

No. 88945-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RONALD MELVIN MENDES,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 42161-5-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 08-1-00527-
The Honorable John R. Hickman, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Ronald Melvin Mendes, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division II, case number 42161-5-II, which was filed on May 14, 2013. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. 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?
2. 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?
3. Pro se issues: did the prosecutor commit misconduct; should the trial court have severed the murder and witness tampering charges; should the trial court have given a more complete revival of self-defense instruction; did the State violate Mendez's double jeopardy protections when it tried him for second degree murder on two theories; and did the

trial court close the courtroom thereby violating Mendez's right to a public trial?

IV. 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)

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)

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

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).

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)

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) Mendez appealed. (CP 145) The Court of Appeals affirmed his conviction in an unpublished opinion.

B. SUBSTANTIVE FACTS

Ronald Mendes met Lori Palomo in October of 2007, when Palomo was temporarily estranged from her long-time boyfriend,

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

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)

V. ARGUMENT & AUTHORITIES

The issues raised by Mendez’s petition should be addressed by this Court because the Court of Appeals’ decision conflicts with settled case law of the Court of Appeals, this Court and of the United State’s Supreme Court. RAP 13.4(b)(1) and (2). The Court

of Appeals ignored the evidence and misapplied or ignored relevant, binding case law of this Court and the Court of Appeals.

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).

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). However, 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, § 9.⁵ 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. Stalsbroten, 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 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

⁵ This 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).

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 in 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.

C. *PRO SE* ISSUES

In his *pro se* Statement of Additional Grounds for Review, Mendez argued that the prosecutor committed misconduct; that the trial court should have severed the murder and witness tampering charges; that the trial court should have given a more complete revival of self-defense instruction; that the State violated his double jeopardy protections when it tried him for second degree murder on two theories; and that the court improperly closed the courtroom to the public. The arguments and authorities pertaining to these issues are contained in Mendez's Statement of Additional Grounds, which is hereby incorporated by reference. The Court of Appeals rejected these arguments. (Opinion at 11-12) This Court should

review the *pro se* issues as well.

VI. 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. This Court should accept review and reverse Mendes' convictions.

DATED: June 10, 2013



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

CERTIFICATE OF MAILING

I certify that on 06/10/2013, 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, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, WA 99001-2049.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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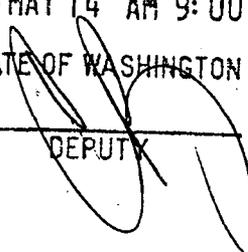
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STATE OF WASHINGTON,

Respondent,

v.

RONALD MELVIN MENDES aka RONALD
JOSEPH MENDES,

Appellant.

No. 42161-5-II

UNPUBLISHED OPINION

JOHANSON, A.C.J. — Ronald Melvin Mendes (aka Ronald Joseph Mendes) appeals his second degree felony murder conviction. He claims that the evidence is insufficient to prove that he acted as a first aggressor and that the victim used reasonable force in attempting to expel Mendes. He also claims that the State failed to disprove that he shot the victim in self-defense and that the trial court violated his right to silence by compelling his testimony. In his statement of additional grounds (SAG),¹ Mendes claims prosecutorial misconduct, failure to sever the murder charge from the other charges, jury instruction errors, double jeopardy, and public trial errors. We affirm because the State presented sufficient evidence to support the jury's felony murder conviction, and Mendes fails to demonstrate prejudicial error.

¹ RAP 10.10.

FACTS

In October 2007, Lori Palomo and her boyfriend, Danny Saylor, broke off their long-term live-in relationship. During this break, Palomo met Mendes, and they engaged in a three week intimate relationship that ended when Palomo returned to live with Saylor. Although Palomo lived with Saylor, Mendes occasionally came to Saylor's house to see Palomo.

One night, while Palomo's car was parked at Saylor's house, someone vandalized it; Palomo and Saylor suspected Mendes was the vandal. Thereafter, Saylor did not want Mendes to come over. Palomo asked that Mendes not come around Saylor's house anymore. Judy Anderson, Mendes's stepsister, also cautioned Mendes multiple times not to go there.

In January 2008, despite these warnings, Mendes returned to Saylor's house armed with a loaded .45 caliber gun. Chuck Bollinger, one of two temporary house guests staying in Saylor's living room, met Mendes at the front door. Bollinger advised Mendes that he should not be at Saylor's house; Mendes and Bollinger then went to a gas station where Mendes showed Bollinger the gun. After fueling Mendes's vehicle, they returned to Saylor's house, and Mendes asked Bollinger to wake Saylor so that Mendes could discuss the vandalism incident with Saylor.

Though hesitant to wake Saylor, Bollinger recalled that Saylor instructed Bollinger to wake him if Mendes showed up. Bollinger told Mendes not to bring the gun inside Saylor's house. As Bollinger approached Saylor's front door, Mendes went to the trunk of his vehicle—where Bollinger assumed Mendes would leave the gun. When McKay Brown, Saylor's other house guest, opened the front door to let in Bollinger, Mendes followed Bollinger inside, uninvited. Mendes again insisted that Bollinger wake Saylor, so Bollinger went to Saylor's

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bedroom to summon him. While Bollinger went to wake Saylor, Brown again advised Mendes to leave. Mendes did not leave.

Learning that Mendes was in his home, Saylor quickly dressed and went to the front room. A brief "ruckus" occurred, in which Saylor pushed Mendes against the front door and the two swung at each other. 7 Verbatim Report of Proceedings (VRP) at 324. Then, the fighting stopped; and moments later, Mendes aimed the gun at Saylor, and said, "I'll smoke you, mother fucker." 8 VRP at 456.

Saylor responded to the threat by ordering Mendes to leave. Saylor left the front room to find his baseball bat, and Bollinger yelled at Mendes again to leave. Saylor spent up to a couple minutes searching in the bedroom, kitchen, and then the laundry room, where he finally found the bat.

As Saylor searched for the bat, Mendes continued to hold the loaded firearm, and Bollinger tried "rushing" Mendes out the door. 7 VRP at 433. When Saylor returned to the front room with his bat in the air, Bollinger had Mendes near the front doorway. Mendes saw Saylor, who said nothing as he approached, and Mendes immediately aimed the firearm and shot Saylor in the chest, inside the front room doorway. Saylor never swung the bat, nor did he say he was going to swing it. He died within seconds of being shot.

The State charged Mendes with second degree intentional murder,² second degree felony

² RCW 9A.32.050(1)(a).

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murder,³ and four counts of witness tampering.⁴ Before retrial,⁵ the trial court ordered the parties and witnesses not to reference the earlier “trial,” to prevent Mendes suffering any unfair prejudice. 2 VRP at 55. After the State’s case, Mendes asked the trial court whether he would be entitled to a self-defense instruction based on the State’s evidence alone. The trial court declined to decide the motion until both sides rested. Mendes testified that while Saylor searched for the bat, he tried to withdraw from the situation and leave Saylor’s property; but, chronic leg and hip pain prevented his moving quickly enough to walk from Saylor’s front room to his car parked 20 feet away.

Mendes and the State agreed on all but one jury instruction. They disagreed on an instruction relating to the duty to retreat and to defend against an attack. The trial court did give the jury a self-defense instruction. The jury acquitted Mendes of second degree intentional murder. It convicted him of second degree felony murder, the firearm enhancement, and four counts of witness tampering. Mendes appeals the felony murder conviction.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Mendes first argues that the State offered insufficient evidence to prove second degree murder. We disagree. When we review the evidence in the light most favorable to the jury’s

³ RCW 9A.32.050(1)(b). The second degree murder charges included firearm enhancements.

⁴ RCW 9A.72.120.

⁵ In 2010, Division One of this court reversed Mendes’s conviction and remanded the case for retrial. *State v. Mendes*, noted at 156 Wn. App. 1059 (2010).

verdict, there is sufficient evidence to support the second degree felony murder conviction.

A. Standard of Review

We review insufficient evidence claims for whether, when viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Witherspoon*, 171 Wn. App. 271, 298, 286 P.3d 996 (2012). Sufficiency challenges admit the truth of the State's evidence and all reasonable inferences drawn from it. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

The trier of fact makes credibility determinations, and we will not review those determinations. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We also defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

B. First Aggressor

First, Mendes argues that the State failed to prove that he acted as the first aggressor. We disagree because, viewing the evidence in the light most favorable to the jury's verdict, Mendes entered Saylor's house unwelcomed, then he pointed a gun and threatened to shoot the unarmed Saylor.

Palomo and Anderson cautioned Mendes that he was not welcome at Saylor's home. Knowing he was not welcome, Mendes nonetheless went to Saylor's house near midnight, where Bollinger again reminded Mendes that he was not welcome and that Saylor was angry with him. Bollinger advised Mendes to leave and specifically told him not to bring the loaded firearm into

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the house; but still, Mendes entered the house, uninvited and armed, and he demanded that Bollinger wake Saylor.

Brown testified that once Bollinger summoned Saylor to the front room, the two fought and Saylor pushed Mendes against the front door, where the two swung at each other. According to Brown, the two then stopped fighting, and Mendes aimed the gun at Saylor, threatened to “smoke” him, and called him derogatory names. 7 VRP at 328. It was only after this threat of deadly force, that Saylor armed himself with a baseball bat.

