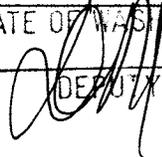


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DIVISION II

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

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

RONALD JOSEPH MENDES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 08-1-00527-7

BRIEF OF RESPONDENT

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

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B. STATEMENT OF THE CASE.

1. Procedure

On January 29, 2008, the State charged Ronald Joseph Mendes, hereinafter “defendant,” with second degree murder with a firearm enhancement, and second degree unlawful possession of a firearm. CP 1-

2. On April 24, 2008, the State filed a first amended information charging defendant with first degree murder with a firearm enhancement, second degree murder with a firearm enhancement, and second degree unlawful possession of a firearm. CP 7-8.

The parties appeared for trial before the Honorable Katherine M. Stoltz on September 15, 2008. RP 2¹. On September 22, 2008, the State filed a corrected information as to middle name and date of birth only. 2RP 18; 3 RP 43-45; CP 37-38. The parties argued motions *in limine*.

A jury convicted defendant of second degree intentional murder on Count I, and found that defendant was armed with a firearm when he committed that offense; the jury found defendant guilty of second degree felony murder as charged in Count II, and also found that was in possession of a firearm at the time he committed that offense; and guilty of second degree unlawful possession of a firearm in Count III. CP 93,

¹ The verbatim report of proceedings consists of 15 volumes, including the sentencing hearing, and are referred to as RP (page #).

94, 95, 96, 97; RP 1296-97. The jury found defendant not guilty of first degree murder. CP 92; RP 1296.

On November 14, 2008, the court sentenced defendant to 397 months on second degree murder, and 60 months on unlawful possession of a firearm. CP 98-111; RP 1323. The court also sentenced defendant to 60 months to run consecutive to all other prison time on the firearm enhancement for a total sentence of 457 months. CP 98-111; RP 1323.

2. Facts

Lori Palomo and Danny Saylor dated for seven years. RP 87. On occasion, they would separate, and Palomo would move out of the house for awhile. RP 85, 86, 88, 89-90. One of these separations in which Palomo moved out occurred in October 2007. RP 91. When she moved out, Palomo stayed at the house in which defendant was living. RP 88, 89, 91, 92. While Palomo stayed at the same house as defendant, she and defendant began an intimate relationship. RP 93-94. After three weeks, Palomo testified that she ended her relationship with defendant and moved back in with Saylor. RP 94-95.

Approximately one month after she returned to Saylor's house, defendant began coming by the house she shared with Saylor. RP 97-98. Defendant would sometimes talk to Saylor, but sometimes Palomo just recognized the sounds of defendant's vehicle. RP 108, 109. Palomo testified that on Christmas Eve she told defendant to leave her alone and not come by Saylor's house anymore. RP 99, 101. Palomo testified that

defendant reacted angrily to her request that he stop coming to her and Saylor's home. RP 102. One night, about a week after Christmas, she again heard defendant's car outside Saylor's house RP 110-11, 167, 173-74. The following morning they noticed that someone painted the word "cunt" on her car. RP 110-11, 167, 168, 169. Because she recognized the sound of defendant's car that night, Palomo and Saylor believed that defendant had spray painted the word on her car. RP 110-11, 167, 169. After that, Palomo testified that Saylor became angry with defendant and did not want defendant on his property. RP 112.

On January 27, 2008, she and Saylor were lying in bed getting ready to go to sleep. RP 123. Chuck Bollinger and McKay Brown were in the living room and Mike Paux was upstairs. RP 123-24, 246, 247. Bollinger came to the bedroom and told them that defendant was at the house. RP 125. Saylor jumped out of bed saying "I'm going to kick his ass," pulled on clothes and ran out into the living room. RP 125, 184. Palomo, who testified that she was afraid of defendant, first heard a scuffle and then heard defendant say "I could smoke you." RP 125, 126, 191-92, 228. Saylor briefly came back into the bedroom before going into the kitchen and laundry room all the while looking for a bat. RP 125, 126, 127, 133, 192. Palomo testified that Saylor appeared angry and agitated while looking for the bat. RP 193, 228. Saylor was mad that defendant pulled a gun on him in his own home. RP 193, 229.

Palomo testified that she could hear Bollinger telling defendant to leave, then Saylor found the bat and went running into the living room with it. RP 127, 194. Then she heard a gunshot. RP 127. When Palomo ran out into the living room, she saw Saylor right before he fell to the ground saying "He shot me." RP 127, 229. Palomo testified she was focused on Saylor and could not see defendant. RP 127-28.

On cross examination, Palomo admitted that she used methamphetamine for approximately ten years, but quit taking methamphetamine when Saylor died. RP 158. Palomo testified that she and Saylor last smoked methamphetamine two or three days before Saylor was shot. RP 158.

Chuck Bollinger testified similarly to Lori Palomo. RP 309-74. Bollinger was staying at Saylor's house for a few days, sleeping on Saylor's living room couch. RP 315. He testified that before Saylor went to bed on January 27, 2008, Saylor asked Bollinger to wake him up if defendant came to the house. RP 316, 317. Bollinger got ready for bed, turned off all the lights, including the porch light, and went to sleep on the couch. RP 318. Bollinger woke up when defendant tapped on the door. RP 318. When Bollinger opened the door he told defendant that Saylor was mad at defendant. RP 321. Bollinger told defendant that he didn't know if defendant should be at the house. RP 321. Defendant said to wake Saylor up so defendant could explain he didn't vandalize Palomo's car. RP 321, 322, 352. It appeared to Bollinger that defendant knew of the

vandalism to Palomo's car and was there to talk to Saylor about it. RP 350-51. While Bollinger was talking to defendant with the front door open, defendant walked in and sat down on the couch. RP 322.

