

NO. 42161-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONALD MENDES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 08-1-00527-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence to prove all elements of felony murder, beyond a reasonable doubt?
2. Where the State proved all elements of felony murder, including mens rea, beyond a reasonable doubt, whether the State also disproved self-defense?
3. Whether, at or near the close of the State's case, the defendant was entitled to an advisory ruling from the trial court regarding the sufficiency of the evidence?
4. Where the defendant made a voluntary tactical decision to testify in his defense, whether the trial court compelled him to testify?

B. STATEMENT OF THE CASE.

1. Procedure

On January 29, 2008, the Pierce County Prosecuting Attorney (State) charged the defendant, Ronald Mendes, with one count of murder in the second degree (felony murder) and one count of unlawful possession of a firearm. CP 1-2. The case went to trial. The defendant was convicted. CP 5-6. The murder conviction was reversed and remanded for

a new trial. *See, State v. Mendes*, # 64912-4-I, noted at 156 Wn. App. 1059 (2010)(2010 WL 2816974); CP 18-35.

On April 13, 2011, the trial was assigned to Hon. John Hickman for the retrial. 1RP 3. The State filed a Fourth Amended Information, charging the defendant with murder in the second degree (intentional and felony murder), and four counts of tampering with a witness. CP 43-46.

After hearing all the evidence, the jury found the defendant guilty of Count II – felony murder, and 4 counts of tampering with a witness. CP 108, 133. The defendant moved for a judgment notwithstanding the verdict. CP 120-126. The court denied the motion. 17 RP 1441.

For murder in the second degree, the court sentenced the defendant to 397 months, plus 60 months for the firearm sentencing enhancement. CP 137. The court imposed an exceptional sentence for tampering with a witness. CP 137.

The defendant filed a timely notice of appeal. CP 145. He appeals his murder conviction. He does not appeal his convictions of unlawful possession of a firearm or tampering with a witness.

2. Facts

Lori Palomo and the victim, Danny Saylor, lived together at the victim's home. 6 RP 117. Palomo was Saylor's girlfriend. 6 RP 118. On occasion, Palomo and Saylor argued. 6 RP 120. After those arguments, Palomo would leave, only to return a few days later. *Id.*

After an argument in November, 2007, Palomo went to stay with a friend at the home of a person named Tom Espey. 6 RP 125. The defendant was also staying with Espey. *Id.* Palomo and the defendant engaged in a romantic relationship while there. 6 RP 126. This relationship lasted approximately 3 weeks. 6 RP 126. Palomo and the victim then reconciled and she returned to his house. 6 RP 127.

The defendant, still enamored of Palomo, attempted to contact her at the victim's home. 6 RP 128, 11 RP 1054. The defendant's repeated attempts to reunite with Palomo irritated the victim. 6 RP 131. After Palomo returned to the victim, someone vandalized her car, which was parked in front of the victim's house. Someone spray-painted insulting obscenities on Palomo's car. 6 RP 131. Palomo and the victim strongly suspected the defendant of committing this vandalism. 6 RP 131. The victim was angry with the defendant for the repeated contacts and the vandalism. 6 RP 132.

Just before midnight on January 27, 2008, the defendant went to the victim's house. 7 RP 423. He knocked on the door, waking Chuck Bollinger, who was sleeping on a couch in the living room. *Id.* The defendant requested that Bollinger wake the victim. 7 RP 425. The defendant wanted to explain to the victim that the defendant was not the person who had spray-painted Palomo's car. *Id.* Unknown to the defendant, the victim had requested that Bollinger wake him if the defendant returned. 7 RP 427.

Bollinger advised the defendant that waking the victim was not a good idea, because the victim was angry with the defendant regarding the vandalism. 7 RP 428. The defendant persisted, so Bollinger went to the victim's room. 6 RP 133, 7 RP 429. Indeed, the victim was angry with the defendant. 7 RP 430. The victim hurriedly dressed and went out to the living room to confront the defendant. 7 RP 429.

There, the defendant pointed a gun at the victim and said "I'll smoke you, mother-fucker." 6 RP 133, 7 RP 328, 431. The victim ordered the defendant out of the house. 7 RP 328. The victim left the living room to look for his baseball bat, apparently with the intent to use it to expel the defendant from the house. 6 RP 133.

After the victim left the living room, Bollinger yelled at the defendant to get out of the house. 6 RP 134, 7 RP 433. Bollinger repeated this several times and tried to hustle the defendant out the door. 7 RP 433, 434. McKay Brown also yelled at the defendant to put the gun down and get out. 328, 331.

The defendant moved toward the door, gun in hand. 7 RP 332. As the defendant slowly stepped through the front door, the victim ran out of the kitchen with the bat. 7 RP 331, 434. At that point, the defendant pointed the gun and shot the victim. 7 RP 333, 435, 458.

