) (defense counsel's argument is not a "cure-all for prejudice" caused by inadequate jury instructions; "our case law recognizes that arguments and evidence cannot substitute for instructions by the court."). It is axiomatic that the judge, not the lawyers, instructs the jury on the law to apply to the case. Indeed, the jury was told just that. The judge instructed the jury:

> It is my job to decide what rules of law apply to the case. While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them. You must follow all of the rules as I explain them to you.

(Inst. No. 1, v1 p106).

Jurors presumably followed this instruction. *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984) (it is presumed that jury understood and heeded the trial court's instruction to "rely on admitted evidence and the instructions, not on the closing arguments.").

Here, two clauses of the self-defense instruction called for evaluation of the defendant's actions *vis a vis* his encounter with a single "person." And the court did not instruct the jury – as it was required and as the defendant was entitled – to consider the effect of multiple assailants. Accordingly, the trial court's refusal to give the multiple assailants instruction as requested and tendered by Mr. Wagner was error and requires reversal.

2. Contrary to the State, the instruction on Colorado's "make-my-day" statute did not provide "guidance" to the jury; it misled them because the evidence raised no issue of illegal entry into the Vasquez dwelling.[3]

In the Opening Brief, Mr. Wagner argued that by giving a misleading and inapposite instruction on Colorado's "make-my-day" statute, the trial court both misled the jury and wrongly put yet another limitation on Mr. Wagner's defensive use of force. The make-my-day instruction wrongly suggested to the jury that the beating Mr. Lucero was receiving at the hands of multiple occupants was somehow lawful.

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[3] To the extent that the State suggests this issue is reviewed on an abuse of discretion standard, the State is wrong. When the court gives a confusing and misleading instruction over defendant's objection, the harmless error standard applies on review. *People v. Silva*, 987 P.2d 909, 913 (Colo.App. 1999).

Thus, this inapposite instruction, given over Mr. Wagner's objection, implied that Mr. Wagner was not justified in using force to defend Lucero because Lucero's beating did not constitute the use of *unlawful* force. Op. Br. at 21-25.

In response, the State defends the instruction by suggesting it "provid[ed] to the jury guidance as to what constitutes the exercise of lawful force by the occupant of a dwelling, or a person in control of a building." Ans. Br. at 16. But in reality, the instruction provides misguidance, not guidance.

The make-my-day statute renders an occupant's use of force against another to be lawful only when, *inter alia*, the other person "has made an unlawful entry into the dwelling." § 18-1-704.5 (2), C.R.S. And Lucero – the person Mr. Wagner was defending – did not unlawfully enter the Vasquez home. Lucero (as well as Wagner and Lee Madrid) were brought to the Vasquez's party by Madrid's girlfriend, Letticia, who was invited to the party by another of the Vasquez's friends. (v12 p69-71, p90-91; v13 p8-11). According to Lucero, they were greeted upon their entry by some other of the 60 guests at the party.

> Q. ... Did you guys just walk in or were you greeted by somebody or, tell us how all of that came about.
>
> A. We were greeted by some girls and Lee's girlfriend and friends.
>
> Q. Did people seem to be nice to you?

A. Uh-huh.

Q. Tell us what happens once you go inside.

A. Um, we were just talking. Everyone was talking. I was talking to this girl on the couch.

(v12 p11).

And Mr. Vasquez – one of the homeowners – saw the Lucero/Wagner group conversing with his wife, among others. Nothing about his reaction suggests an "illegal entry." Indeed, he made little notice of their entrance.

Q. Okay. You didn't know them personally, but they knew other people who had been at the party?

A. Only one person in that party that knew one person, one of the individuals.

Q. One of the people who came in that you didn't know was in the kitchen talking to a group of girls, correct?

A. Yes.

Q. And one of those women was your wife –

A. Yes.

Q. – was talking to these people?

A. Well, he was talking to my wife and her friends. And they were all talking to him.

Q. That was in the kitchen where you were?

A. Yes.

> Q. So you had seen at least one of these individuals who you didn't know come in?
>
> A. Yeah. I just saw him. At the time, he was in the kitchen when I was cleaning.
>
> Q. And you never told any of these guys that they couldn't come into your house?
>
> A. No. Like I said, I didn't think it was going to be a problem because I thought they were there to pick up somebody.

