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

1. Whether the trial court abused its discretion when, before the State had rested, it declined to give the defendant an advisory ruling regarding the sufficiency of the evidence?
2. Whether the trial court abused its discretion where it avoided any involvement in a decision to be made by the defendant, in consultation with his attorney, regarding the conduct of the defendant's case?
3. Where the defendant made a voluntary tactical decision to testify in his defense, whether the trial court compelled him to testify?

B. STATEMENT OF THE CASE.

1. Procedure

On January 29, 2008, the Pierce County Prosecuting Attorney (State) charged the defendant, Ronald Mendes, with one count of murder in the second degree (felony murder) and one count of unlawful possession of a firearm. CP 1-2. The case went to trial. The defendant was convicted. CP 5-6. The murder conviction was reversed and remanded for

a new trial. See, *State v. Mendes*, # 64912-4-I, noted at 156 Wn. App. 1059 (2010)(2010 WL 2816974); CP 18-35.

On April 13, 2011, the trial was assigned to Hon. John Hickman for the retrial. 1RP 3. The State filed a Fourth Amended Information, charging the defendant with murder in the second degree (intentional and felony murder), and four counts of tampering with a witness. CP 43-46.

After hearing all the evidence, the jury found the defendant guilty of Count II – felony murder, and 4 counts of tampering with a witness. CP 108, 133. The defendant moved for a judgment notwithstanding the verdict. CP 120-126. The court denied the motion. 17 RP 1441.

For murder in the second degree, the court sentenced the defendant to 397 months, plus 60 months for the firearm sentencing enhancement. CP 137. The court imposed an exceptional sentence for tampering with a witness. CP 137.

The defendant filed a timely notice of appeal. CP 145. He appealed his murder conviction. He did not appeal his convictions of unlawful possession of a firearm or tampering with a witness. The Court of Appeals affirmed his convictions in *State v. Mendes*, #42161–5–II, noted at 174 Wn. App. 1074 (2013)(2013 WL 2107022). This Court accepted review of the "compelled to testify" issue.

## 2. Facts

Lori Palomo and the victim, Danny Saylor, lived together at the victim's home. 6 RP 117. Palomo was Saylor's girlfriend. 6 RP 118. On

occasion, Palomo and Saylor argued. 6 RP 120. After those arguments, Palomo would leave, only to return a few days later. *Id.*

After an argument in November, 2007, Palomo went to stay with a friend at the home of a person named Tom Espey. 6 RP 125. The defendant was also staying with Espey. *Id.* Palomo and the defendant engaged in a romantic relationship while there. 6 RP 126. This relationship lasted approximately 3 weeks. 6 RP 126. Palomo and the victim then reconciled and she returned to his house. 6 RP 127.

The defendant, still enamored of Palomo, attempted to contact her at the victim's home. 6 RP 128, 11 RP 1054. The defendant's repeated attempts to reunite with Palomo irritated the victim. 6 RP 131. After Palomo returned to the victim, someone vandalized her car, which was parked in front of the victim's house. Someone spray-painted insulting obscenities on Palomo's car. 6 RP 131. Palomo and the victim strongly suspected the defendant of committing this vandalism. 6 RP 131. The victim was angry with the defendant for the repeated contacts and the vandalism. 6 RP 132.

Just before midnight on January 27, 2008, the defendant went to the victim's house. 7 RP 423. He knocked on the door, waking Chuck Bollinger, who was sleeping on a couch in the living room. *Id.* The defendant requested that Bollinger wake the victim. 7 RP 425. The defendant wanted to explain to the victim that the defendant was not the person who had spray-painted Palomo's car. *Id.* Unknown to the

defendant, the victim had requested that Bollinger wake him if the defendant returned. 7 RP 427.