Bollinger left defendant in the living room so he could tell Saylor that defendant was at the house. RP 323-24, 352. Saylor reacted to the news by quickly getting out of bed and putting on his clothes. RP 324, 356-57. After Saylor ran out of the bedroom, Bollinger heard the sounds of a scuffle. RP 324, 357. Bollinger quickly went out to the living room and saw defendant standing in the corner of the living room pointing a gun at Saylor, who was now standing still. RP 324-25, 328, 357. Bollinger heard defendant say angrily "I'll smoke you, motherfucker." RP 325, 326, 358. Bollinger testified when he shouted at defendant it distracted him and Saylor ran out of the room. RP 328, 329, 330, 359. Bollinger told defendant he had to leave and started pushing defendant toward the door. RP 330, 331. Bollinger testified that defendant never relinquished the gun. RP 331-32, 366-67. Bollinger pushed defendant toward the door, defendant opened up the screen door when Saylor came running out of the kitchen with a bat. RP 334, 360. Saylor was holding the bat in the air when defendant shot Saylor through the heart, killing him. RP 333-34. Bollinger laid Saylor down and followed defendant out of the house. RP 338. Bollinger testified that he couldn't see well because the porch light was off, but he did see defendant seated in the driver's seat of SUV before defendant drove away. RP 338, 339.

McKay Brown testified that he was staying at Saylor's house, sleeping on the couch on the night defendant shot Saylor. RP 504, 506, 508. He had fallen asleep and woke up to the sounds of a fist fight. RP 508. Brown saw Saylor and defendant fighting and then saw defendant take out a gun and point it at Saylor's chest. RP 508, 510, 511, 514, 515, 516. Brown testified that defendant said "I'll smoke your ass, bitch." RP 516. Brown testified he yelled at defendant to get the 'F' out of the house and put the 'f'ing gun down. RP 516. Brown saw Saylor run out of the living room and defendant walk toward the front door. RP 517. Saylor came out of the kitchen area with a bat and defendant shot him. RP 517. Brown testified that defendant took off very quickly. RP 518.

Defendant's step-sister, Judy Anderson, testified that she knew Lori Palomo through defendant. RP 284. Anderson testified that after Palomo went back to live with Saylor, both defendant and Palomo would send loving, affectionate messages to each other through Anderson. RP 285, 287, 298. Once after Christmas in 2007, when she was taking Palomo a message from defendant, she spoke briefly with Saylor on his front porch. RP 285. Saylor told Anderson that he did not want defendant on his property. RP 291-92. Anderson told defendant three times that Saylor did not want him on Saylor's property. RP 292.

Anderson testified that defendant called her before he was arrested on this incident to tell her that he had shot Danny Saylor. RP 290, 292. He called her again, after he was arrested, to tell her that he shot Saylor, and also to tell her where he had hidden the gun. RP 292, 295. Defendant asked Anderson to get the gun and take it to James Cardey. RP 293, 295. Anderson testified that she had Cardey's number, so she called him to tell him where the gun was because she did not want anything to do with the gun. RP 295.

Defendant testified that he met Lori Palomo around October 2007, when she came and stayed for several months at the house where defendant was living. RP 1018-19. Defendant and Palomo began a sexual relationship and did methamphetamine together. RP 1019. After some time, Ms. Palomo went back to Danny Saylor's house to live with Saylor. RP 1020. However, defendant testified that even after she moved back in with Saylor, Palomo would continue to contact him and they would have sex and use methamphetamine. RP 1020.

Defendant testified that despite the fact that Palomo returned to live with Saylor, defendant has no animosity or jealousy toward Saylor. RP 1020. On direct, defendant testified that prior to this incident, no one had ever told him that Saylor had a problem with defendant. RP 1021. However, on cross examination defendant admitted that his sister had

passed on a message from Saylor telling defendant not to come around Saylor's house anymore. RP 1074. Defendant admitted that he knew he wasn't welcome at Saylor's house. RP 1074. Defendant then testified that he believed this had all cleared up by New Years, and that when he went to Saylor's house on January 27th he believed Saylor did not have an issue with defendant. RP 1076.

Defendant testified that he has been using methamphetamine for 12 years and considers himself an addict. RP 1021-22. On January 26, 2008, the day before the shooting, defendant testified that he had gone to James Cardey's residence to help him retrieve Cardey's car. RP 1021, 1022, 1092. Defendant testified that Cardey was having trouble with some people in the meth world who had picked Cardey as a mark. RP 1021. These people would break into Cardey's house and steal things like guns, computer laptop, and Cardey's car. RP 1021.

Defendant testified that while at Cardey's house, Cardey gave defendant a gun so he could be armed when he went to retrieve Cardey's vehicle. RP 1023, 1024, 1101, 1105, 1107. Defendant testified that he armed himself because the person who had taken Cardey's vehicle was

known to carry several firearms. RP 1023, 1101, 1120, 1121². After spending the night at Cardey's house, defendant returned to his house on January 27, 2008, and found Cardey's missing vehicle parked outside of defendant's house. RP 1023-24, 1102, 1106.

Defendant testified that he went over to Saylor's house twice on January 27, 2008, to speak with Saylor about having Palomo help Defendant get his laptop out of pawn. RP 1147, 1148. Defendant explained that while Palomo was staying at defendant's house, Palomo had helped defendant to pawn a laptop. RP 1024, 1025, 1112. Because the laptop was pawned in Palomo's name, defendant could not get the laptop back without Palomo being present. RP 1114, 1115.