(v12 p10).[4]

This was nothing more than a genial and sociable entrance to a large party. Nothing about these circumstances suggests an unlawful entry into a dwelling. Colorado's make-my-day statute has no applicability to these circumstances. Rather than provide guidance on some applicable legal principle, it served only to mislead the jury as demonstrated by the question they submitted during deliberations. *See* Op. Br. at 24-25 discussing v1 p156.

The State also makes the flimsy claim that during argument, Mr. Wagner somehow "used the instructions in order to bolster" his defense. This argument, too, is without merit. As the State concedes, Mr. Wagner vigorously and repeatedly objected to the instruction. Op. Br. at 20, citing v15 p186-188; p202-206; v16 p4.

[4] The State's hyperbolic claim in its statement of facts that Mr. Wagner and his friends "crashed" the party is incorrect.

Counsel simply made an effort to do what little she could in order to deal with an erroneous instruction that wrongly limited Mr. Wagner's primary defense. What little she could do did not ameliorate the error. *C.f. DeBella v. People*, 233 P.3d 664, 669 (Colo. 2010)(the defense attorney's decision to argue evidence admitted over his objection should not operate as a concession to its later use).

3. The court reversibly erred by instructing the jury on the provocation limitation on self-defense because there was no evidence that Mr. Wagner provoked the alleged victim.

The State makes no serious response to Mr. Wagner's argument that the trial court erred by giving a provocation instruction when there was no evidence of provocation as its elements are set out by this Court in *People v. Silva*, 987 P.2d 909 (Colo.App. 1999). Mr. Montoya was the alleged victim, not Ms. Vasquez. Moreover, Montoya was assaulting Lucero, not Wagner (the defendant). And finally, nothing suggests any of Wagner's actions vis a vis Ms. Vasquez – let alone Montoya – were intended to cause Montoya (the alleged victim) to attack him thereby providing a pretext for injuring Montoya. *Silva*, 987 P.2d at 914. The State simply ignores the requirements for a provocation instruction that is set out in *Silva*. Instead of legal analysis, the State simply creates a justification out of whole cloth that bears no relation to the rule of law governing the provocation issue.

4. The evidence was more than sufficient to warrant instructing the jury – as requested by Mr. Wagner – that it may consider his voluntary intoxication by alcohol and drugs in determining whether he had the culpable mental states for the various specific intent crimes charged.

The State acknowledges, as it must, that under Colorado law voluntary intoxication may negate the existence of the culpable mental state for any specific intent crime. § 18-1-804 (1), C.R.S.; *People v. Miller*, 113 P.3d 743 (Colo. 2005); *People v. Harlan*, 8 P.3d 448 (Colo. 2000). And the State does not dispute that through the testimony of Detective Naysmith about statements made by Mr. Wagner during his interview the following was in evidence:

- Earlier the same evening Mr. Wagner was at a "club" with friends and was drinking (v15 p63)
- After leaving the club he met some other friends and went to the Vasquez party (v15 p64)
- Prior to arriving at the Vasquez's party Mr. Wagner drank one-quarter to one third of a bottle of Vodka. (v15 p63-64)
- Prior to arriving at the Vasquez's party Mr. Wagner also smoked a large quantity of marijuana. (v15 p65-66).
- Mr. Wagner couldn't remember much of what happened at the Vasquez party because he "had been drinking quite a bit" and he "was drunk." (v15 p67)

- As a result, Mr. Wagner reported his "mind was crazy" and "during the course of the fight ... he was just getting flashes of things" (v15 p67, p68).