Viewing the evidence in a light most favorable to the jury’s verdict, any rational trier of fact could have found that Mendes acted as a first aggressor by precipitating a fight. Accordingly, sufficient credible evidence demonstrated that Mendes’s conduct precipitated the fight by acting as the first aggressor. *See Witherspoon*, 171 Wn. App. at 298.

C. Reasonable Force

Mendes next claims that the State failed to prove that Saylor used reasonable force to expel Mendes from Saylor’s home. We disagree. Any rational jury could have found that because Mendes threatened deadly force, Saylor reasonably armed himself with a bat.

When a person is assaulted in a place where he has a right to be, he has no duty to retreat. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Under state law:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

.....
(3) Whenever used by a party about to be injured . . . or a malicious trespass . . . in case the force is not more than is necessary.

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RCW 9A.16.020(3). And a person is justified in using reasonable force in self-defense when facing the appearance of imminent danger. *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000).

After learning that Mendes was in his home, uninvited in the middle of the night, Saylor approached Mendes and the two fought briefly before stopping. Mendes then pulled a gun and threatened Saylor, who ordered Mendes to leave. Witnesses said Saylor left the front room for anywhere between 10 seconds to “a couple minutes.” 7 VRP at 334. During this time, Brown and Bollinger reiterated Saylor’s order that Mendes leave, and Brown added that Mendes should drop his gun. Mendes did not drop his gun and surrender; instead, when he saw Saylor return to the front room with a bat—apparently to forcibly eject Mendes—Mendes raised his weapon and fired.

Saylor had no duty to retreat. Viewing this evidence in the light most favorable to the jury’s verdict, any rational trier of fact could have found that Saylor’s use of a baseball bat was reasonable force to expel the armed and uninvited Mendes from his house in the middle of the night. Accordingly, there was sufficient evidence from which any rational jury could conclude that Saylor used reasonable force. *See Witherspoon*, 171 Wn. App. at 298.

D. Disprove Self-Defense

Next, Mendes claims that the State failed to disprove that Mendes shot Saylor in self-defense after withdrawing from the altercation. Again, we reject his argument.

A defendant who initially provokes a victim to act with force cannot claim self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Specifically, an aggressor who provoked the altercation in which he killed another person, cannot successfully invoke self-

defense to justify or excuse the homicide, unless he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973).

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990), is instructive. Dennison was burglarizing an apartment in a house while armed with a gun. *Dennison*, 115 Wn.2d at 612-13. A resident caught Dennison in the home, and Dennison moved to the front porch where he told the resident that he had not taken anything, that "it was all over," and that he wanted to leave. *Dennison*, 115 Wn.2d at 613. The resident then shot at Dennison, who returned fire, eventually killing the resident. *Dennison*, 115 Wn.2d at 613.

At trial, Dennison argued that he had withdrawn from being the aggressor, reviving his self-defense claim. *Dennison*, 115 Wn.2d at 617. But our Supreme Court rejected this argument, holding that if Dennison had truly intended to withdraw from the burglary and communicated his withdrawal to the decedent, he would have dropped his gun or surrendered. *Dennison*, 115 Wn.2d at 618. Because Dennison still held his gun, although pointed to the ground, this action did not clearly manifest a good faith intention to withdraw from a burglary or remove the decedent's fear. *Dennison*, 115 Wn.2d at 618.

At the outset, it is important to note that the Supreme Court held that Dennison was not even entitled to assert self-defense, *Dennison*, 115 Wn.2d at 616; but here, however, the trial court instructed the jury regarding self-defense. Instead, Mendes asserts that the State did not sufficiently disprove that he acted in self-defense. Although Mendes states that after he aimed his gun and threatened to kill Saylor, he withdrew from the altercation and attempted to leave

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Saylor's house, the jury was free to reject those facts. Like *Dennison*, Mendes did not demonstrate good-faith intent to withdraw; he did not drop his weapon or unload its ammunition. He continued to hold the loaded gun in his shooting hand. Mendes did not communicate his intent to withdraw or surrender in any way. And though he claimed to withdraw, Mendes fired at Saylor the instant he next saw him. Viewing this evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found that Mendes did not express an intent to withdraw in good faith; accordingly, the State offered sufficient evidence to disprove Mendes's self-defense claim. See *Witherspoon*, 171 Wn. App. at 298.

II. MENDES'S RIGHT TO SILENCE

Mendes next argues that the trial court improperly compelled him to testify when it declined to rule whether the State's evidence alone entitled him to a self-defense instruction. We reject this argument for two reasons. First, Mendes is not entitled to an advisory ruling on jury instructions before the close of all the evidence. Second, Mendes's decision to testify was a voluntary and tactical decision, and Mendes offers no evidence that he was forced or compelled to testify. Accordingly, Mendes's arguments fail.