The first time defendant went to Saylor's residence on January 27th was around noon, however, defendant didn't speak with Saylor because when he pulled in the driveway, McKay Brown told him that Saylor and Palomo were sleeping. RP1026-27. Defendant asked Brown to tell Saylor and Palomo that he (defendant) would be back later to talk to Saylor. RP 1027. Defendant then left to run some errands. RP 1027-28.

² Defendant testified that he previously worked as a repo-man for Washington Recovery Services and would frequently carry a firearm when it appeared that repossessing the vehicle may become violent. RP 1091, 1100, 1121.

Defendant returned to Saylor's residence at around 11:30 that night. RP 1028, 1123, 1124, 1147. Defendant testified that someone looked out the window when he pulled up and the porch light was on. RP 1028. Chuck Bollinger answered the door, asked defendant what he was doing, and then told defendant that Saylor was mad at defendant for painting Palomo's car. RP 1028, 1124. Defendant testified that he did not know what Bollinger was talking about, but told him to wake up Saylor. RP 1028. On cross examination, defendant admitted that Bollinger told defendant that he shouldn't be at Saylor's house, but defendant did not take him seriously. RP 1124, 1125.

Defendant testified he was facing the front of the house talking to McKay about the vehicle defendant was driving when Saylor kicked defendant from behind. RP 1029, 1125, 1129. Defendant testified that he fell over the coffee table and into the corner. RP 1029. Defendant testified he was scared and pulled his gun saying "Back off. What are you doing? Quit hurting me, man." RP 1029, 1133. Defendant then testified he told Saylor "I don't want to shoot no one. I want to leave." RP 1030. However, on cross examination defendant admitted he may have said "I'm going to smoke you, motherfucker." RP 1134. After defendant brandished the firearm, Bollinger told him to put the gun down. RP 1030.

Instead of putting the gun down defendant replied “Chuck, he’s fucking gonna beat me up. He’s hurting me.” RP 1030. Bollinger was helping defendant to the door when defendant became aware that Saylor running toward him with a bat, so defendant pointed the gun at Saylor and shot him. RP 1030, 1126, 1145. Saylor fell to the ground immediately. RP 1150. Defendant testified that Saylor knew defendant had a weapon, and that Saylor was going to kill him. RP 1033.

After he shot Saylor, defendant testified that he left because people started yelling and screaming. RP 1030, 1151. Defendant testified that he felt threatened after he shot Saylor. Defendant said “My life would be threatened because Danny was on the floor, shot; the bat is still laying right next to him.” RP 1034. Despite fearing that his life was in danger, defendant testified that that he did not speed away from Saylor’s house. RP 1156, 1157.

Defendant testified that he got into his car, drove home, and hid the gun he used to shoot Saylor in a closet in his house. RP 1034, 1159. While at his house, Detective Larson called and told defendant that Larson needed to talk to him about the shooting. RP 1035-36. Because he believed Detective Larson would arrest him, defendant testified that he needed to take care of a few personal things before he speaking with the detective so he hung up on Detective Larson. RP 1036, 1164. After he

hung up, defendant told the people in his house that the police were on their way, took four Oxycontins, and left his residence. RP 1037. A neighbor told officers she saw someone matching defendant' description climb over the fence that borders her property, but defendant testified that it must have been someone else who lived at the house that looked just like defendant. RP 676, 850, 1169-71.

On both direct and cross examination, defendant admitted he had numerous crimes of dishonesty including grand theft, two convictions for check fraud, three convictions for forgery, possession of stolen property, and attempted theft. RP 1037-38, 1053, 1054, 1084-88.

Defendant testified that has known Danny Saylor since October 2007. RP 1018. However, on cross examination defendant admitted that he knew *of* Saylor since October 2007, but didn't actually meet him until just before Christmas 2007. RP 1068. Defendant later testified that he met Saylor right before Thanksgiving 2007. RP 1069. Defendant testified on cross examination he has had a total of three conversations with Saylor in his life. RP 1068. Defendant testified that it was unfortunate that Saylor was dead, but that Saylor's death was his own fault for attacking defendant with a baseball bat. RP 1168.

C. ARGUMENT.

1. THE COURT PROPERLY GAVE THE FIRST AGGRESSOR INSTRUCTION WHERE DEFENDANT FIRST POINTED HIS FIREARM AT DANNY SAYLOR AND THREATENED TO “SMOKE” HIM.

Jury instructions are appropriate where they “permit each party to argue his theory of the case and properly inform the jury of the applicable law.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court’s instructions depends on whether the trial court’s decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court’s decision is reviewable only for abuse of discretion if based on a factual dispute. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court’s decision based upon a ruling of law is reviewed de novo. *Id.*

Generally, self-defense cannot be invoked by a defendant who is the first aggressor and whose acts result in an altercation unless he or she first withdraws. *State v. Riley*, 137 Wn.2d at 909. A first aggressor instruction is appropriate when there is some credible evidence from which a jury can reasonably determine that the defendant engaged in conduct that precipitated the fight and “provoked the need to act in self-

defense.” *Id.* The trial court may give an aggressor instruction despite conflicting evidence about whether the defendant’s conduct precipitated the fight. *Id.* at 910 (citing *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)). To determine whether there is sufficient evidence to support giving the instruction, a court views the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. *Riley*, 137 Wn.2d at 910, citing *State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987).

