

No. 38642-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

RONALD MELVIN MENDES
(aka RONALD JOSEPH MENDES),

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 08-1-00527-7
The Honorable Katherine Stolz, Judge

AMENDED OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE.....	3
	A. <u>Procedural History</u>	3
	B. <u>Substantive Facts</u>	4
IV.	ARGUMENT & AUTHORITIES.....	11
	A. <u>The trial court committed prejudicial and reversible error when it included a first aggressor instruction.</u>	11
	B. <u>Appellant was denied his right to effective assistance of counsel when trial counsel failed to propose an instruction informing the jury that a first aggressor’s right to self-defense is revived if the aggressor withdraws from the altercation.</u>	16
	C. <u>The trial court erred when it refused Mendes’ request to instruct the jury that the predicate assault charged in count 2 could have been justified if committed in self-defense.</u>	19
	D. <u>The State failed to disprove beyond a reasonable doubt that Mendes was acting in self-defense when he shot Saylor.</u>	24
	E. <u>The trial court erred when it failed to vacate the second degree murder conviction in count 2, because a verdict of guilt by a jury is still a conviction for double jeopardy purposes even if it is not included in the judgment and even if Mendes is not sentenced on that conviction.</u>	26
V.	CONCLUSION	33

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<u>State v. Allery</u> , 101 Wn.2d 591, 682 P.2d 312 (1984).....	24
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	17
<u>State v. Clausing</u> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	12
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993).....	16
<u>State v. Ferguson</u> , 131 Wn. App. 855, 129 P.3d 856 (2006)	22, 23
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	13, 15
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986)	17, 23
<u>State v. Gohl</u> , 109 Wn. App. 817, 37 P.3d 293 (2001)	27-28, 31
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995)	16
<u>State v. Johnston</u> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	17
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987).....	16
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	24
<u>State v. Mierz</u> , 127 Wn.2d 460, 471, 901 P.2d 286 (1995).....	16
<u>State v. Riley</u> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	12, 13, 14, 15, 17, 25
<u>State v. Trujillo</u> , 112 Wn. App. 390, 49 P.3d 935 (2002).....	30
<u>State v. Turner</u> , 102 Wn. App. 202, 6 P.3d 1226 (2001)	27

<u>State v. Turner</u> , 144 Wn. App. 279, 182 P.3d 478 (2008).....	31, 32
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998)	20-21
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	29-30
<u>State v. Williams</u> , 132 Wn.2d 248, 937 P.2d 1052 (1997)	17, 23
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	26, 28-29, 30, 31, 32

FEDERAL AND OTHER STATE CASES

<u>People v. Beasley</u> , 778 P.2d 304 (Colo.Ct.App.1989).....	14
<u>People v. Manzanares</u> , 942 P.2d 1235, (Colo.Ct.App.1996)	14
<u>People v. Mayes</u> , 262 Cal. App. 2d 195, 68 Cal. Rptr. 476 (1968).....	14
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	16, 17, 19

OTHER AUTHORITIES

ER 609(a)	27
RAP 2.5(a).....	27
RCW 9.94A.030(12)	27
RCW 9.94A.525.....	27
U.S Const., amd. 5	26
U.S. Const. amd. 6	16
Wash. Const. article 1, § 9.....	26

Wash. Const. art. I, § 22 (amend. x).....	16
WPIC 16.02	21
WPIC 17.02	21
5 LaFave, Israel & King, CRIMINAL PROCEDURE (2d ed. 1999).....	26

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it included Jury Instruction 26, which defined the first aggressor rule, in its instructions to the jury.
2. Appellant was denied his right to effective assistance of counsel when trial counsel failed to propose an instruction informing the jury that a first aggressor's right to self-defense is revived if the aggressor withdraws from the altercation.
3. The trial court erred when it refused to include Appellant's proposed self-defense instruction pertaining to second degree assault, the predicate felony alleged for second degree murder as charged in count 2.
4. In convicting Appellant of second degree murder (counts 1 and 2), the State failed to present sufficient evidence to disprove beyond a reasonable doubt that Appellant was acting in self-defense.
5. The trial court violated Appellant's double jeopardy protections when it failed to vacate the second degree murder conviction in count 2.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State's witnesses testified that Appellant never

threatened the victim; where Appellant came to the victim's house and explained that he did not want any trouble; where the victim became enraged and told witnesses that he was going to "kick his ass;" and where the victim initiated the physical altercation; did the trial court err when it told the jury that it should convict if it found that Appellant was the first aggressor? (Assignment of Error 1)

2. Where all of the witnesses who were present at the shooting testified that Appellant was trying to leave and had walked outside onto the porch before the victim ran towards him with a baseball bat; and where the trial court instructed the jury that a first aggressor loses his right to act in self-defense; was Appellant denied his right to effective assistance of counsel when trial counsel failed to propose an instruction informing the jury that a first aggressor's right to self-defense is revived if the aggressor withdraws from the altercation? (Assignment of Error 2)