The State argues that this is not enough evidence to warrant an intoxication instruction. The State claims that "before such an instruction can be given evidence must have been presented that the defendant was so intoxicated at the time of the crime that he [was] incapable of either deliberating or acting intentionally." Ans. Br. at 23. The State's claim is unfounded and is not supported by any Colorado authority. Again, the State's argument is wrong for many reasons.

First, the only Colorado case cited by the State that purportedly supports the State's proposition and that actually has an issue that concerns the propriety of the intoxication instruction is *Brown v. People*.[5] Ans. Br. at 23. (The two other Colorado cases cited by the State – both from the 1960s – do not concern the propriety of an intoxication instruction. The issue in *Dolan*[6] was whether there was sufficient evidence to submit first-degree murder to the jury in spite of the defendant's intoxication. The issue in *Gallegos*[7] was whether the court erred in excluding evidence of the defendant's intoxication, which the court answered in the affirmative. Neither case dealt with what evidence is required before the court *instructs* the jury it may

[5] 239 P.3d 764 (Colo. 2010).
[6] *Dolan v. People*, 449 P.2d 828 (Colo. 1969).
[7] *Gallegos v. People*, 411 P.2d 956 (Colo. 1966).

consider the defendant's intoxication in determining if he formed the specific intent for the crime.). And *Brown v. People* does not stand for the proposition that the State attributes to it.

In *Brown*, the defendant and the victim, his girlfriend, took a pill of ecstasy and had some drinks while shooting pool at a downtown pool hall one evening. After quarreling, the victim went home to her apartment. The next morning, she awoke to find the defendant in her bedroom who shot her three times non-fatally resulting in his conviction for attempted first-degree murder. At trial, the defendant testified, claiming he had not entered the victim's apartment and instead spent the night drinking at a motel where he eventually passed out.

Although Brown claimed innocence, he also asked for the jury to be instructed on attempted second-degree murder and the related instruction of voluntary intoxication, both of which the trial court refused because they were inconsistent with Brown's theory of defense. Thus, the primary issue in *Brown* was whether a defendant is entitled to instructions that are inconsistent with his defense. After resolving that issue in Brown's favor, the Court nevertheless held that – on this particular record – it was not error to refuse the tendered instructions.

As to the voluntary intoxication instruction, the Court reasoned, in relevant part, that the record did not support the instruction because "there was ample time

for Brown to recover from the ecstasy and pool hall drinks he consumed" the night before the next morning's attack. *Brown*, 239 P.3d at 770. Thus, the State's proposition that "before [an intoxication] instruction can be given, evidence must have been presented that the defendant was so intoxicated at the time of the crime that he had been incapable" of forming the requisite mental state is not supported by *Brown*. Ans. Br. at 23. Rather, the Court held Brown's "ample time ... to recover" from consuming alcohol and drugs the evening *before* the attack rendered the record devoid of evidence suggesting he was intoxicated at the time of the next morning's attack. *Brown* has nothing to say about *the degree* to which the evidence must suggest a defendant is intoxicated at the time of his act in order to warrant the instruction, as the State would have it. *Brown* merely says that the evidence in his case did not suggest that he was intoxicated *at all* at the time of his act.

Second, here, unlike in *Brown*, Mr. Wagner's act was committed on the same evening during which he had consumed a substantial amount of vodka and smoked a substantial amount of marijuana. Unlike *Brown*, there was no long intervening time between the consumption and the act. Mr. Wagner stated that prior to arriving at the Vasquez party he and his associates were at a "club", then stopped at another party, and went to the Vasquez home. (v15 p63-64). And he reported drinking during that night up to a third of a bottle of vodka and smoking "big weed." (v15 p64-66).

Moreover, this itinerary was corroborated by David Lucero who testified that, together with Wagner, he went to "Club Vinyl" between 10:30 and 11:00, stopped at a "hotel party" and then arrived at the Vasquez party at 2:00 or 3:00. (v13 p8-10). Thus, unlike in *Brown*, the evidence suggesting the defendant consumed alcohol and drugs shortly before his act had significant corroboration.

