

No. 42161-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RONALD MELVIN MENDES,

Appellant.

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

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE	2
	A. PROCEDURAL HISTORY	2
	B. SUBSTANTIVE FACTS	4
IV.	ARGUMENT & AUTHORITIES	13
	A. THE STATE FAILED TO DISPROVE BEYOND A REASONABLE DOUBT THAT MENDES WAS ACTING IN SELF-DEFENSE WHEN HE SHOT SAYLOR	13
	1. <i>The State Failed to Prove that Mendes Was the First Aggressor or that the Force Used By Saylor to Expel Mendes Was Reasonable</i>	14
	2. <i>The State Failed to Disprove that Mendes Acted in Self-Defense When He Shot Saylor</i>	19
	B. THE TRIAL COURT’S REFUSAL TO RULE ON WHETHER THE EVIDENCE PRESENTED DURING THE STATE’S CASE-IN-CHIEF ENTITLED MENDES TO A SELF-DEFENSE INSTRUCTION COMPELLED MENDES TO WAIVE HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY AS A WITNESS IN HIS OWN CRIMINAL TRIAL	20
V.	CONCLUSION	24

TABLE OF AUTHORITIES

CASES

WASHINGTON COURTS

<u>City of Seattle v. Stalsbroten</u> , 138 Wn.2d 227, 978 P.2d 1059 (1999)	23
<u>State v. Allery</u> , 101 Wn.2d 591, 594, 682 P.2d 312 (1984)	14
<u>State v. Bland</u> , 128 Wn. App. 511, 116 P.3d 428 (2005).....	18
<u>State v. Knapstad</u> , 107 Wn.2d 346, 729 P.2d 48 (1986).....	22
<u>State v. Maurer</u> , 34 Wn. App. 573, 663 P.2d 152 (1983).....	22
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	13
<u>State v. McKeown</u> , 23 Wn. App. 582, 596 P.2d 1100 (1979).....	22
<u>State v. Moore</u> , 79 Wn.2d 51, 483 P.2d 630 (1971)	23
<u>State v. Riley</u> , 137 Wn.2d 904, 976 P.2d 624 (1999)	14, 16, 17, 19
<u>State v. Van Auken</u> , 77 Wn.2d 136, 460 P.2d 277 (1969).....	24
OTHER STATE & FEDERAL	
<u>People v. Manzanares</u> , 942 P.2d 1235, 1241 (Colo.Ct.App.1996)	16

People v. Mayes,
262 Cal. App. 2d 195, 68 Cal. Rptr. 476 (1968) 16

Schmerber v. California,
384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)..... 23

OTHER AUTHORITIES

16 David K. DeWolf & Keller W. Allen,
WASH. PRAC., TORT LAW AND PRACTICE § 13.45 (3rd ed.2011) 18

CrR 6.15..... 22

RCW 9A.16.020(3)..... 18

U.S. Const. Amd. V 23

Wash. Const. art. 1, § 9 23

I. ASSIGNMENTS OF ERROR

1. In convicting Ronald Mendes of second degree murder, the State failed to present sufficient evidence to disprove beyond a reasonable doubt that Mendes was acting in self-defense.
2. The trial court's refusal to rule on whether the evidence presented during the State's case-in-chief entitled Ronald Mendes to a self-defense instruction compelled Mendes to waive his constitutional right not to testify as a witness in his own criminal trial.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the evidence showed that Ronald Mendes did not know how much anger Danny Saylor felt toward him when Mendes came to Saylor's house to smoke methamphetamine, and that Saylor initiated the physical altercation even though Mendes did not verbally or physically threaten Saylor, did the State fail to present sufficient evidence to establish that Mendes was the first aggressor, which would negate Mendes' claim that he shot Saylor in self-defense? (Assignment of Error 1)
2. Where the evidence showed that Ronald Mendes was leaving Danny Saylor's house and had stepped outside onto

the front porch when Saylor rushed at Mendes with a baseball bat raised over his head, and that only at that point did Mendes fire his gun at Saylor, did the State fail to present sufficient evidence to disprove beyond a reasonable doubt that Mendes was acting in self-defense? (Assignment of Error 1)