3. Where the alleged predicate assault for second degree felony murder was not the same act that resulted in the victim's death; and where the undisputed evidence showed that Appellant only drew a weapon after the victim initiated a

physical altercation; did the trial court err when it refused to include Appellant's proposed self-defense instruction pertaining to second degree assault? (Assignment of Error 3)

4. Where the victim initiated a physical altercation, and where Appellant was leaving the victim's house when the victim rushed at Appellant while holding a baseball bat in the air, did the State present sufficient evidence to disprove that Appellant was acting in self-defense when he shot the victim? (Assignment of Error 4)
5. Is a verdict of guilt by a jury still a conviction for double jeopardy purposes even if it is not included in Appellant's judgment and even if Appellant was not sentenced on that count? (Assignment of Error 5)

III. STATEMENT OF THE CASE

A. Procedural History

The State charged Ronald Melvin Mendes¹ by Information with one count of first degree premeditated murder (count 1) and one count of second degree murder (count 2) , both relating to the

¹ Mendes clarified at trial that his legal name is Ronald Melvin Mendes. (RP 44-45; CP 37-38)

shooting death of Danny Saylor.² (CP 37-38) The State also charged one count of unlawful possession of a firearm (count 3), and alleged that counts 1 and 2 were committed while armed with a firearm.³ (CP 37-38) Mendes asserted that he acted in self-defense, and the jury was instructed on the concept of justifiable homicide. (RP 1032, 1033, 1196; CP 69, 75, 85)

The jury found Mendes not guilty of premeditated murder but guilty of the lesser offense of second degree murder in count 1, guilty of second degree murder in count 2, and guilty of unlawful possession of a firearm. (CP 92, 93, 95, 97, 1296-97) The jury also found that Mendes was armed with a firearm during the commission of counts 1 and 2. (CP 94, 96; RP 1296-97)

Because counts 1 and 2 were based on the same act, the court only sentenced Mendes on counts 1 and 3.⁴ The court imposed a standard range sentence totaling 457 months. (RP 1340, 1307-08, 1323; CP 101, 104, 114-23) This appeal timely follows. (CP 51-52)

B. Substantive Facts

Ronald Mendes met Lori Palomo in October of 2007, when

² Pursuant to RCWs 9A.32.030(1)(a) and 9A.32.050(1)(b). (CP 37-38)

³ Pursuant to RCWs 9.41.040(a)(i), 9.94A.510, 9.94A.530. (CP 37-38)

⁴ However, the court did not dismiss or vacate count 2.

Palomo was temporarily estranged from her long-time boyfriend, Danny Saylor. (RP 86, 87-88, 91) Mendes and Palomo occasionally used methamphetamine together, and began an intimate relationship. (RP 92, 94, 1019) But after a few weeks, Palomo reunited with Saylor. (RP 94) Saylor was also a regular methamphetamine user. (RP 96)

Palomo testified that she tried to end her relationship with Mendes. (RP 94, 98) She claimed that Mendes came to Saylor's home uninvited several times during the months of November and December of 2007. (RP 97-98) She testified that she saw Mendes on Christmas Eve, and told him to leave her alone. (RP 98) Palomo also thought that Mendes spray-painted the word "cunt" on her car. (RP 110-11) Palomo testified that Saylor was angry about the spray-paint incident. (RP 111, 112)

But Mendes and his step-sister, Judy Anderson, testified that Palomo initiated contact with Mendes during those months, and even came to Christmas dinner with Mendes' family. (RP 280, 284, 287, 296-97) Anderson testified in the State's case-in-chief that she relayed loving messages from Mendes to Palomo, and that Palomo would call her house when she wanted to contact Mendes. (RP 285-86, 287, 297-98) However, during one encounter at

Saylor's home, Saylor told Anderson that he did not want Mendes to come to his house, so Anderson told Mendes he should not go there anymore. (RP 291, 292)

On the night of January 27, 2008, Saylor and Palomo, and friends Michael Paux, Charles Bollinger and McKay Brown were all staying overnight at Saylor's Tacoma home. (112-13, 246, 311, 316, 500, 504) Palomo and Saylor were getting ready to go to sleep in an upstairs bedroom, but first Saylor told Bollinger, "If Ron shows up, wake me up." (RP 316) Bollinger testified that Saylor did not say this in an angry way, so he did not think anything of it. (RP 316, 318)