In short, nothing about *Brown* – either legally or factually – suggests the trial court here was not required to instruct the jury on voluntary intoxication.

Third, the State's suggestion that Mr. Wagner was required to establish an extreme degree of intoxication[8] before the jury could merely be instructed it *may consider* voluntary intoxication in their mental state determination is contrary to well-established Colorado law. "The quantum of evidence that must be offered by the defendant in order to be entitled to an instruction on a theory of defense is a scintilla of evidence." *People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998) (internal quotation marks and citation omitted). Here, that quantum is amply met. Mr. Wagner claimed significant and recent consumption of alcohol and drugs such that he

[8] The State argues that before the jury may be instructed that it may consider intoxication in determining culpable mental state the evidence needed to show the defendant "was acting in a manner that indicated he was too intoxicated to either deliberate or act intentionally" or that he was "stumbling around in an alcoholic stupor". Ans. Br. at 25. But that is a determination that a properly instructed jury must make, not the trial court by refusing to so instruct the jury.

could not remember much of what happened and such that his "mind was crazy." Whatever the quantum of evidence that the State believes is required to qualify for this instruction is not one required by Colorado case law. But the established quantum of evidence for the instruction was surely met here.

The State is essentially confusing the quantum of evidence required to warrant a directed verdict with the quantum required to simply instruct the jury on the issue. The State's confusion is evident from its citation to, for example, *Dolan v. People*, where the issue was whether – in view of the evidence of defendant's intoxication – the evidence was sufficient to submit the first-degree murder charge to the jury. *Id.* 449 P.2d at 835. The State cites this wholly inapposite case in a string beginning with the introductory signal "*see*" when it does not warrant even a "*c.f.*". *Dolan* provides no guidance on when an intoxication instruction is required, let alone does it stand for the proposition that precedes it. See *The Bluebook: A Uniform System of Citation*, § 1.2(a) at 22-23 (17th ed. 2000).

Fourth, the State's efforts to discredit Mr. Wagner's claims of intoxication have no bearing on his entitlement to a voluntary intoxication instruction. An intoxication instruction, like other instructions supporting a theory of defense must be given when the record contains supporting evidence, even where the supporting evidence consists only of "highly improbable testimony by the defendant." E.g. *People v. Vasquez*, 148

P.3d 326, 328 (Colo.App. 2006) (even if defendant's testimony suggesting he did not intend to use deadly force was highly improbable, he was entitled to self-defense instruction that did not confine jury's evaluation of the reasonableness of defensive acts under the deadly force limitation); see also *People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992) (same with respect to alibi instruction) and *Lybarger v. People*, 807 P.2d 570, 579 (Colo. 1991) (same with respect to "treatment by spiritual means" instruction regarding child abuse charge); *c.f. People v. Garcia*, 826 P.2d 1259, 1262 (Colo. 1992) ("As a general rule, any credible evidence, no matter how improbable, unreasonable or slight which tends to reduce a homicide to manslaughter entitles a criminal defendant to a jury instruction on the lesser-included offense.").

This is not to suggest that Mr. Wagner's report of significant alcohol and drug consumption was at all improbable. Indeed, it was not. His report that he and his friends went to a club and to another party shortly before arriving at the Vasquez party was corroborated by Mr. Lucero. That a young man of Wagner's age out with friends and going to clubs and multiple parties might excessively consume alcohol and drugs is far from improbable.

While the aspersions cast by the State may bear on the jury's evaluation of the intoxication evidence, the jury must in the first instance be properly instructed on the relevance of intoxication. That is all Mr. Wagner asked for in the trial court and all

that he asks for in raising this issue on appeal: proper instruction to the jury on relevant evidence presented at trial. After all, "[i]t is for the jury and not for the court to determine the truth of the defendant's theory." *People v. Fuller*, 781 P.2d 647, 651 (Colo. 1989).