In *State v. Riley*, 137 Wn.2d 904, 906, Johnny Lee Riley shot Gustavo Jaramillo after a verbal confrontation. On the day of the shooting, Riley approached Jaramillo and his friend, Calloway, about purchasing a vehicle. *Riley*, at 906. Riley testified that he was joking with Jaramillo about being a gang member when Jaramillo threatened to shoot Riley. *Id.* at 906. In response to Jaramillo’s threat, Riley testified that he pulled a gun on Jaramillo. *Id.* Riley demanded Jaramillo’s gun to prevent Jaramillo from shooting Riley in the back as he left. *Id.* Jaramillo denied having a gun on him and told Riley that his gun was in some bushes across the street. Riley testified that he shot Jaramillo when

Jaramillo reached for a gun. *Id.* at 907. Other witnesses testified that Riley approached Jaramillo with the gun and then shot Jaramillo when Jaramillo turned his head to look at Riley. *Id.* 907.

At trial, the court gave instructions on self-defense and first aggressor; Riley objected to the first aggressor instruction. *Id.* at 907. After his conviction, Riley appealed arguing, among other issues, that the giving of the first aggressor instruction was error. *Id.* at 907-08. The Supreme Court affirmed the trial court's finding that the first aggressor instruction was proper because there was evidence that Riley drew his gun first and aimed it at Jaramillo. *Id.* at 909. The court held that words alone do not give rise to a reasonable apprehension of great bodily harm. *Id.* at 912. In a footnote, the court noted that the giving of the first aggressor instruction did not prevent Riley from arguing his theory of the case, which was self-defense, because the jury was also properly instructed on self-defense. *Id.* at 908 n. 1.

Similarly, in *State v. Wingate*, 155 Wn.2d 817, 818, 122 P.3d 908 (2005), the defendant was the first to draw a gun and the court properly gave a first aggressor instruction. In *Wingate*, Stephen Park and several of his friends went to James Koo's house to confront Koo about dating Park's ex-girlfriend. *Wingate*, 155 Wn.2d 817, 818. When Park and his friends arrived, many of Koo's friends, including Joshua Wingate, had gathered at Koo's house because they heard Park was coming over to confront Koo. *Wingate*, at 818-19. At trial, the defense and the State

presented two very different versions of events after Park's arrived at Koo's house.

Wingate, who had brought a handgun with him, testified that Park took a sawed off shot gun from his trunk, pumped it, and placed it back in the trunk. *Wingate*, at 819. Park then crossed the street to confront Koo. Wingate testified that while Park was trying to confront Koo, Wingate observed Feist, Scott, and Poydras standing by the open trunk. *Id.*

Wingate approached the three men and pulled out his gun to scare them away from the trunk so Wingate could retrieve the shotgun. *Id.* When

Koo went inside his house, Park noticed Wingate pointing a gun at his friends. *Id.* Wingate testified that while Park confronted Wingate, Feist pulled gun from his waistband. *Id.* Feist put the handgun in the trunk when Wingate threatened to shoot him. *Id.* Wingate and Park exchanged words and Park asked whether Wingate was going to shoot him. *Id.*

Wingate testified that he believed Park was reaching for a gun and, feeling that he was out numbered four to one, Wingate shot Park in the leg. *Id.* at 819-20.

In contrast, the State presented evidence that Park did not touch a shotgun that day. *Wingate*, at 820. Park testified that when he tried to confront Koo, Koo went into his house. *Id.* After Koo went into his house, Park noticed that Wingate was pointing a gun at his friends. *Id.* Park went over and stood between Wingate and Park's three friends,

raised his hands and asked if Wingate was going to shoot him. Wingate shot Parks in the leg and then said “Who else wants some?” *Id.* at 820.

The trial court gave a first aggressor instruction over Wingate’s objection. *Wingate*, at 820. The Court of Appeals reversed finding that the first aggressor instruction was improper. The Supreme Court reversed the Court of Appeals and affirmed the trial court’s ruling giving the first aggressor instruction because, like *Riley*, there was evidence that Wingate was the first to draw a gun in this conflict. *Id.* at 823.

In the present case, like in *Riley* and *Wingate*, the trial court properly gave the first aggressor instruction. During trial, evidence was adduced that when Palomo and Saylor separated in October 2007, defendant and Palomo began a sexual relationship and did methamphetamine together. RP 94, 163, 1019. When Palomo moved back into Saylor’s house, Palomo and defendant continued to meet and have sex and ingest methamphetamine. RP 1020. Defendant’s sister testified that weeks before the shooting, she told defendant that Saylor did not want defendant at his house. RP 291-92. Palomo testified that defendant wrote the word “cunt” on her vehicle after she told defendant not to come around the house. RP 99, 101, 110-11, 167, 169. Despite knowing that he was unwelcome at Saylor’s home, defendant, armed with a firearm, went to Saylor’s house at 11:30 at night on January 27, 2008. RP 125, 1074, 1123-24. A fist fight broke out between defendant and Saylor. RP 508, 510-11. In response to the fist fight, it is uncontroverted that defendant

pulled out a gun, pointed it at Saylor, and threatened to “smoke” him. RP 126, 127, 183, 228, 325, 358, 515-17, 1134. After defendant threatened to shoot Saylor, Bollinger tried to get defendant out of Saylor’s house by pushing defendant toward the door while Saylor went into the back of the house. RP 194, 517. Several witnesses testified that defendant followed through with his threat and shot Saylor in the heart when Saylor approached him with a baseball bat. 365-66, 517-18, 537, 1031, 1033 1144-45.

When the evidence is viewed in the light most favorable to the State, as this court must do, it is clear that the first aggressor instruction was appropriate because defendant was the first to draw a gun and threaten to “smoke” Saylor. See *Wingate*, 155 Wn.2d 817, 823, citing *State v. Fernandez-Mendoza*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Arguably, the first act of aggression was to spray paint the word “cunt” on Palomo's car – it is clear from the testimony that defendant knew Saylor and Palomo believe he had spray painted the offensive word on Palomo’s car, and that that showing up at night armed with a gun was likely to provoke a belligerent response from Saylor. Additionally, defendant was in Saylor’s home, not in a place where he had a right to be, and Saylor had no duty to retreat. See *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984).

2. DEFENDANT WAS NOT ENTITLED TO A REVIVAL OF SELF-DEFENSE INSTRUCTION AND HIS ATTORNEY CANNOT BE CONSIDERED DEFICIENT FOR CHOOSING NOT TO REQUEST AN INSTRUCTION THAT WOULD NOT HAVE BEEN GIVEN.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L.Ed.2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel’s representation fell below an objective standard of reasonableness. Second,

a defendant must show that defense counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness. *State v. Huddleston*, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the

failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. *McFarland*, 127 Wn.2d at 337; *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to

find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

In the present case, defendant asserts that his trial counsel was ineffective for failing to request a jury instruction informing the jury that a first aggressor's right to self-defense is revived if the aggressor withdraws from the altercation. Brief of Appellant at 16. Defendant's argument fails because it was inconsistent with defendant's case theory, which relied exclusively on self-defense, and there was no evidence that defendant withdrew from the conflict.

A defendant who is a first aggressor is not entitled to an instruction on self-defense unless she has withdrawn from combat in such a way as to have clearly apprised her adversary that she was desisting, or intending to desist, from her aggressive action. See *State v. Brown*, 3 Wn. App. 401, 404, 476 P.2d 124 (1970); (citing *State v. Wilson*, 26 Wn.2d 468, 480, 174 P.2d 553 (1946)). A defendant is entitled to a jury instruction supporting this theory of the case only where her withdrawal is supported by substantial evidence in the record. *State v. Bell*, 60 Wn. App. 561, 566, 805 P.2d 815, review denied, 116 Wn.2d 1030 (1991). Here, there was not sufficient evidence in the record to support an instruction on self-defense predicated on withdrawal.

The theory of self-defense presumes that the defendant is not the initial aggressor, while the theory of revived self-defense allows an initial aggressor the right of self-defense once he or she has withdrawn from the

conflict. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). In *State v. Brown*, 3 Wn. App. 401, 402, 476 P.2d 124 (1970), Joseph Brown was convicted of second degree assault for shooting Paul Robertson in a bar. On appeal, he challenged the trial court's refusal to give a self defense instruction. *Id.* at 401-02. The Court of Appeals affirmed the trial court noting that Brown had approached Robertson in a bar and provoked the confrontation by verbally attacking Robertson. *Id.* at 403-04. In response, Robertson wrapped a bike chain around his fist and threatened to knock the gun out of Brown's hand. *Id.* at 403. The Court of Appeals found that Brown was the first aggressor and even Brown's testimony that he backed up six or seven feet and told Robertson that he (Brown) hoped Robertson wouldn't try it, was insufficient evidence "to permit the jury to find Robertson had been clearly advised that Brown 'in good faith was desisting or intended to desist, from further aggressive action.'" *Id.* at 404.

In the present case, defendant's trial strategy relied exclusively on the theory of self-defense, rather than on a revived self-defense theory. Defendant testified that he went to talk to Saylor and that the subsequent physical confrontation was initiated by Saylor. RP 1129, 1130, 1131. Defendant testified that he was defending himself when he pulled out his gun and threatened to "smoke" Saylor. RP 1133, 1134. Defendant further testified that the only reason he shot Saylor was because Saylor was

coming at him with a raised baseball bat. RP 1030, 1032, 1039, 1145, 1168. This testimony is consistent with defendant's case theory of self-defense.

While the State presented evidence that defendant was the first aggressor, consistent with his self-defense case theory, defendant never testified that he was the aggressor in any way. In fact, any testimony that defendant was the aggressor would have undermined his case theory and his credibility with the jury.

Additionally, none of the evidence adduced at trial supports the notion that defendant withdrew from the combat at a time and in a manner that clearly apprised Saylor that defendant was withdrawing from the altercation. Like *Brown*, once defendant displayed the gun and threatened to shoot Saylor, defendant did not release the gun. RP 1030. While defendant testified that he dropped his keys and his cigarettes, he never put down the gun. RP 1030. In addition to retaining his firearm, Bollinger had to push defendant toward the door in an attempt to get him out of the house. RP 330, 331-32, 334, 1030. Because defendant retained the firearm and had to be pushed out of the house by Bollinger, it is apparent that defendant had not abandoned the fight and had not clearly indicated his intent to withdraw to Saylor.

Defendant was not entitled to a jury instruction that withdrawal revives the claim of self-defense because defendant never presented evidence that he was the first aggressor, nor was there evidence adduced at

trial that defendant withdrew from the combat and clearly apprised Saylor that he was desisting or intended to desist from further aggressive action. Because defendant was not entitled to a revived self-defense instruction his trial counsel cannot be found deficient for choosing not to request an instruction.

Additionally, trial counsel's decision regarding case theory or trial strategy cannot provide a basis for a claim of ineffective assistance of counsel. *State v. Doogan*, 82 Wn. App 185, 189, 917 P.2d 155 (1996). Here, defendant's case theory was exclusively that of self-defense. Trial counsel cannot be deficient for choosing not to ask for a jury instruction that would have been wholly inconsistent with defendant's case theory, and unsupported by the evidence adduced at trial. Defendant's claim is without merit and must fail.