Bollinger and Brown then went to sleep on couches in the living room, and Paux went to sleep in an attic bedroom. (RP 246, 248, 318, 505, 507-08) Bollinger, also a State's witness, awoke later to the sound of tapping on the front door. (RP 318) He opened the door, and saw Mendes standing outside. (RP 320) Mendes did not appear angry or threatening. (RP 350) In fact, he told Bollinger that he did not want any trouble, and just wanted to talk to Saylor to explain that he did not spray paint Palomo's car. (RP 331, 322-23, 351) Bollinger allowed Mendes into the home, and they chatted amicably in the living room. (RP 322, 323)

Because Saylor had asked to be told if Mendes came to the house, Bollinger went to the bedroom and told Saylor that Mendes was in the living room. (RP 323-24) Saylor jumped up “like a bat out of hell,” and began getting dressed. (RP 324) Saylor said he was going to “kick his ass.” (RP 184) Bollinger was surprised at Saylor’s reaction and tried to calm him down, telling Saylor that Mendes only wanted to talk. (RP324, 353, 367-68) But Saylor would not listen, and instead put on and laced up his heavy work boots, then ran downstairs to the living room. (RP 324, 356)

Bollinger immediately heard the sounds of a scuffle coming from the living room. (RP 324) Brown awoke at that moment to a “bunch of ruckus.” (RP 508) He saw Saylor and Mendes fighting and, although Mendes was trying to punch Saylor, it was clear that Saylor was “tearing him up pretty good.” (RP515, 515, 523-24) Brown saw Mendes break free, then Mendes pulled out a gun and pointed it at Saylor. (RP 515-16)

When Bollinger re-entered the living room, he saw Mendes standing in the corner holding a gun, and Saylor standing by the front door. (RP 325) Bollinger, Brown and Palomo heard Mendes say something like, “I could smoke you.” (RP 125, 325, 516) Bollinger thought Mendes was mad because Saylor “came out

there and didn't even talk to him. He just started beating him up[.]”
(RP 325)

When Bollinger and Brown began yelling at Mendes to put the gun away and leave, Saylor ducked out of the room. (RP 327-28, 516-17) Bollinger testified that he started pushing Mendes towards the front door, and that Mendes was cooperating and trying to leave. (RP 330, 332, 360, 360) Brown also testified that Mendes walked toward the front door. (RP 517)

However, because Mendes has serious hip problems as a result of a fall from a ladder, he was not able to move quickly. (RP 182-83, 300-01, 302-03, 366, 1017) Bollinger and Palomo both heard Mendes complaining about pain in his hips as he made his way towards the door. (RP 182, 332) But Bollinger kept pushing Mendes quickly towards the door because he was worried that Saylor would return with a weapon, and he “knew it wasn't going to be good,” and he thought Saylor might “do something drastic.” (RP 331-32, 373) In fact, Saylor had returned to his bedroom and angrily asked Palomo where he could find his baseball bat, so that he could beat Mendes with it. (RP 126, 127, 193)

Bollinger and Brown testified that Mendes got to the front door, pushed it open and stepped outside onto the porch. (RP 333,

517, 530, 532) At that moment, the men saw Saylor, holding a baseball bat over his head, running at top speed towards Mendes. (RP 333, 334, 364, 517, 536) In an instant, Mendes fired the gun at Saylor. (RP 334, 517, 537) Saylor fell to the ground, and Mendes got into his car and drove away. (RP 335, 340)

When police arrived, they observed Saylor lying on the floor just inside the front door. (RP 581, 597) They saw a baseball bat lying on the floor near Saylor's body. (RP 618) Paramedics also arrived, but were unable to save Saylor. (RP 557, 560-61, 567) He died from a gunshot wound to the upper-left side of his chest. (RP 638, 661, 664) Tests done by the medical examiner on Saylor's urine and blood showed the presence of amphetamine, methamphetamine, and marijuana. (RP 892, 894, 897)

James Cardey was an acquaintance of Mendes', and also a regular methamphetamine user. (RP 384, 474-75) He and Mendes had made arrangements for Mendes to fix one of Cardey's cars. (RP 391-92) Earlier on the day of the incident, Mendes came to Cardey's home to get the car keys. (RP 392-93) According to Cardey, after hearing Mendes drive away, he placed a gun under his couch cushions and went to take a shower. (RP 398-99) When Cardey returned, the gun was missing. (RP 394-95, 398-99)

Although Mendes was not in the home when Cardey put the gun under the cushion, Cardey still believed Mendes snuck into the house and took the gun while he was showering. (RP 399-400) But Mendes testified that Cardey gave him the gun for protection when Mendes confronted the people they both believed had stolen one of Cardey's cars. (RP 1022-23)

Markings on a shell casing found outside Saylor's home matched Cardey's gun. (RP 619, 719, 971) Mendes told Cardey that he used the gun to shoot someone, but that it was in self-defense and he did not have a choice. (RP 405-06)

Mendes testified on his own behalf. He testified that Palomo would occasionally contact him and they would have sexual relations and take methamphetamine together, even after Palomo reunited with Saylor. (RP 1019, 1020) Palomo also helped him pawn a laptop computer, and on the afternoon of January 27, Mendes came to Saylor's house because he needed Palomo and Saylor's help retrieving it. (RP 1024-25, 1111-12) When Mendes arrived that day, Brown came outside and told him that Palomo and Saylor were sleeping. (RP 1026) Mendes told Brown to tell Saylor he would come back later. (RP 1027) If Saylor was angry with Mendes that day, Brown did not mention that fact to Mendes. (RP

1027)

Mendes returned around midnight, and Bollinger let him into the house. (RP 1028) Bollinger told Mendes that Saylor was angry about Palomo's car, and Mendes asked to talk to Saylor so they could straighten things out. (RP 1028-29) Bollinger left to get Saylor, and he stayed and talked to Brown. (RP 1029) Suddenly, he felt Saylor kick him from behind, and he fell over. (RP 1029)

Mendes testified that he was scared because Saylor was coming towards him, so he pulled out the gun and told Saylor to back off. (RP 1029) He said that he wanted to leave, and Bollinger helped him towards the door. (RP 1030) As he stepped outside, he saw Saylor "running at me, like, point blank, just with a bat in his hand, and he was gonna hit me." (RP 1030) Mendes thought Saylor was going to kill him with the baseball bat, so he "just reacted instantly" and shot him. (RP 1030-31, 1032) Mendes felt that his life was in danger. (RP 1032, 1033)

IV. ARGUMENT & AUTHORITIES

A. The trial court committed prejudicial and reversible error when it included a first aggressor instruction.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the

case, and when read as a whole properly inform the jury of the applicable law.” State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

Over defense objection, the trial court gave the following “first aggressor” instruction relating to the first degree murder charge (count 1), the lesser included offense of second degree felony murder (count 1), and the second degree murder charge (count 2):

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense [of] another and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant’s acts and conduct provoked or commenced the fight, then the self-defense is not available as a defense.

(CP 81 (Jury Instruction 26); RP 1198, 1204-06, 1209)⁵

A defendant who initially provokes a victim to act with force cannot claim self-defense. State v. Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). Accordingly, if there is credible evidence the defendant provoked the altercation and essentially created the

⁵ The trial court entered judgment and sentence on count 1 only, but did not vacate count 2. (CP 101, 102, 104, 114-23) Substantive challenges to the second degree murder conviction in count 2 are included in this brief in the event that this or another court attempts to enter judgment and sentence on count 2 in the future.

need to act in self-defense, a first aggressor instruction is appropriate. Riley, 137 Wn.2d at 910.

However, because the State has the burden of disproving the defendant's self-defense claim beyond a reasonable doubt, "courts should use care in giving an aggressor instruction." Riley, 137 Wn.2d at 910 n. 2. "[F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction." Riley, 137 Wn.2d at 910 n. 2 (quoting State v. Arthur, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985)).

It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In this case, the instruction was improper and prejudicial because the evidence did not support a finding that Mendes was the first aggressor, and the uncontested facts showed that Mendes was withdrawing from the altercation.

The State argued, and the trial court agreed, that the mere act of showing up uninvited at Saylor's home could have been sufficient to provoke a violent and belligerent response from Saylor. (RP 1206-09) This is simply incorrect.

[T]he initial aggressor doctrine is based upon the

principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force. **For the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm.**"

Riley, 137 Wn.2d at 912 (emphasis added).⁶ In this case, the State presented no evidence whatsoever to suggest that Saylor believed he was in danger of imminent harm from Mendes when he ran to the living room and attacked Mendes. Palomo testified that Mendes had never acted in a threatening manner towards Saylor. (RP 182) Bollinger testified that Mendes was calm and passive when he arrived at the home, that Mendes told him he did not want trouble, and that Mendes told him that he simply wanted to explain to Saylor that he had not spray-painted Palomo's car. (RP 321, 322-23, 350, 351)

Saylor was not acting afraid when he prepared himself to confront Mendes in the living room; instead he was angry, paused to put on heavy boots, and said he was going to "kick his ass." (RP

⁶ See also, People v. Mayes, 262 Cal. App. 2d 195, 197, 68 Cal. Rptr. 476 (1968) (no provocative act which does not amount to a threat or an attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, justify a battery); People v. Manzanares, 942 P.2d 1235, 1241 (Colo.Ct.App.1996) (that defendant may have uttered insults or participated in arguments does not justify first aggressor instruction) (citing People v. Beasley, 778 P.2d 304, 306 (Colo.Ct.App.1989) (insults alone do not make one the initial aggressor so as to preclude self-defense)), cited with approval by Riley, 137 Wn.2d at 912.