Fifth, the State's argument that had Mr. Wagner argued he lacked a culpable mental state for the various crimes because of intoxication "he would have eliminated any support at all" for self-defense is patently absurd. Ans. Br. at 26. Tellingly, the State cites no authority for this proposition, in all likelihood because there is none. Arguing that the defendant both lacked the culpable mental state for the crime because of intoxication and that he acted reasonably in defense of himself or another are not inconsistent claims. *E.g. Shackelford v. State*, 486 N.E.2d 1014, 1016 (Ind. 1986) ("The theories of self-defense and intoxication are not inconsistent as a matter of law."). Colorado law provides the right of a person to use physical force or even deadly force in some instances to defend himself or another from the use of unlawful physical force by another. § 18-1-704, C.R.S. The law does not qualify that right by making it available only to sober people. It requires only that the person act in an objectively reasonable manner whether or not he is intoxicated. *People v. Vasquez*, 148 P.3d at 330, citing 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.5 (d), at 51 (2d ed. 2003).

Finally, the State's contention – once again, tellingly unsupported by citation to any legal authority – that even if the court erred in this regard his convictions for felony murder and second-degree burglary "remain unaffected" is patently wrong. Ans. Br. at 26. The State's premise is that felony murder and second-degree burglary are crimes of "general intent." *Id.* That premise is wrong. As explained in the Opening Brief – which unlike the State's Answer Brief provided citation to relevant authority – the crimes of felony murder, second-degree burglary, and second-degree assault are all specific intent crimes (in the case of felony murder, when a predicate crime requires specific intent). Op. Br. at 31-33, citing cases. Accordingly, because intoxication may negate the culpable mental state for any specific intent crime, the trial court's failure to so instruct the jury requires reversal of Mr. Wagner's conviction for felony murder, first-degree murder, second-degree assault, and second-degree burglary.

5. By telling the jury that they could not reach the lesser-included offenses unless they found Wagner not guilty of the charged offense, the prosecutor misstated the law.

The State contends the prosecutor did not mistake the rule of law established in *Zamarripa-Diaz*[9] and *Bachicha*[10] because he "did not tell the jury that it had to

[9] *People v. Zamparripa-Diaz*, 187 P.2d 1120 (Colo.App. 2008).
[10] *People v. Bachicha*, 940 P.2d 965 (Colo.App. 1996).

unanimously acquit Wagner of first degree murder (after deliberation) before it considered that offense's lesser included offenses." Ans. Br. at 31 (emphasis added). Evidently, the States' argument hinges on the absence of the word "unanimously."

This is what the prosecutor told the jury about when and under what circumstances it could consider the lesser-included offenses:

> Ladies and gentlemen, you don't get to those lesser included offense unless you *find* the defendant not guilty of the charged offense.

Op. Br. at 39 citing (v16 p45) (emphasis added).

The absence of the word "unanimously" does not ameliorate the prosecutor's misstatement of law in any way. The jury was instructed that its "verdict must be unanimous." (v1 p154). And the jury's verdict forms all verbatim use the word "find." Thus, any finding by the jury is, by definition, unanimous. The absence of the word "unanimous" does not render the prosecution's argument to be a correct statement of law. Indeed, it is the opposite.

Moreover, as argued in the Opening Brief, because of the other instructional shortcomings and because of the state of the evidence, the prosecutor's misstatement of law requires reversal under the plain error standard. Op. Br. at 41-43.

6. Failure to give the multiple assailants instruction requires, as well, reversal of Wagner's convictions for second and third degree assault.

Mr. Wagner stands on the argument made in his opening brief. Op. Br. at 44-45.

7. Even if the Court believes that, standing alone, one of the errors does not require reversal, the cumulative effect of the errors requires reversal.

Mr. Wagner stands on the cumulative error argument made in his opening brief. Op. Br. at 45-47.

CONCLUSION

For reasons stated and authorities cited, this Court should reverse Mr. Wagner's convictions and remand this case for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on May 16, 2011, a copy of this Reply Brief of Defendant-Appellant was served on Paul Koehler of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us: