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No.88945-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

RONALD MELVIN MENDES,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

Court of Appeals No. 42161-5-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 08-1-00527-7
The Honorable John R. Hickman, Judge

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ORIGINAL

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I. ISSUE PRESENTED FOR REVIEW

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?

II. 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 Appeals[2] 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

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[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.

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)

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) Division 2 of the Court of Appeals affirmed his conviction in an unpublished opinion. This Court granted review "as to the compelled testimony issue." (See Order dated October 2, 2013)

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[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)

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 lease 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 was the only witness to testify in the defense case. 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)

III. ARGUMENT & AUTHORITIES

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 trial 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.

The Court of Appeals held that because no authority exists

that specifically requires a trial court to make a ruling in these circumstances, the trial court's refusal to do so here was justified. (Opinion at 9) The Court of Appeals failed to see the larger point: 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

[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).

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).

After the court denied Mendes' request, Mendes' counsel told the court:

> [J]ust to preserve the record, I have a standing objection and my objection will also involve a notice to the Court that at this point, decisions made by the defendant are based on the Court's ruling. Those decisions might be different if there was a different ruling, so his decisions at this point are based on this ruling.
>
> And if, in fact, at some subsequent date, it's determined that it was an appropriate motion and it was appropriate to rule on it, then my position is his decisions as to how to proceed in this case tactically could have been different as well.

(RP 1110-11) Despite this, the Court of Appeals held that Mendes made a "voluntary and tactical decision" to testify and that he "offers no evidence he was forced or compelled to testify." (Opinion at 9, 10)

The Court of Appeals relied on part on this Court's decision in State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979). In that

case, Foster was on trial for first degree intentional assault. He testified that he acted in self-defense. The State subsequently proposed an instruction for second degree negligent assault. The trial court included the instruction over Foster's objection, and the jury convicted Foster of second degree assault. 91 Wn.2d at 69-70.

On appeal, Foster argued that that he was not given sufficient notice that the jury would be instructed on the charge of negligent assault, and therefore he was wrongfully led to waive his privilege against self-incrimination. 91 Wn.2d at 472. He argued that he would not have given this testimony had he known that the jury would be instructed on second-degree negligent assault. 91 Wn.2d at 473. This Court rejected Foster's argument, stating:

> [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. We therefore find his Fifth Amendment challenge to be without substantive merit.

91 Wn.2d at 473.

This case is quiet easily distinguishable from Foster. Unlike Foster, Mendes sought clarification on potential jury instructions **before** he chose to testify. Unlike Foster, Mendes expressed on the record, before testifying, that he was influenced by the trial court's

refusal to address his request. And unlike Foster, Mendes was not asking the trial court to exclude an instruction that the State was otherwise entitled to only because it contradicted his version of events. Mendes simply wanted to know if the evidence already presented to the jury met the burden of proof that would entitled him to a self-defense instruction.

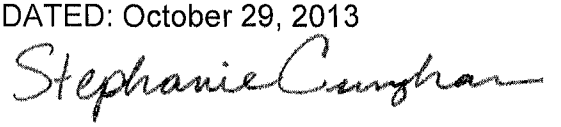
The trial court's refusal to rule on his motion, and its refusal to say whether the evidence presented in the State's case would entitle Mendes to a self-defense instruction, forced Mendes to waive his constitutional rights and compelled him to testify against his will. Mendes was thereby forced not only to reveal facts relating to the charges against him, but was forced to submit to a lengthy and damaging cross-examination by the State. (RP 1162-1315) This included introduction of Mendes' prejudicial criminal history, discussion of his unsavory "drug lifestyle," lengthy questioning by the prosecutor regarding prior inconsistent statements made by Mendes, and the introduction of previously excluded jailhouse phone recordings wherein Mendes discusses the incident without

expressing the same regret he expressed on the stand.[6] (RP 1121, 1122-23, 1175-76, 1182, 1205-07, 1210, 1251; Exhs. 119, 121) The Sate took full advantage of its cross examination to paint Mendes as a dishonest and heartless killer.

IV. CONCLUSION

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 violation of Mendes' important constitutional right requires that his convictions be reversed.

DATED: October 29, 2013



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

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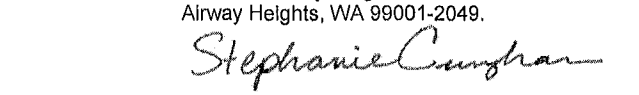
I certify that on 10/29/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald M. Mendes, DOC# 762933, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, WA 99001-2049.



STEPHANIE C. CUNNINGHAM, WSBA #26436

[6] The trial court admitted these recordings over defense objection because it "could be considered impeachment or demeanor evidence that the jury might be entitled to review in terms of his credibility on the stand here today and how he appeared and how he acted in those phone calls." (RP 1206-07)

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The Supplemental Brief of Petitioner is attached for *State v. Ronald Melvin Mendes,* Case No. 88945-7.

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