184, 324, 354, 356) Bollinger tried to calm Saylor down, and explained to Saylor that Mendes was in the living room “just sitting there” and that “he just wants to talk to you.” (RP 367-68)

This uncontested evidence, provided by the State’s witnesses, shows that Saylor had no reason to believe, and was not at all concerned, that Mendes might be a physical threat. Saylor did not “reasonably believe he . . . was in danger of imminent harm” when he ran to the living room and attacked Mendes. See Riley, 137 Wn.2d at 912. Instead, he was simply angry that Mendes was there. Mendes’ act of showing up at Saylor’s home was not an act likely to provoke a violent response. In this case, Saylor was the first aggressor, not Mendes, and the first aggressor instruction was completely improper.

Instructing the jury on the “first aggressor” doctrine, when the facts did not support this instruction, was prejudicial error because it diminished the State’s burden of disproving justifiable self-defense. Therefore, Mendes’ convictions for second degree murder must be reversed. See Fernandez-Medina, 141 Wn.2d at 455.

B. Appellant was denied his right to effective assistance of counsel when trial counsel failed to propose an instruction informing the jury that a first aggressor's right to self-defense is revived if the aggressor withdraws from the altercation.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove: (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466

U.S. at 693.

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). But to establish ineffectiveness on this basis, the defendant must show that he or she was entitled to the instruction. State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support the theory. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

A first aggressor's right to self-defense is revived if he withdraws from the altercation:

[I]n general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, **unless he or she in good faith first withdraws from the combat** at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action.

Riley, 137 Wn.2d at 909 (emphasis added). As argued above, defense counsel correctly objected to the inclusion of the first aggressor instruction, which told the jury that a first aggressor is not entitled to assert self-defense. (CP 81; RP 1198) But assuming,

for the sake of argument, that the trial court correctly included that instruction, then trial counsel should have requested an additional instruction explaining that withdrawing from the altercation revives the right to self-defense.

Mendes would have been entitled to this instruction if requested because the evidence fully supported this theory of the case. The uncontested testimony from both State and defense witnesses established that Mendes was trying to leave the property, and was in fact outside the door and on the porch when he was rushed by a bat-wielding Saylor. (RP 127, 332-33, 517, 530, 532, 1030) If requested, the instruction would have been given.

There was no tactical reason not to request this instruction. In fact, defense counsel specifically argued to the jury that Mendes was trying to leave when Saylor rushed at him with the bat, and that Mendes reacted in self-defense. (RP 1268-69) But without the additional instruction telling the jury that Mendes' withdrawal revived his right of self-defense, the jury did not understand that it could still acquit Mendes even if it found that he was the first aggressor. There was simply no tactical reason not to request a jury instruction that supported, and was so vital to, Mendes' theory of the case.

Both prongs of the Strickland test have been met in this case: if counsel had requested the instruction it would have been given; and counsel's failure to request this additional instruction was deficient and prejudicial because such an instruction was critical to the jury's understanding and application of self-defense in this case. Mendes was deprived of his right to effective assistance of counsel, and his second degree murder convictions should be reversed.

C. The trial court erred when it refused Mendes' request to instruct the jury that the predicate assault charged in count 2 could have been justified if committed in self-defense.

In count 2, the State charged and prosecuted Mendes for felony murder, alleging that Mendes killed Saylor in the course or furtherance of committing, or in immediate flight from the commission of, a second degree assault against Saylor. (CP 37-38, 70) The State argued that the predicate felony assault occurred when Mendes pointed the gun at Saylor and said he could "smoke" him. (RP 1250-51) In addition to instructing the jury on the definition and elements of second degree felony murder, the trial court instructed the jury on the definition and elements of second degree assault. (CP 69-72)

Mendes proposed an instruction based on WPIC 17.02, telling the jury that an assault is justified and lawful if a person is acting in self-defense.⁷ (RP 1196, 1215-16; CP 50) The trial court refused to include the instruction, concluding that only the justifiable homicide instruction can be given when the ultimate charge is homicide, and that the justifiable assault instruction can only be given when the ultimate charge is assault. (RP 1218)

The trial court misunderstood the law and incorrectly found that it could not apply the lawful force or self-defense instruction to the predicate assault allegation. When the trial court's refusal to give an instruction is based on a ruling of law, the appellate court reviews the decision de novo. State v. Walker, 136 Wn.2d 767,

⁷ The instruction stated, in full:

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

(CP 50)

772, 966 P.2d 883 (1998).

WPIC 16.02 defines the concept of self-defense as it applies to homicide, stating in relevant part: “Homicide is justifiable when committed in lawful defense of the slayer . . . when: (1) the slayer reasonably believed that the person slain . . . intended to commit a felony or to inflict death or great personal injury.” WPIC 17.02 defines the concept of self-defense, or lawful force, as it applies to assault, stating in relevant part: “The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured and when the force is not more than is necessary.” The Note on Use following WPIC 17.02, states: “Use this instruction for any charge other than homicide or attempted homicide. If homicide is involved, use WPIC 16.02, Justifiable Homicide—Defense of Self and Others.”

The State and the trial court read this Note as a firm rule forbidding the use of WPIC 17.02 whenever the ultimate charge is homicide. (RP 1215-19) But the State and the trial court read this Note too literally. Of course, if the charge is homicide (or felony murder based on a predicate felony other than assault), then an instruction defining when an assault is justified would be inappropriate, and if the charge is assault then an instruction

defining when homicide is justified would similarly be inappropriate.

And this Court recently held that the lawful force instruction is improper even when assault is the predicate felony alleged in a felony murder charge. See State v. Ferguson, 131 Wn. App. 855, 862, 129 P.3d 856 (2006). But the WPIC 17.02 Note on Use and Ferguson do not address the unique facts presented in this case, and did not preclude giving the lawful force instruction.

In Ferguson, the defendant was charged with felony murder for stabbing the victim during a fistfight initiated by the victim, and the trial court refused to give a self-defense instruction for the assault, which was the predicate offense for the felony murder. 131 Wn. App. at 857-59. On appeal, this Court affirmed the trial court's decision to give only the justifiable homicide instruction, stating:

WPIC 17.02 can never be given in a felony murder case where the assault is the predicate felony because it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm.

131 Wn. App. at 862.

In Ferguson, the predicate assault was the act that caused the victim's death. The court's holding contemplated a specific factual scenario not at issue here; that is, one in which the

defendant uses a deadly weapon in a deadly manner to repel an attack that did not reasonably create fear of death or great bodily harm. Because he had used excessive force, Ferguson could not claim that his use of force was reasonable to prevent injury. 131 Wn. App. at 861-62.

But in this case, the predicate assault was not the act that caused Saylor's death. The predicate assault was merely the display of the gun and the verbal threat, a reasonable response to Saylor's physical attack upon Mendes. Therefore, Ferguson's reasoning and holding do not apply here.

A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support the theory. Williams, 132 Wn.2d at 259-60; Hughes, 106 Wn.2d at 191. Failure to give such instructions is prejudicial error. Williams, 132 Wn.2d at 259-60; Hughes, 106 Wn.2d at 191. By refusing to allow Mendes to argue that the predicate assault was lawful and justified, when the evidence clearly supported this theory, the trial court denied Mendes his right to argue his theory of the case to the jury. Mendes' conviction for second degree murder in count two must therefore be reversed.

D. The State failed to disprove beyond a reasonable doubt that Mendes was acting in self-defense when he shot Saylor.

Where a defendant presents evidence that he reasonably believed the victim was about to harm him or another person and he acted in self-defense, the State must prove the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983).

A claim of self-defense is judged by a subjective standard. McCullum, 98 Wn.2d at 488-89. The jury must "view the evidence from the defendant's point of view as conditions appeared to him or her at the time of the act." McCullum, 98 Wn.2d at 488-89 (citing State v. Wanrow, 88 Wn.2d 221, 234-36, 559 P.2d 548 (1977)). Thus, the jury must view the claim of self-defense "from the defendant's perspective in light of all that [he] knew and experienced with the victim." State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984) (citing Wanrow, 88 Wn.2d at 235-36).

As argued in detail above, the evidence established that Saylor, not Mendes, was the first aggressor. Saylor ran into the living room and began kicking and punching Mendes. (RP 125, 324, 357, 1029) Brown testified that Saylor was clearly overpowering Mendes. (RP 514-15, 524) It was only in response

to this attack that Mendes pulled out the gun and pointed it at Saylor. (RP 325, 515, 1029)

But even if Mendes was the first aggressor, the evidence shows that he withdrew from the altercation, which revived his right to use force in self-defense. See Riley, 137 Wn.2d at 909. After Mendes drew the gun, Saylor immediately left the room to get his own weapon, and Mendes tried to leave. (RP 125, 126, 327-28, 517, 1030) Mendes had already stepped outside, and was clearly withdrawing from the altercation, when Saylor rushed towards him holding a bat over his head. (RP 127, 332-33, 517, 530, 1030) All of the witnesses believed Saylor was going to strike Mendes with the baseball bat. (RP 193, 334, 360-61, 536-37, 1030, 1031) Only then, when he believed his life was in danger, did Mendes fire the gun at Saylor. (RP 1030, 1031, 1032)

There is nothing in the evidence that disproves Mendes' claim that he shot Saylor only because he believed his life was in danger. In fact, the testimony of each and every witness supports the conclusion that Mendes only fired the gun in self-defense. The State failed to meet its burden of disproving, beyond a reasonable doubt, that Mendes acted in self-defense. Mendes' two murder convictions and related firearm sentence enhancements should be

reversed and dismissed.