3. Where Ronald Mendes clearly stated that he did not wish to testify if the evidence presented during the State's case-in-chief entitled Mendes to a self-defense instruction, did the trial court's refusal to rule on that issue compel Mendes to waive his constitutional right not to testify as a witness in his own criminal trial? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State initially charged Ronald Melvin Mendes by Information with one count of first degree premeditated murder (count 1), one count of second degree murder (count 2), and one count of unlawful possession of a firearm (count 3), in connection with the shooting death of Danny Saylor.¹ (CP 1-2)

¹ Pursuant to RCWs 9A.32.030(1)(a), 9A.32.050(1)(b), and 9.41.040(a)(i). (CP 1-2)

The jury found Mendes not guilty of premeditated murder but guilty of the lesser offense of second degree felony murder in count 1, guilty of second degree murder in count 2, and guilty of unlawful possession of a firearm. (CP 5, 22-23)

Mendes appealed, and the Court of Appeals² reversed his conviction because Mendes' trial counsel was ineffective for failing to request a revived self-defense jury instruction, and because the trial court erred in failing to instruct the jury that it could acquit Mendes of second degree murder if it found that he acted in self-defense when he committed the predicate assault.³ (CP 19-35)

On remand, the State filed an Amended Information charging Mendes with second degree intentional murder (count 1), second degree felony murder (count 2), and four counts of tampering with a witness (counts 4 thru 7).⁴ (CP 43-46) The State further alleged that Mendes was armed with a firearm when he committed the alleged murder, and that Mendes' sentence should be aggravated based on the multiple current offense factor. (CP 43-46)

² The case was transferred to and decided by Division 1 of the Court of Appeals.

³ See State v. Mendes, 156 Wn. App. 1059 (2010).

⁴ Pursuant to RCWs 9A.32.050(1)(a), 9A.32.050(1)(b), and 9A.72.120(1)(b). (CP 43-46)

The jury found Mendes not guilty of intentional murder but guilty of felony murder, and found Mendes was armed with a firearm at the time of the offense. (CP 106, 108, 109; RP 1424) The jury also found Mendes guilty of the four counts of witness tampering. (CP 110-13; RP 1424-25)

The trial court imposed an exceptional sentence totaling 517 months. (CP 137; RP 1473-75) This appeal timely follows. (CP 145)

B. SUBSTANTIVE FACTS

Ronald Mendes met Lori Palomo in October of 2007, when Palomo was temporarily estranged from her long-time boyfriend, Danny Saylor. (RP 118, 125-6) Mendes and Palomo's friendship evolved into an intimate relationship, and also included frequent methamphetamine use. (RP 126, 145) But after a few weeks, Palomo reunited with Saylor. (RP 126)

Saylor was also a regular methamphetamine user. (RP 145) Saylor was aware of Palomo's affair with Mendes, but was not bothered by it and did not express any hostility towards Mendes. (RP 130)

Palomo testified that she wanted to cease any contact with Mendes, but that Mendes came to Saylor's home uninvited several

times during the months of November and December of 2007. (RP 127-28) On at least one occasion, Saylor was home when Mendes came to the house and, according to Palomo, their interaction was uneventful. (RP 187) In fact, Palomo thought it likely that the two men discussed the purchase and sale of methamphetamine. (RP 240)

Mendes also sent his sister, Judy Anderson, to Saylor's home to relay a message to Palomo that she should call him. (RP 130, 1054-56) On one such visit, Palomo told Anderson that Saylor did not want Mendes to come to the house anymore. (RP 1063, 1071-72)

Palomo testified that she saw Mendes on Christmas Eve of 2007, and told him to stop coming to Saylor's home because she wanted to end their relationship. (RP 182) But at the same time, Palomo accepted Mendes' invitation to dine at his sister's house, and the next day Palomo picked up Mendes and they shared a "nice" Christmas dinner at Anderson's home. (RP 183-84, 1057-58) From the way they behaved together, Anderson assumed they were still boyfriend and girlfriend. (RP 1058, 1091)

Soon after, however, someone spray painted derogatory terms on Palomo's car. (RP 188) Palomo believed, but had no

proof, that Mendes did this, and she shared her suspicions with Saylor. (RP 188, 209) From that point on, according to Palomo, Saylor felt some hostility towards Mendes. (RP 187, 212) Saylor even expressed to Palomo a desire to harm Mendes because of this incident, although Palomo never relayed that information to Mendes. (RP 210, 238)

On the night of January 27, 2008, Saylor and Palomo, and friends Michael Paux, Charles Bollinger and McKay Brown were all staying at Saylor's Tacoma home. (RP 265, 322, 418) All five were regular methamphetamine users, and all had ingested the substance that either that day or in the days before. (RP 314, 324, 263-64, 418, 419-20)

Shortly before midnight, Saylor and Palomo were in their bedroom watching television, Bollinger and Brown were asleep on couches in the living room, and Paux was asleep in an attic bedroom. (RP 261, 322, 324, 422) Bollinger later awoke to the sound of tapping on the front door. (RP 423) He opened the door, and saw Mendes standing outside. (RP 423) Bollinger knew Mendes, and they had smoked methamphetamine together in the past. (RP 424) The two men agreed that they would drive together to a gas station and that Bollinger would pay for Mendes' gas in

exchange for Mendes sharing some methamphetamine with him when they returned. (RP 445, 474)

When they returned, Mendes showed Bollinger a gun that he had stored in the console of the car. (RP 445) Mendes told Bollinger that he had the gun for protection. (RP 450) Bollinger was concerned about being in the vicinity of a gun, since he was a convicted felon and therefore prohibited from possessing a firearm. (RP 477-78)

Bollinger also testified that he told Mendes that he thought it unwise for Mendes to be there because Saylor was upset with him about the spray painting of Palomo's car. (RP 446) Mendes told Bollinger that he was not responsible for spray painting Palomo's car, and he simply wanted to explain this to Saylor. (RP 446) Bollinger did not tell Mendes that he could not come into the house and did not tell Mendes to leave. (RP 428)

Bollinger testified that the front door to the house was locked, so he knocked and was able to rouse Brown, who opened the door and let him in. (RP 451, 452) According to Bollinger, Mendes followed him into the house, and the men chatted amicably. (RP 452) Mendes also produced a pipe and asked the men if they wanted to smoke his methamphetamine. (RP 454, 474-

75, 479)

Because Saylor had earlier 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 133, 427, 452) Saylor immediately jumped out of bed and began getting dressed, which included putting on his heavy work boots. (RP 133, 190, 429, 456, 481)

Bollinger and Palomo immediately heard the sounds of a scuffle coming from the living room. (RP 133, 481) Brown, who testified that he had been sleeping up to this point, said he awoke at that moment to a "ruckus." (RP 324) He saw that Saylor had Mendes pinned up against the door and was hitting him repeatedly. (RP 325) Mendes was trying unsuccessfully to fight back, and Saylor clearly had the upper hand. (RP 325-26, 364) Brown saw Mendes break free, then Mendes pulled a gun out of his jacket pocket and pointed it at Saylor. (RP 326-28, 365)

When Bollinger re-entered the living room, he saw Mendes standing in the corner of the living room pointing a gun at Saylor. (RP 430) Saylor was standing in front of the door. (RP 381) Bollinger, Brown and Palomo heard Mendes say something like, "I could smoke you." (RP 133, 328, 431)