3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON SELF-DEFENSE USING WPIC 16.02 BECAUSE DEFENDANT WAS CHARGED WITH A HOMICIDE.

As noted in section one, jury instructions are appropriate where they "permit each party to argue his theory of the case and properly inform the jury of the applicable law." *State v. Riley*, 137 Wn.2d 904, 909. On appeal, when the trial court's decision not to issue a requested instruction is based upon a matter of law, the standard of review is *de novo*. *State v. Lucky*, 128 Wn.2d 727, 731, *overruled on other grounds by State v.*

Berlin, 133 Wn.2d 541, 544. Here, the trial court's decision not to give WPIC 17.02 as part of the court's jury instructions was based upon a ruling of law.

In *State v. Ferguson*, 131 Wn. App. 855, 860, 129 P.3d 856 (2006), this court held that "WPIC 17.02 can never be given in a felony murder case where 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."

In *Ferguson*, Lavell Lindsey stood in front of Jason Ferguson's vehicle as Ferguson attempted to exit a nightclub parking lot. *Ferguson*, at 847. After exchanging fighting words, Ferguson exited his vehicle with a knife. *Ferguson*, at 858. Lindsey started punching Ferguson, and Ferguson responded by stabbing Lindsey multiple times with his knife. *Id.*, at 857-58. Lindsey's friend, Dalton, attempted to come to Lindsey's aid, but Ferguson stabbed Dalton in the neck with the knife. *Id.* at 857. Lindsey ultimately died from his wounds. *Id.* at 858.

Ferguson was charged with second degree murder in Lindsey's death and first degree assault for stabbing Dalton with the knife. *Id.* at 859. The instructions allowed the jury to convict if the jury found the elements of second degree intentional murder or second degree felony

murder with the predicate felony being a second degree assault. *Id.* at 859. Ferguson was convicted of second degree murder.³ *Id.* at 859.

At trial, Ferguson proposed WPIC 17.02, defining the use of force one may use in self-defense in an assault, to be used both for the assault of Dalton and second degree murder of Lindsey. *Id.* at 859-60. The trial court used WPIC 17.02 only for the assault of Dalton and used WPIC 16.02 for the second degree murder of Lindsey. *Id.* at 860.

On appeal, Ferguson argued that because the jurors were instructed on second degree felony murder predicated on a second degree assault, they should have been instructed on self-defense as it applies to assault. *Id.* at 860. Relying on *State v. Walden*, 131 Wn.2d 469, 932 P.3d 1237 (1997), which cited *State v. Churchill*, 52 Wn. 210, 100 P. 309 (1909) with approval, this court rejected Ferguson's argument. *Id.* at 861-62. This court noted that in *Churchill* (also a homicide case) the court rejected defendant's challenge to the self-defense jury instruction that required a finding of "great bodily harm" rather than merely "bodily harm" because it encouraged the taking of human life "upon the merest pretext of danger." *Ferguson*, at 861.

³ The jury verdict was a general verdict that did not specify whether the conviction was based upon intentional murder or felony murder. *Ferguson*, at 859.

Defendant's attempts to distinguish *Ferguson's* holding from the present case are without merit. In *Ferguson*, the defendant took a knife to a fist fight. Here, defendant initiated the hostilities by going to Danny Saylor's house at midnight with a firearm. Defendant had been told repeatedly that he was not welcome at Saylor's residence. When Saylor reacted by engaging defendant in a fist fight, defendant brandished a firearm and told Saylor, "I'm going to smoke you, motherfucker." Like *Ferguson* who used a deadly weapon (a knife) in a fist fight, defendant pointed a deadly weapon (a firearm) at Saylor and threatened to kill him in a fist fight. Minutes later, when Saylor tried to defend himself with a baseball bat, defendant followed through on his threat and shot Saylor through the heart. Like *Ferguson*, defendant used excessive force when he brandished a firearm and threatened to kill Saylor in his own home. Like *Ferguson*, defendant was not entitled to an assault self-defense instruction. The court properly instructed the jury on self-defense using WPIC 16.02. Defendant's claim to the contrary is without merit and must fail.

4. AS THE FIRST AGGRESSOR, DEFENDANT WAS NOT ENTITLED TO CLAIM SELF DEFENSE;
ALTERNATIVELY, IF THE JURY CONCLUDED DEFENDANT WAS NOT THE FIRST AGGRESSOR, THE STATE PROVED THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

As argued above, defendant was the first aggressor. Defendant went to Saylor's house at 11:30 at night, armed with a firearm, knowing he was not welcome at the house, and when a fight broke out between him and Saylor, defendant was the first person to introduce a firearm into the fight. As a result, petitioner is the first aggressor in the fight and has no right to claim self-defense. Because defendant did not have a right to self-defense, the State has no burden to disprove self-defense.

However, if this court were to find defendant was not the first aggressor or, alternatively, withdrew from the fight and thus revived his right to claim self defense, defendant's argument still fails because the State proved the absence of self defense beyond a reasonable doubt.

An individual may legally use force to prevent injury as long as the force is "not more than is necessary." RCW 9A.16.020(3). To use force, one must reasonably believe injury is imminent, but actual danger is not necessary. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). If a defendant produces some evidence of self-defense, then the burden shifts

to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 493-94, 656 P.2d 1064 (1983). The absence of self-defense becomes an element of the charged offense that the State must prove beyond a reasonable doubt. *McCullum*, 98 Wn.2d 484, 488; *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988).