- E. The trial court erred when it failed to vacate the second degree murder conviction in count 2, because a verdict of guilt by a jury is still a conviction for double jeopardy purposes even if it is not included in the judgment and even if Mendes is not sentenced on that conviction.⁸

Mendes was convicted of second degree murder in both count 1 and count 2, relating to the same act. (CP 37-38, 93, 95) The State noted at sentencing that entering judgment and sentence on both counts would violate double jeopardy. (RP 1304) The trial court entered judgment and sentence on count 1 only, but did not vacate count 2. (CP 101, 102, 104, 114-23)

The double jeopardy provisions of Article 1 § 9 of the Washington Constitution and the Fifth Amendment to the United State's Constitution prohibit multiple punishments for the same offense imposed in the same proceeding. State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The double jeopardy doctrine protects defendants against "prosecution oppression." 5 LaFave, Israel & King, CRIMINAL PROCEDURE § 25.1(b), at 630 (2d ed. 1999).

A conviction, under Washington law, remains a conviction

regardless of the trial court's decision not to enter judgment on it.

The Sentencing Reform Act defines "conviction" as:

an adjudication of guilt pursuant to Titles 10 or 13 RCW, and includes a verdict of guilty, and acceptance of a plea of guilty.

RCW 9.94A.030(12). And a conviction can still be counted in a future offender score under the above definition regardless of whether a court reduces it to judgment or whether sentence is imposed. RCW 9.94A.525.

Similarly, ER 609(a) permits impeachment of a witness with evidence that the witness has been convicted of a crime. The time limit governing the use of such evidence is calculated from the witness' release from custody or from the date of conviction. ER 609(a). Entry of a judgment and/or sentence is not a requirement for impeachment under this rule.

Clearly then, a conviction in and of itself is punishment for purposes of double jeopardy, even if it is not included in the judgment and even if no sentence is imposed. For example, in State v. Gohl, the State argued that convictions for attempted murder and first degree assault did not violate double jeopardy because the

⁸ A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a); State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226 (2001).

sentencing court, finding that the crimes encompassed the same criminal conduct, imposed no sentence for the assault. 109 Wn. App. 817, 37 P.3d 293 (2001). The Gohl court disagreed, stating:

This argument contradicts the rule that conviction, and not merely imposition of sentence, constitutes punishment. The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses.

109 Wn. App. at 822 (citing Ball v. United States, 470 U.S. 856, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)).

In Womac, the State charged the defendant with homicide by abuse (Count 1), second degree murder (Count 2), and first degree assault of a child (Count 3), alleging that his single act of abuse caused the child victim's fatal brain injury. 160 Wn.2d at 647-48. Womac was not charged in the alternative, but rather with three separate counts as separate charges. 160 Wn.2d at 647, 660. A jury convicted on all three counts. 160 Wn.2d at 647.

At sentencing, Womac moved to dismiss Counts 2 and 3, claiming dismissal was necessary to avoid a double jeopardy violation. The State asked that the charges and verdicts on Counts 2 and 3 remain in place until Count 1 had survived post-sentence

challenges. The trial court determined double jeopardy did not require dismissal of Counts 2 and 3 and left both convictions on Womac's record. *Womac*, 160 Wn.2d at 648.

The trial court imposed an exceptional sentence on Count 1 only, and entered an appendix to the Judgment and Sentence, which stated:

Count II, murder in the second degree, is a valid conviction and the court would sentence the defendant on Count II if it were not prohibited from doing so by the double jeopardy provisions of the state and federal constitutions. ... Count III is a valid conviction but no punishment will be imposed because of double jeopardy concerns.”

Womac, 160 Wn.2d at 655.

The Supreme Court found that the trial court's failure to vacate Counts 2 and 3 violated Womac's double jeopardy protections because he committed a single offense against a single victim, but received three convictions for that single offense. *Womac*, 160 Wn.2d at 650.

The Womac Court also addressed and distinguished two cases where multiple convictions were not included on the judgment, as Womac's were, but also were not vacated. Womac, 160 Wn.2d at 658-60. In State v. Ward, the jury found the defendant guilty of second degree felony murder and first degree

manslaughter. 125 Wn. App. 138, 104 P.3d 61 (2005). The Court of Appeals found no double jeopardy violation in Ward's case, as the judge entered judgment and sentenced Ward only on the second degree felony murder charge, and did not mention the first degree manslaughter conviction in the judgment. 125 Wn. App. at 144. Because there was no violation of double jeopardy, reasoned the court, the trial court was not required to vacate Ward's manslaughter charge. 125 Wn. App. at 144.