Saylor yelled at Mendes to leave, then ducked out of the room. (RP 328, 433) As soon as Saylor left the room, Mendes dropped the gun to his side and started to move toward the front door. (RP 382, 487) Mendes paused because he thought he dropped his methamphetamine, but Bollinger told Mendes to go and started pushing him toward the front door. (RP 433, 434, 488) Bollinger and Brown both testified that Mendes was cooperating and trying to leave. (RP 329, 331, 433, 487) However, because Mendes has serious hip problems as a result of a previous fall, he was not able to move quickly. (RP 210-11, 434, 482)

Bollinger kept pushing Mendes toward the door because he was concerned about what Saylor might do. (RP 488) Meanwhile, 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 133, 218, 221)

Bollinger and Brown testified that Mendes got to the front door, pushed it open and stepped outside onto the porch. (RP 329, 331, 332, 333, 434-35) At that moment, the men saw Saylor, holding a baseball bat over his head, running at top speed toward Mendes. (RP 333, 347, 372, 435) Bollinger moved aside because he felt sure that Saylor was going to hit Mendes with the bat. (RP

489) As Saylor approached, Mendes fired the gun. (RP 333, 435, 436) Saylor fell to the ground, and Mendes ran to his car and drove away. (RP 335, 343)

When police arrived, they observed Saylor lying on the floor just inside the front door. (RP 397, 598, 846) They saw a baseball bat lying on the floor near Saylor's body, and found an empty shell casing outside the house near the front steps. (RP 403, 643, 651) Paramedics also arrived, but were unable to revive Saylor. (RP 852) He died from a gunshot wound to the upper-left side of his chest. (RP 902) Tests done by the medical examiner on Saylor's urine showed the presence of amphetamine, methamphetamine, and marijuana. (RP 977)

James Cardey was an acquaintance of Mendes', and also a regular methamphetamine user. (RP 518, 559) He and Mendes had made arrangements for Mendes to fix one of Cardey's cars. (RP 516-17, 518) Earlier on the day of the incident, Mendes was at Cardey's home and likely saw a gun from Cardey's collection sitting on his coffee table. (RP 531-32) According to Cardey, after Mendes left he placed a gun under his couch cushions and went to take a shower. (RP 532, 578) When Cardey returned, the gun was missing. (RP 532)

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 533) But Mendes testified that Cardey gave him the gun for protection when Mendes confronted people they both believed had stolen one of Cardey's cars. (RP 1145, 1234-35)

Markings on a shell casing found outside Saylor's home matched Cardey's gun. (RP 1018) 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 541-43)

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 1129-30) Palomo also helped him pawn a laptop computer, and on the afternoon of January 27, 2008, Mendes came to Saylor's house because he needed Palomo's help retrieving it from the pawn shop. (RP 1131, 1132) When Mendes arrived that day, Brown came outside and told him that Palomo and Saylor were sleeping, and that he should come back later. (RP 1132) If Saylor was angry with Mendes that day, Brown did not mention this fact to Mendes, and Mendes did not know that he was

not welcome there. (RP 1201, 1256)

Mendes returned around midnight, with plans to smoke methamphetamine and make a plan to retrieve the laptop. (RP 1134) When Bollinger answered the door, he told Mendes that Saylor was angry about Palomo's car. (RP 1134) But Mendes could not see any paint on Palomo's car, so he did not think there was a problem anymore. (RP 1134-35)

When Bollinger and Mendes returned from their drive, Mendes sat down on one of the couches and began preparing the methamphetamine so that the men could smoke it. (RP 1136-37) Bollinger took one "hit," then went to tell Saylor that Mendes was there to talk. (RP 1137) Only then did Brown mention that Mendes should leave because Saylor wanted to beat him up. (RP 1138, 1256)

Mendes testified that he stood up and began gathering his belongings, when suddenly he felt Saylor kick him from behind. (RP 1138) Mendes fell over onto the coffee table, and Saylor continued to hit and kick him. (RP 1139)

Mendes testified that he was scared of Saylor, so he pulled out the gun and told Saylor that he would "smoke" him if he did not let him leave. (RP 1139) He said that he wanted to leave but had

trouble walking because of pain in his hips, so Bollinger helped him toward the door. (RP 1140, 1141) As he stepped outside, he saw Saylor running towards him, holding a baseball bat over his head (RP 1141-42) Mendes was sure that Saylor was going to kill him with the baseball bat, so he “just reacted” instantly and shot him. (RP 1142, 1312-13)

IV. ARGUMENT & AUTHORITIES

A. 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).

1. *The State Failed to Prove that Mendes Was the First Aggressor or that the Force Used By Saylor to Expel Mendes Was Reasonable*

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). The trial court instructed the jury on this "first aggressor" rule:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense 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 91; Jury Instruction 20).

The State argued that Mendes' act of showing up uninvited at Saylor's home could have been sufficient to provoke a violent and belligerent response from Saylor, and that Mendes therefore cannot claim self defense to either the predicate assault (pointing the gun at Saylor) or to the ultimate shooting of Saylor. (RP 1346-47, 1353-55, 1359-60, 1400) But the evidence does not support the State's theory.

First, the State did not establish that Mendes knew that his presence at the house would provoke such a belligerent and assaultive response. Mendes received mixed messages from Palomo, who at first told him to stay away, then changed her mind and spent a happy Christmas with Mendes and his family. (RP 182, 183-84, 1057-58) Mendes arrived at Saylor's home on January 27 offering to share his methamphetamine with anyone who wanted it. (RP 454, 474-75)

During his drive with Bollinger, Mendes did not say anything indicating he understood how angry Saylor was at him. (RP 466) Palomo never told Mendes that Saylor was angry with him. (RP 210, 238) And Mendes testified he did not know Saylor was angry with him and did not know he was unwelcome in Saylor's home. (RP 1201, 1256)

Even the people closest to Saylor, who were living in his home and saw him every day, were surprised at the intensity of Saylor's reaction to Mendes' presence. (CP 210, 345-46, 453, 471, 475, 480) If they could not have foreseen Saylor's response, how could Mendes have foreseen it?

Second, "the 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 912.⁵ But 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.

None of the witnesses ever heard Mendes speak or act in a hostile or threatening manner towards Saylor. (RP 213, 475) Bollinger testified that Mendes was calm when he arrived at the home and that Mendes told him that he simply wanted to talk to Saylor and explain that he had not spray-painted Palomo's car. (RP 425, 428, 446)

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, then ran into the living room and immediately began kicking and punching Mendes. (RP 133, 429,

⁵ 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.

481, 1138) Brown testified that Saylor was clearly overpowering Mendes. (RP 325, 326, 364) It was only in response to this attack that Mendes pulled out the gun and pointed it at Saylor.

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. No reasonable juror could find that Saylor believed he was "in danger of imminent harm" when he ran to the living room and attacked Mendes. See Riley, 137 Wn.2d at 912. Saylor was simply angry that Mendes was there and was eager to beat him up.

To call Mendes a first aggressor under these circumstances would mean that an individual can use physical force to respond to behavior that is merely obnoxious or annoying. It means that an individual now has the right to use physical force simply because they are angry at another person, and that the other person loses the right to defend him or herself from such an attack. This is not the proper use of the first aggressor doctrine, and would set a risky precedent.

Next, the State also argued that Saylor, as the homeowner, had no duty to retreat and had the right to defend himself and his property from the intruder Mendes. (RP 1354-55; CP 94) While it

is true that an owner of property may lawfully use reasonable force to expel an unwanted intruder, the force used may not be “more than is necessary” to prevent a malicious trespass. RCW 9A.16.020(3); State v. Bland, 128 Wn. App. 511, 513 n. 1, 116 P.3d 428 (2005). And the use of excessive force by the homeowner gives the trespasser the privilege of self-defense. 16 David K. DeWolf & Keller W. Allen, WASH. PRAC., TORT LAW AND PRACTICE § 13.45 (3rd ed.2011) (citing RESTATEMENT (SECOND) OF TORTS § 82 (1965)).

In this case, Saylor used more force than necessary to expel Mendes. He immediately began kicking and punching Mendes, without first determining whether Mendes would leave peacefully. And Mendes was in fact leaving the house when Saylor rushed at him with a raised baseball bat. It was not necessary for Saylor to resort to force to defend himself or his property. Saylor's force was not reasonable under the circumstances, and does not negate Mendes' claim that he acted in self-defense.

The evidence shows that Mendes' presence was an annoyance to Saylor, not a threat. Mendes' act of showing up at Saylor's home was not an act worthy of a violent response. Accordingly, the State did not disprove Mendes' self-defense claim

by establishing that he was a first aggressor.

2. *The State Failed to Disprove that Mendes Acted in Self-Defense When He Shot Saylor*

Even if Mendes was the first aggressor, 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). In this case, the uncontested evidence shows that Mendes 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. (RP 133, 328, 331, 433, 435) Mendes did not pursue Saylor, but instead tried to leave the house. (RP 217, 433, 487)

Mendes had already stepped outside, and was therefore clearly withdrawing from the altercation, when Saylor rushed towards him holding a bat over his head. (RP 333, 372, 382, 434-35, 1141) All of the witnesses, including Palomo who was in the bedroom with Saylor, realized that Mendes was trying to leave the

house. (RP 134, 221, 329, 331, 433, 487) And all of the witnesses believed Saylor was going to strike Mendes with the baseball bat. (RP 218, 221, 488, 489, 1142)

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' murder conviction and related firearm sentence enhancement should be reversed and dismissed.

B. THE TRIAL COURT'S REFUSAL TO RULE ON WHETHER THE EVIDENCE PRESENTED DURING THE STATE'S CASE-IN-CHIEF ENTITLED MENDES TO A SELF-DEFENSE INSTRUCTION COMPELLED MENDES TO WAIVE HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY AS A WITNESS IN HIS OWN CRIMINAL TRIAL

At the close of the State's case-in-chief, Mendes' counsel asked the court to make a preliminary ruling on whether enough evidence had been presented through the State's witnesses to warrant a self-defense instruction. (RP 1104-05, 1107-09) Counsel explained that Mendes did not wish to testify unless the court found that more testimony was necessary on this issue. (RP

1108-09)

The State objected to the request as “completely inappropriate” because, in the prosecutor’s opinion, that decision could not be made until after all of the evidence was presented. (RP 1106-07) The State argued that the court could not rule on whether the State had established the elements of the charged crimes, so the court could not rule on whether the evidence supported giving an instruction either. (RP 1105-06) The trial court agreed, and declined to rule on Mendes’ request because “jury instructions can only be, in my opinion, reviewed and granted after the entire case is over and the Court has all of the evidence before it.” (CP 1109-10)

Based on the court’s decision, Mendes took the stand and testified on his own behalf. (RP 1110-11, 1117) Before he did, defense counsel informed the trial court that his decision to testify was directly influenced by the court’s ruling. (RP 1110-11)

The State and the court were wrong. First, the criminal procedure court rules do not mandate when jury instructions may and may not be ruled upon. The court rules merely indicate that proposed instructions must be provided to the court when a case is called for trial, and objections must be taken before instructing the

jury. CrR 6.15(a), 6.15(c). There is nothing in the court rules that forbids a trial court from ruling on this sort of motion. See State v. Maurer, 34 Wn. App. 573, 576, 663 P.2d 152 (1983) (“Although it is true that no statute or rule authorizes the specific action the court took here, it does not follow that the court was powerless to act.”).