Although CrR 6.15(a) tells us when parties must offer proposed jury instructions, neither this rule nor other court rules tell us whether a court is required to decide if a defendant is entitled to a self-defense instruction at the close of the State's case. Mendes provides no authority and we have found none that would require a court to issue a ruling regarding self-defense instructions before the close of all the evidence. We therefore reject this contention.

In a related argument, Mendes claims that the trial court compelled him to testify because it declined to state at the close of the State's evidence whether he was entitled to a self-defense

instruction. Again, we reject this argument as not well founded. The Fifth Amendment of the federal constitution, and article 1, section 9 of the Washington Constitution protect an accused from being compelled to testify against himself at trial. We interpret these two constitutional provisions the same. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). “Compelled” connotes that the accused was forced to testify against his will or that he offered his testimony under compulsion and over his objection. *State v. Van Auken*, 77 Wn.2d 136, 138, 460 P.2d 277 (1969) (quoting *State v. Jeane*, 35 Wn.2d 423, 433, 213 P.2d 633 (1950)).

In *State v. Foster*, Foster argued that the trial court compelled his testimony when it failed to inform him that it would instruct the jury on second degree negligent assault—had he known, he would not have testified. 91 Wn.2d 466, 472-73, 589 P.2d 789 (1979). Our Supreme Court rejected Foster’s argument noting, “[T]here is no evidence of compulsion to testify in this case; rather, the record reflects that the defendant voluntarily testified in seeking to exculpate himself. Appellant was represented at trial by counsel and made the tactical decision to testify.” *Foster*, 91 Wn.2d at 473.

Here, the trial court did not rule that a self-defense instruction hinged on Mendes testifying. The trial court stated that, if Mendes could provide any authority to support granting an advisory ruling, the trial court would consider offering one. Mendes provided no such authority. Instead, he made the tactical decision to testify, to ensure that he would receive a self-defense instruction. As in *Foster*, here the trial court did not compel a defendant’s testimony because “the defendant voluntarily testified in seeking to exculpate himself.” *Foster*, 91 Wn.2d at 473. Because Mendes cannot demonstrate that the trial court forced him to testify against his

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will, or that he testified under compulsion and over his objection, he fails to demonstrate that the trial court compelled his testimony.

III. STATEMENT OF ADDITIONAL GROUNDS

Mendes raises five additional claims in his SAG: (1) prosecutorial misconduct, (2) failure to sever the murder and witness tampering charges, (3) jury instruction errors, (4) double jeopardy, and (5) public trial errors. These claims are without merit.

First, Mendes claims that the State violated a pretrial order that neither the parties nor their witnesses could refer specifically to Mendes's "prior trial" before the jury. 2 VRP at 55-56. The trial court said they may say "last proceeding" or "last hearing," just not "trial." 12 VRP at 1175. Here, the State said "prior proceeding," not "prior trial." 12 VRP at 1173. Accordingly, Mendes cannot demonstrate prosecutorial misconduct because the State did not err.

Next, Mendes argues that the State erred by denying his motion to sever the witness tampering from the murder charges. Because the record does not demonstrate a timely severance motion, Mendes failed to preserve this issue for appeal.

Mendes also argues that the trial court failed to give a full revived self-defense instruction. Mendes, however, failed to object to this alleged error at trial, and he agreed with and supported the State's proposed revived self-defense instruction. The invited error doctrine precludes a party from setting up an error at trial and then complaining of it on appeal. CrR 6.15(c); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Because Mendes invited this alleged error, he cannot now complain of it on appeal.

Mendes next argues that the State subjected him to double jeopardy when it tried him for second degree murder on two theories—intentional murder and felony murder. But the State

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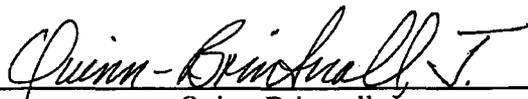
may charge and prosecute a defendant for alternative means of committing the same crime. *State v. Womac*, 160 Wn.2d 643, 660 n.9, 160 P.3d 40 (2007). Here, the State charged Mendes with both intentional murder and felony murder under the second degree murder statute; and, because the jury only convicted Mendes of felony murder, Mendes was never subjected to double jeopardy.

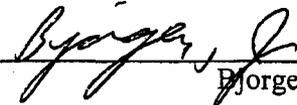
Finally, Mendes argues that the trial court erred in closing the courtroom to visitors during voir dire because the courtroom was too full, violating his public trial rights. His claim, however, involves matters outside the record. The record never mentions the trial court closing the courtroom during voir dire. Accordingly, we are unable to address this issue on direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

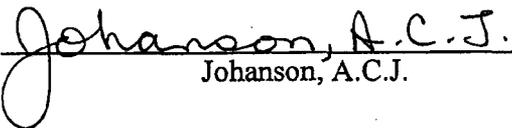
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:


Quinn-Brintnall, J.


Bjorgen, J.


Johanson, A.C.J.