In State v. Trujillo, a jury convicted four defendants of first degree assault, and in the alternative, first degree attempted murder. 112 Wn. App. 390, 49 P.3d 935 (2002). The Court of Appeals reasoned since the verdict for first degree assault was not reduced to judgment, it "does not subject the appellants to any future jeopardy." 112 Wn. App. 411.

The Womac Court distinguished its facts from Ward and Trujillo, in part because the multiple crimes in those cases were charged in the alternative. 160 Wn.2d at 660. The Court found it notable that Womac's crimes were charged as separate, individual numbered counts. 160 Wn.2d at 660. Similarly here, Mendes was charged in two separate numbered counts, not in the alternative. (CP 37-38)

Recently, in State v. Turner, the State charged Turner in the alternative with first degree assault and first degree robbery. A jury convicted Turner of second degree assault and first degree robbery. 144 Wn. App. 279, 182 P.3d 478 (2008). The trial court did not reduce the assault conviction to the judgment and sentence because it merged with the robbery conviction, and sentenced Turner only on the robbery conviction. 144 Wn. App. at 281, 283. The trial court also entered an order vacating the assault charge for purposes of sentencing, but indicating that the assault conviction was valid and could be taken to sentencing if the Court of Appeals found any problems with the robbery conviction. 144 Wn. App. at 281. On appeal, this court followed the holdings in Ward and Trujillo, distinguished its facts from Womac, and held that a conviction that is not put to judgment is not a conviction for double jeopardy purposes. 144 Wn. App. at 283.

The court's opinion in Turner was incorrect.⁹ First, the court ignored the express language in both Womac and Gohl that a conviction by itself is punishment for double jeopardy purposes. Womac, 160 Wn.2d at 656-57; Gohl, 109 Wn. App. at 822.

⁹ The Supreme Court has accepted review of Turner, but as of the writing of this brief, has not yet issued its opinion. See Supreme Court Case No. 81626-3.

Second, the court dismissed the distinction that Womac made between cases where the crimes are charged in the alternative as opposed to separate numbered counts. Turner, 144 Wn. App. at 283, Womac, 160 Wn.2d at 660. And Turner also ignored the Womac Court's express disapproval of conditionally vacating convictions that violate double jeopardy only to allow them to be revived and reinstated if the remaining conviction is later set aside. 160 Wn.2d at 658.

Moreover, Turner, Ward and Trujillo also overlook the fact that a non-vacated second conviction can still be revived in the future. But the Supreme Court specifically noted that, as "a court has no authority to 'take a verdict on another charge ..., find that it violates double jeopardy ..., not sentence the defendant ... on it [,] and just ... hold it in abeyance for a later time.'" 160 Wn.2d at 658. When a trial court simply ignores but does not vacate a second conviction for the same criminal act, the possibility of revival hangs over the head of that defendant, just as it does when the conviction is "conditionally vacated." Either procedure is improper, and violates a defendant's fundamental double jeopardy protections.

Under the State and Federal constitutions, the Sentencing Reform Act, and Womac, a guilty verdict is a "conviction" for double

jeopardy purposes even if it is not reduced to judgment and even if no sentence is imposed. Therefore, the trial court's failure to vacate Mendes' second degree murder conviction in count 2 violates double jeopardy. That conviction must be unconditionally vacated.

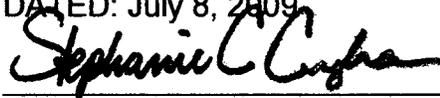
V. CONCLUSION

The trial court's decision to include a first aggressor instruction when the evidence clearly did not support such a theory was prejudicial and reversible error because it relieved the State of its burden of proving beyond a reasonable doubt the absence of self-defense. Mendes' counsel was ineffective for failing to request an instruction explaining that Mendes' right to self-defense was revived when he withdrew from the altercation.

The court's decision to omit a self-defense instruction for the predicate second degree assault allegation was also prejudicial and reversible error because the evidence did support such a theory, and its omission denied Mendes his right to argue his theory of the case. Finally, the evidence presented by the State did not disprove that Mendes shot Saylor in self-defense when Saylor threatened to attack Mendes with a baseball bat. For these reasons, Mendes' second degree murder convictions must be reversed.

Alternatively, Mendes' count 2 must be vacated because it is a conviction which violates Mendes' double jeopardy protections.

DATED: July 8, 2009



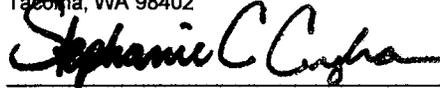
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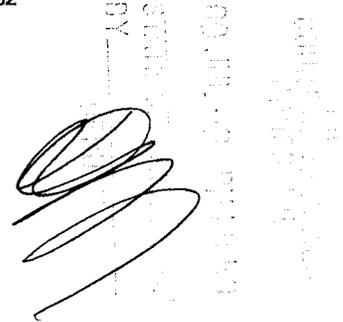
I certify that on 07/08/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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