Second, in a criminal trial a defendant may challenge the sufficiency of the evidence at several points throughout the proceeding, including before trial and at the end of the State's case in chief. See State v. Knapstad, 107 Wn.2d 346, 356–57, 729 P.2d 48 (1986); State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). And the court may rule on these challenges and even dismiss a charge at the close of the State's case if the State fails to present sufficient evidence to establish the elements of a charged crime. See Knapstad, 107 Wn.2d at 352; Maurer, 34 Wn. App. at 576-77. Accordingly, asking the trial court to rule on whether the evidence presented in the State's case is sufficient to send the question of self-defense to the jury is not “completely inappropriate,” as it similarly requires the trial court to weigh the sufficiency of the evidence before proceeding with the next phase of the trial.

By refusing to rule on Mendes' motion, the trial court forced

Mendes to waive his constitutional right not to testify as a witness in his own criminal trial. The Fifth Amendment to the United States Constitution states in part that “[no person] shall be compelled in any criminal case to be a witness against himself[.]” Our State constitution contains a similar provision, which states in part that “[n]o person shall be compelled in any criminal case to give evidence against himself [.]” Wash. Const. art. 1, § 9.⁶ Accordingly, “an accused may not be compelled to reveal, either directly or indirectly, ‘his knowledge of the facts relating him to the offense or from having to share his thoughts and beliefs with the Government.’” City of Seattle v. Stalsbrot, 138 Wn.2d 227, 233, 978 P.2d 1059 (1999) (quoting Pennsylvania v. Muniz, 496 U.S. 582, 595, 110 S. Ct. 2638, 110 L. Ed. 2d 1990)).

This right protects a defendant from being compelled to provide evidence of a “testimonial or communicative nature,” or from testifying against himself. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). The term “compelled” has been held to connote that the accused was forced to testify against his will, and that testimony was exacted under

⁶ Our Supreme Court has held that the two provisions should be given the same interpretation. See State v. Moore, 79 Wn.2d 51, 483 P.2d 630 (1971).

compulsion and over his objection. State v. Van Auken, 77 Wn.2d 136, 460 P.2d 277 (1969).

Mendes told the court that his testimony would be given over his “standing objection” and that his decision to testify was “based on the court’s ruling.” (RP 1111) The court’s refusal to rule on his motion, and its refusal to say whether the evidence presented through the State’s case would entitle Mendes to a self-defense instruction, forced Mendes to waive his constitutional rights and compelled him to testify against his will. Mendes was forced not only to reveal facts relating to the charges against him, but was thereby forced to submit to cross-examination by the State and to the introduction of his prejudicial criminal history. This violation of Mendes’ important constitutional right requires that his convictions be reversed.

V. CONCLUSION

The evidence presented by the State did not disprove that Mendes drew a gun in self-defense in order to stop Saylor’s attack, nor did it disprove that Mendes shot Saylor in self-defense when Saylor threatened to attack him with a baseball bat. Accordingly, Mendes’ second degree murder conviction should be reversed. Furthermore, the trial court’s refusal to rule on whether the

evidence presented during the State's case-in-chief entitled Mendes to a self-defense instruction compelled Mendes to waive his constitutional right not to testify as a witness in his own criminal trial. Mendes' convictions should also be reversed on this alternative ground.

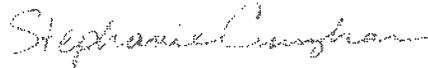
DATED: January 30, 2012



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Ronald Melvin Mendes

CERTIFICATE OF MAILING

I certify that on 01/30/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald M. Mendes, DOC# 762933, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

January 30, 2012 - 9:01 AM

Transmittal Letter

Document Uploaded: 421615-Appellant's Brief.pdf

Case Name: State v. Ronald Melvin Mendes

Court of Appeals Case Number: 42161-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: S C Cunningham - Email: **sccattorney@yahoo.com**

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us