The bullet struck the victim in the upper left chest. 10 RP 905. The bullet tore a large hole in the victim's lung and the left ventricle of his heart. 10 RP 906. He died within minutes. 8 RP 598, 10 RP 849.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMENTS OF FELONY MURDER, INCLUDING MENS REA, AND DISPROVING SELF-DEFENSE, BEYOND A REASONABLE DOUBT.

The applicable standard of review for a claim of insufficiency of evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*

Circumstantial and direct evidence are considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove second degree felony murder, the State had to establish that, while committing or attempting to commit any felony, and in the course of and in furtherance of such crime, or in the immediate flight therefrom, the defendant caused the victim's death. RCW 9A.32.050(1)(b). Where the State has charged second degree felony murder, the State does not have to prove intent to kill, or, indeed, any mental element as to the killing itself. *In re Personal Restraint of Andress*, 147 Wn.2d 602, 614, 56 P.3d 981 (2002). In order to obtain a conviction of felony murder, the State need not prove that the defendant intended to kill the victim; it need show only that the defendant intended to commit the underlying felony and that in the course of, in furtherance of, or in immediate flight therefrom, the defendant caused the death of a person other than one of the participants. *In re Personal Restraint of Richey*, 162 Wn. 2d 865, 869, 175 P. 3d 585 (2008). The state of mind necessary to prove a felony murder is the same state of mind necessary to prove the underlying felony. *State v. Osborne*, 102 Wn.2d 87, 93, 684 P.2d 683 (1984).

The State bears the burden of proving all elements of a crime beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Because self-defense is an affirmative defense, a defendant may raise the issue by setting forth some evidence that he was defending himself at the time of the alleged assault. *State v. Walden*, 131 Wn.2d 469,

473-74, 932 P.2d 1237 (1997). Once a defendant offers such evidence, the burden shifts to the State to prove beyond a reasonable doubt that the defendant had no right to defend himself under the circumstances. *Id.*

One acting in self-defense is not committing a crime; he is acting lawfully. RCW 9A.16.050. Because self-defense is explicitly made a “lawful” act, it negates the element of “unlawfulness” contained within the statutory definition of criminal intent. *State v. McCullum*, 98 Wn. 2d 484, 495, 656 P.2d 1064 (1983).

In evaluating self defense, the jury is instructed to view the evidence from the defendant's perspective and determine what a reasonably prudent person would have done and the degree of force a reasonable person would believe was necessary. *State v. Walden*, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997).

One cannot provoke a fight and then claim self-defense when finishing it with deadly force. *See, State v. Riley*, 137 Wn. 2d 904, 976 P. 2d 624 (1999). Likewise, one cannot commit a crime and then claim self defense when the victim reacts with violence. *See, State v. Craig*, 82 Wn. 2d 777, 514 P. 2d 151 (1973).

Here, the jury was correctly instructed that a self-defense claim is not valid when the defendant himself provoked the situation through intentional actions that were reasonably likely to cause a hostile response. CP 91; *see, Riley*, at 914.

In *State v. Craig*, *supra*, the defendant was charged with felony murder for fatally beating and stabbing a cab driver, and then robbing him. When the defendant leaned over the seat to steal the cab driver's money, the driver tried to strike the defendant with a lug wrench. In addition to another theory, the defendant argued self-defense. The trial court and the Supreme Court held that, because the defendant was the aggressor and had not abandoned his threatening behavior, the defendant was not entitled to a self defense instruction. 82 Wn. 2d at 784.

In *State v. Dennison*, 115 Wn. 2d 609, 801 P. 2d 193 (1990), the defendant was burglarizing an apartment in a house. The victim, also armed with a gun, appeared in the bedroom doorway. According to Dennison, Dennison grabbed the victim's hand which was on the gun and pushed it into the air. Dennison held his own gun in the victim's stomach. Dennison asserted that he backed the victim out of the house and onto the porch.

Dennison testified that he was withdrawing from the residence, just trying to escape- that he had not taken anything, that it was all over, that he did not intend to hurt the victim. According to Dennison, the victim acknowledged this. Dennison then pointed his gun down at the ground and released his grip on the victim's hand which held the gun. Dennison testified that after he released the victim's hand, the victim shot at him. Dennison said that he returned fire. In the exchange of gunfire, the victim was fatally wounded. 115 Wn.2d 613.

The trial court denied Dennison's request for an instruction on self-defense. The Supreme Court agreed. 115 Wn. 2d at 616. Dennison was not entitled to an instruction on self defense because the felony murder rule has strict liability; that the defendant is liable for the death that occurs even though the defendant is fleeing or attempting to flee the scene of the felony. *Dennison*, 115 Wn. 2d at 616.