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that 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). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). 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) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, including the absence of self-defense, the decision of the trier of fact should be upheld.

Assuming, *arguendo*, this court determines that defendant is not the first aggressor and the State must prove the absence of self-defense beyond a reasonable doubt, here the State produced ample evidence that defendant did not act in self-defense.

The jury could have found the State's case theory more credible than defendant's. The State presented evidence that defendant was involved in an ongoing affair with Danny Saylor's girlfriend, Lori Palomo. RP 284, 297-98. Defendant and Palomo testified that they began sleeping together when Palomo and Saylor separated briefly in the fall of 2007. RP 94, 163, 1019. Defendant testified that he and Palomo continued having sex and ingesting methamphetamine even after Palomo went back to live with Saylor. RP 1020. After Palomo told defendant to stop contacting her, defendant spray painted the word "cunt" on her car, which was parked outside Saylor's house. RP 110-115, 167, 168, 169. Defendant was told repeatedly that he was not welcome at Danny Saylor's house. RP 292. Anderson told defendant on three separate occasions, and Bollinger told him the night of the incident, that defendant should not be at the house and that Saylor was mad at defendant. RP 292. Despite these warnings, defendant went to Saylor's house, armed with a gun, at 11:30 at night. RP 321, 515. When Saylor responded to defendant's unwelcome late-night appearance with a fist fight, defendant unreasonable escalated the conflict

by pulling out a firearm, pointing it at Saylor, and then threatening to kill him. RP 325, 515. Rather than leaving when Saylor told him to, defendant had to be pushed out of the house by Bollinger. RP 330-32, 517. When Saylor, who has no duty to retreat in his own home, responded to defendant's threat to shoot him by getting a baseball bat, defendant followed through on his threat by shooting and killing Saylor. RP 334, 517-18. Based upon these facts, the jury could easily have determined that defendant initiated the conflict by coming to Saylor's house.

In addition to finding the State's case theory more credible, the jury may not have found defendant's testimony credible. At the outset, defendant's credibility was impeached with his numerous convictions for crimes of dishonesty, and his testimony was inconsistent and frequently defied logic. Defendant testified that he believed that he was welcome at Saylor's house despite the fact that he had an ongoing affair with Saylor's girlfriend, Palomo, and knew Saylor and Palomo believed he had spray painted the word "cunt" on Palomo's car. He went to Saylor's house at 11:30 at night to arrange to get his laptop out of pawn, but the pawn shops were not open at that time, and he didn't need to retrieve the laptop for another week. RP 1148. Defendant testified that he pulled the gun on Saylor because he was afraid of "great bodily harm," however, witnesses merely described a fist fight or a scuffle between Saylor and

defendant. RP 125, 324, 508, 510, 511, 1032; *see also* Plaintiff's Ex. Nos. 69-78. Defendant testified he tried to leave the residence, but witnesses testified that Bollinger had to push defendant out of the door. RP 194, 330, 331, 332, 334, 337, 344.

Additionally, defendant's actions after shooting Saylor were inconsistent with defendant's claim of self-defense. Defendant fled the scene, did not call for medical aid, hid the firearm he used in the shooting, called his sister to return the hidden gun to its owner, and then hung up on the police when they tried to contact him about the incident. RP 127, 293, 294, 1155, 1156, 1034, 1037, 1163. The jury could reasonably find that defendant intentionally shot and killed Saylor, and that his attempts to hide the firearm and avoid detection by police was evidence of consciousness of guilt.

Because defendant was the first aggressor, defendant was not entitled to claim self-defense. Alternatively, the State proved the absence of self defense beyond a reasonable doubt.

5. DEFENDANT WAS FOUND GUILTY OF BOTH SECOND DEGREE INTENTIONAL MURDER AND SECOND DEGREE FELONY MURDER, BUT THE JUDGMENT AND SENTENCE IS SILENT AS TO SECOND DEGREE FELONY MURDER, AND THEREFORE, THERE IS NO DOUBLE JEOPARDY VIOLATION AND THE COURT IS NOT REQUIRED TO VACATE THAT FINDING.

Both article I, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution prohibit the State from placing a person in jeopardy twice, based on the same offense. The double jeopardy doctrine protects a criminal defendant from being prosecuted for the same offense after acquittal or after conviction, and also precludes the imposition of multiple punishments for the same offense. *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006). An alleged violation of the protection against double jeopardy is a question of law that an appellate court reviews *de novo*. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The State is permitted to bring multiple charges against a defendant for the same conduct, and a jury may convict on all of the charged counts without violating double jeopardy. *State v. Schwab*, 134 Wn. App. 635, 644, 141 P.3d 658 (2006). "It is only when the trial court enters judgment and imposes sentence on more than one conviction for the same crime that double jeopardy is implicated." *Id.* Vacation of the

remaining charge is not required where the trial court enters a judgment and sentence on one charge only. *See, e.g.*, ***State v. Ward***, 125 Wn. App. 138, 144, 104 P.3d 61 (2005).

In ***State v. Womac***, 160 Wn.2d 643, 659, 160 P.3d 40 (2007), the court held that a sentencing court has no authority to take a verdict on a separate charge, find that it violates double jeopardy, not sentence the defendant on that charge, and to conditionally dismiss the charge for use at a later time. In ***Womac***, the defendant was charged with homicide by abuse and assault in the second degree. *Id.* at 660. All of Womac's convictions were listed on the judgment and sentence. *Id.* The sentencing court specifically entered judgments on the additional charges finding that they were valid charges, but that to impose separate punishments would violate double jeopardy provisions. *Id.* at 658.