Also, the Supreme Court found that Dennison was not truly withdrawing from the confrontation:

[I]f Dennison had truly intended to withdraw from the burglary and communicated his withdrawal to the decedent, he would have dropped his gun or surrendered. Because Dennison still had his gun, although pointed to the ground, this action did not clearly manifest a good faith intention to withdraw from the burglary or remove the decedent's fear.

Dennison, 115 Wn. 2d at 618.

In the present case, the court *did* instruct the jury on self-defense. CP 89. And, although the defendant was arguably a trespasser in the victim's home, the court instructed on "no duty to retreat". CP 94. The court also instructed regarding the "first aggressor". CP 91. The defendant does not assign error to any of these instructions.

Here, the defendant provoked the violence that ensued. He had no right to be there. Palomo (6 RP 127) and Judy Anderson (11 RP 1063, 1064, 1073) told the defendant not to go to the victim's home. On January 27, he went to the victim's home at 11:30 at night. Bollinger told the

defendant that the defendant was not welcome there, that the victim was angry with him. 7 RP 428. Even before the defendant entered the house, Bollinger told the defendant to leave and specifically told him not to bring the gun in the house. 8 RP 445.

When the victim came into the living room, he ordered the defendant to leave. 7 RP 328. The defendant then assaulted the victim by pointing the gun at him. 7 RP 327, 431. The defendant threatened to “smoke”, i.e. kill, the victim. 6 RP 133, 7 RO 328, 329, 430, 431. In addition, the defendant insulted the victim, calling him names. 7 RP 327.

When the victim left the room, Brown (7 RP 328) and Bollinger (7 RP 432, 433, 434) again yelled at the defendant to leave. Brown told him to drop the gun and get out. 7 RP 328. The defendant moved toward the door, gun in hand. 7 RP 332.

The victim returned to the room, with a baseball bat, to forcibly eject the defendant from the victim’s house. 7 RP 331, 424. The defendant was at or near the threshold of the front door. 7 RP 333, 379, 434. The defendant turned and shot the victim. 7 RP 333, 435, 458.

The defendant did assert a physical disability regarding his hips and elicited some testimony regarding this. 7 RP 433, 12 RP 1265. However, Brown testified that the defendant did not complain of any injury or soreness during the confrontation. 7 RP 378. The defendant was later able to climb over a five foot tall fence (9 RP 747) and walk two miles (9 RP 771) to try to escape the police.

As in *Dennison*, the defendant in the present case was in the process of fleeing the victim's home, where the defendant had committed a felony, here an assault. As in *Dennison*, the present defendant was in or near the doorway of someone else's home, a place where he had no right to be, when he shot the victim. As in *Dennison*, the defendant claimed self defense in using lethal force in reaction to the victim's use or threat of force. As in *Dennison*, the defendant was still holding the gun (which he had earlier pointed at the victim and others). The defendant fatally shot a person who had the right to eject the defendant from the victim's home.

The jury was also correctly instructed regarding what "necessary" force is. CP 90. The elements of the self defense instruction included that: "the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident." CP 89.

Here, the jurors were free to conclude from the evidence that the defendant killed the victim while fleeing from assaulting the victim only minutes before. In a self defense case, the jury decides factual issues such as whether the defendant was the aggressor and whether the defendant's use and amount of force was reasonable and necessary. In the present case, the verdict plainly shows that the jury rejected the defendant's claim of self defense. The jurors were the sole judges of the credibility of the

witnesses. They obviously did not believe the defendant's version of the events. They were free to conclude from the evidence that the defendant provoked the whole incident by going to the defendant's home and threatening to shoot him; and therefore was not entitled to self defense.

2. THE TRIAL COURT DID NOT DEPRIVE THE DEFENDANT OF HIS RIGHT TO REMAIN SILENT, NOR COMPEL HIM TO TESTIFY.

The 5th Amendment to the United States Constitution and Article 1, §9 of the Washington State Constitution protect the accused from being compelled to testify against himself at trial. The Fifth Amendment to the United States Constitution has been incorporated into the due process clause of the Fourteenth Amendment and therefore binds the state. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964). The Washington State Constitution contains a similar provision: Const. Art. 1, § 9. The Washington Supreme Court has held that the two provisions should be given the same interpretation. *State v. Unga*, 165 Wn.2d 95, 100, 196 P. 3d 645 (2008); *State v. Mecca Twin Theater and Film Exchange, Inc.*, 82 Wn.2d 87, 507 P.2d 1165 (1973); *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971). The term "compelled" has been held to connote that the accused was forced to testify against his will, and that testimony was exacted under compulsion and over his objection. *State v. Van Auken*, 77 Wn.2d 136, 460 P.2d 277 (1969); *see, also, State v. Foster*, 91 Wn. 2d 466, 473, 589 P. 2d 789 (1979). The central question

raised by the defendant in this case is what does “compelled” mean? And by whom?