In ***State v. Ward***, 125 Wn. App. 138, 141, 104 P.3d 61 (2005), which the ***Womac*** court cites with approval, the defendant was convicted of second degree felony murder and first degree manslaughter. At sentencing, Ward moved to vacate the first degree manslaughter conviction. ***Ward***, 125 Wn. App. at 142. The court denied the motion and sentenced Ward only on second degree felony murder. *Id.* The judgment and sentence entered by the court did not mention the jury's finding that Ward was guilty of first degree manslaughter. *Id.* The Court of Appeals, in affirming the trial court, held:

But Ward was not convicted and sentenced to both second degree felony murder and first degree manslaughter. Instead, the judge entered judgment and sentenced Ward only on the second degree felony murder charge; therefore there was no violation of double jeopardy. Because there was no violation of double jeopardy, the court was not required to vacate the manslaughter charge.

Ward, at 144.

Recently, in *State v. Faagata*, 147 Wn. App. 236, 247, 193 P.3d 1132 (2008), this Court held that there is no double jeopardy violation where a defendant was found guilty of first degree murder and second degree felony murder for the killing of one person, but only the first degree murder conviction was reduced to judgment. In *Faagata*, Faulolua Faagata, Jr. was charged with first degree murder and second degree murder. 147 Wn. App. 236, 238. The jury found Faagata guilty as charged. *Faagata*, at 241. At sentencing, the court sentenced Faagata only on the first degree murder conviction. *Id.* at 241-42.

On appeal, Faagata alleged that his two convictions violated double jeopardy and asked that his second degree felony murder conviction be vacated. *Id.* at 243. Faagata attempted to distinguish his case from *Ward* where the defendant was charged in the alternative as opposed to in separate counts. However, this Court rejected Faagata's argument, stating that the difference between charging a defendant in the alternative and charging a defendant for separate offenses is insignificant for purposes of double jeopardy. Ultimately, juries are required to return

verdicts on all counts, and trial courts, where appropriate, are required to either merge convictions or enter judgment and sentence on only one of multiple convictions so as to avoid double jeopardy. So, while charging in the alternative versus charging for separate offenses is technically different, the practical result if doing so in this context is the same.

Faagata, 147 Wn. App. at 247 n.9.

The present case is similar to both *Faagata* and *Ward*. Here, defendant was convicted of second degree murder in Count I, and second degree felony murder in Count II. RP 1296, 1297; CP 93, 95. The State agrees that the defendant cannot have both counts reduced to judgment. However, here like *Faagata*, where the trial court did not include the second degree felony murder conviction on the defendant's judgment and sentence, there is no double jeopardy violation. See *Ward*, 125 Wn. App. 138 at 144; *Faagata*, 147 Wn. App. at 247-48.

Defendant argues that the mere fact of conviction is punishment violative of double jeopardy because a defendant can be impeached with it under ER 609 without a judgment and sentence, and the conviction may be included in defendant's offender score should he be convicted of a subsequent offense. Brief of Appellant at 27. Like *Faagata* where the court noted that these concerns were inapplicable in that case, they are similarly inapplicable in the present case. See *Faagata*, 147 Wn. App. at

248. Contrary to defendant's argument, if he should commit another offense, his second degree felony murder conviction would not be counted as part of his offender score because it would be considered same criminal conduct as his second degree intentional murder conviction under RCW 9.94A.525(5)(a)(i). Finally, like *Faagata*, defendant, who was convicted and sentenced on intentional murder, will not be exposed to any additional societal stigma or risk additional impeachment for his simultaneous conviction for second degree felony murder. See *Faagata*, at 248.

The defendant asserts that this Court's recent decision is *State v. Turner*, 144 Wn. App. 279, 182 P.3d 478 (2008) is incorrect. Brief of Appellant at 31. In *Turner*, Guy Turner was charged in the alternative with first degree assault and first degree robbery. *Turner* 144 Wn. App. 279, 280. A jury convicted Turner of second degree assault and first degree robbery. *Turner*, at 280. At sentencing, the trial court vacated the assault conviction for purposes of sentencing, and sentenced Turner only on the first degree robbery, because the assault merged into the robbery. *Id.* Only the robbery conviction was reduced to judgment. *Id.* at 282. This Court found no double jeopardy violation.

In arguing that *Turner* was wrongly decided, defendant relies on *Womac* and *State v. Gohl*, 109 Wn. App. 817, 37 P.3d 293 (2001). Defendant's reliance on these cases is misplaced because *Womac* and

Gohl are more like each other than they are similar to *Turner*. In both *Womac* and *Gohl*, the defendants were convicted of multiple counts for the same acts, and all convictions were reduced to judgment, though sentences were not imposed on all counts. Unlike *Womac* and *Gohl*, such was not the case in *Turner* where only the robbery conviction was reduced to judgment. It is only in ignoring this critical distinction that defendant can argue that *Turner* was wrongly decided.

Like in *Faagata*, *Turner*, and *Ward*, there is no double jeopardy violation in the present case because only defendant's conviction for second degree intentional murder was reduced to judgment. Additionally, defendant was only sentenced on second degree intentional murder and the conviction for second degree unlawful possession of a firearm. Thus, there was no double jeopardy violation in this case, and defendant's arguments to the contrary are without merit.

D. CONCLUSION.

For the reasons argued above, this Court should affirm defendant's convictions for second degree intentional murder and unlawful possession of a firearm.

DATED: November 30, 2009.

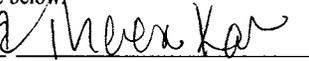
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.30.09 
Date/ Signature

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