The defendant in a criminal trial is frequently required to testify himself in order to prove an affirmative defense, tell his side of the incident, or to attempt to generally reduce or mitigate the risk of conviction. Although defendants regularly face such a dilemma of a choice between complete silence and presenting a defense, it has never been thought a violation of the privilege against compelled self-incrimination. In *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court discussed and acknowledged the difficult choice the defendant had to make when presenting an alibi defense:

The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments.

399 U.S. at 83-84. Although *Williams* dealt with an alibi defense, the same remarks and reasoning can be applied to any defense, especially affirmative defenses, such as was asserted in the present case.

In *Foster, supra*, the defendant was charged with assault in the first degree. He contended that he acted in self defense. He testified in his own behalf to negate the element of intent. On appeal, he argued that he was compelled; that he would not have testified had he known that the jury would be instructed on second-degree negligent assault. *Foster*, 91 Wn. 2d at 472. The Supreme Court rejected this argument. *Id.*, at 473. It further noted that there was no evidence of compulsion to testify. Instead, the record reflected that the defendant voluntarily testified to exculpate himself. The Court found that this was an example of a tactical decision made by the defendant in consultation with his attorney. *Id.*

State v. Van Auken, supra, is another example of a case where the defendants were required to make the difficult decision of whether to testify in the light of the evidence admitted previously in the trial. The defendants were charged with theft by embezzlement. They left Washington and were arrested in California. 77 Wn. 2d at 137. A police officer who accompanied the defendants back to Washington overheard incriminating statements made by the defendants. 77 Wn. 2d at 138. Those statements were admitted in evidence at trial.

The defendants argued that the admission of the officer's testimony forced them to take the witness stand and testify against themselves, contrary to the mandate of Washington Constitution Art. 1, §9. *Id.*, at 138.

The Supreme Court held that admission of the officer's testimony did not operate to 'compel' the defendants to testify in the constitutional sense of that term. *Id.* The Court remarked: "To hold otherwise could create the incongruous result that the state could not introduce otherwise valid evidence simply because defendants might feel a need to take the stand and contradict or explain it." *Id.* Although the defendants did not want to testify, they decided that they were "required" to in order to put forward their theory of the case. This is not "compelled" testimony in the sense of the 5th Amendment or Washington Constitution Art. 1, §9.

The element of compulsion or involuntariness is central to the right against self-incrimination: a defendant's voluntary production of testimonial evidence is not protected by the Fifth Amendment. *South Dakota v. Neville*, 459 U.S. 553, 562, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983). *Seattle v. Stalsbrotten*, 138 Wn. 2d 227, 232, 978 P. 2d 1059 (1999)(Supreme Court discussing 5th Amendment in context of whether evidence of refusal to perform field sobriety tests in a DUI investigation was "compelled" self-incrimination).

In the present case, before the State rested, the defendant asked the court whether the court was going to give an instruction on self defense. 11 RP 1104. The defendant cited no cases as authority to support this request. *Id.* The trial court cannot give an opinion regarding the strength of an argument for self defense. "It is not the trial court's prerogative to

resolve the question of whether the defendant in fact acted in self defense.” *State v. George*, 161 Wn. App. 86, 100, 249 P. 3d 202 (2011).

Here, the defendant was in the same position as those in *Foster*, *Van Auken*, and many other defendants in a criminal trial. He had to make the tactical decision, in consultation with his attorney, whether or not to take the stand in his defense. He had to decide if the evidence presented so far was enough to argue his theory of the case. He had to balance the potential benefit and risk of taking the stand.

Here, the defendant had a rare advantage over most defendants making this decision at trial. This was a retrial upon remand; so the defendant knew what the evidence and testimony would be. He decided to testify in the first trial. He had the same attorney at both trials; so he had discussed the risks and advantages of taking the stand before, in light of the same evidence.

The record reflects that the defendant did not move to dismiss for insufficiency of the evidence at the close of the State’s evidence. He did not move to dismiss on the grounds that the State had failed to disprove self defense. If he had done so, and the court denied it, he would have had what amounted to the same answer he sought from the court.

The record does not show that the court “forced” or required the defendant to testify. The court did not require, suggest, or even imply that the defendant should or must testify. The record does not show that the defendant’s testimony was “exacted under compulsion”. The decision to

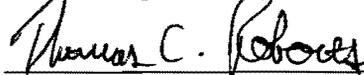
testify was a tactical one; voluntarily made by the defendant in consultation with his attorney. There was no violation of the defendant's rights under the federal or state Constitutions.

D. CONCLUSION.

The defendant received a fair trial where the State adduced sufficient evidence to prove all of the elements of felony murder beyond a reasonable doubt. In so doing, the state disproved self defense. The defendant made a tactical, voluntary decision to testify in his defense. The State respectfully requests that the judgment be affirmed.

DATED: April 30, 2012.

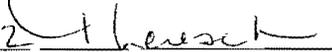
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