Bollinger advised the defendant that waking the victim was not a good idea, because the victim was angry with the defendant regarding the vandalism. 7 RP 428. The defendant persisted, so Bollinger went to the victim's room. 6 RP 133, 7 RP 429. Indeed, the victim was angry with the defendant. 7 RP 430. The victim hurriedly dressed and went out to the living room to confront the defendant. 7 RP 429.

There, the defendant pointed a gun at the victim and said "I'll smoke you, mother-fucker." 6 RP 133, 7 RP 328, 431. The victim ordered the defendant out of the house. 7 RP 328. The victim left the living room to look for his baseball bat, apparently with the intent to use it to expel the defendant from the house. 6 RP 133.

After the victim left the living room, Bollinger yelled at the defendant to get out of the house. 6 RP 134, 7 RP 433. Bollinger repeated this several times and tried to hustle the defendant out the door. 7 RP 433, 434. McKay Brown also yelled at the defendant to put the gun down and get out. 328, 331.

The defendant moved toward the door, gun in hand. 7 RP 332. As the defendant slowly stepped through the front door, the victim ran out of the kitchen with the bat. 7 RP 331, 434. At that point, the defendant pointed the gun and shot the victim. 7 RP 333, 435, 458.

The bullet struck the victim in the upper left chest. 10 RP 905. The bullet tore a large hole in the victim's lung and the left ventricle of his heart. 10 RP 906. He died within minutes. 8 RP 598, 10 RP 849.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHERE IT AVOIDED ANY INVOLVMENT IN THE DEFENDANT'S DECISION WHETHER TO TESTIFY.

A criminal defendant has a nearly absolute constitutional right to testify on his or her own behalf. *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999); *cf.*, *State v. Chapple*, 145 Wn.2d 310, 328, 36 P.3d 1025 (2001). At the federal level, the defendant's right to testify come from the Fifth, Sixth, and Fourteenth Amendments. *Id.* In Washington, a criminal defendant's "right to testify in his own behalf" is explicitly protected under State Constitution Art. 1, §22. This right is "fundamental". *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Only the defendant has the authority to decide whether or not to testify. *Id.*

The Washington Supreme Court has pointed out more than once that a discussion between the trial court and defendant regarding the right to testify might be inappropriate, or at least misconstrued. In *Personal Restraint of Lord*, the Court warned that a detailed colloquy could intrude into the attorney-client relationship protected by the Sixth Amendment

and might also appear to encourage the defendant one way or the other to testify or to decline. See, *In re Personal Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994)(citing *United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir.1985), *cert. denied*, 474 U.S. 1084, 106 S. Ct. 858, 88 L.Ed.2d 897 (1986)). The Court noted it is counsel's responsibility, not the judge's, to advise the defendant regarding such a decision. *Id.*

In *Thomas*, *supra*, the Supreme Court quoted *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995), again warning trial courts to avoid even the appearance of advising or advocating regarding the defendant's decision:

[t]he fact that a criminal defendant, depending on the facts and circumstances of the case, reasonably could choose either to testify or not to testify, necessarily means the determination of whether the defendant will testify is an important part of trial strategy best left to the defendant and counsel without the intrusion of the trial court, as that intrusion may have the unintended effect of swaying the defendant one way or the other.

128 Wn. 2d at 560.

One of the principal reasons that the trial court should refrain from so advising is that there could be tactical reasons, unknown to the judge, that would make it inappropriate for the judge to insert himself into the relationship between client and counsel. See, *State v. Russ*, 93 Wn. App. 241, 969 P.2d 106 (1998). A defendant's decision whether or not to testify

is likely based on a number of factors outside the record, including the strength of the State's case, the court's earlier rulings concerning the inadmissibility of evidence, the strength and clarity of the defendant's account, risks of impeachment with prior convictions or otherwise, and potential defense witnesses or evidence, other than the defendant. Because defense counsel and a defendant discuss these matters outside the record, if the defendant wishes to challenge the decision, often the proper remedy is to bring an independent proceeding by way of personal restraint petition under RAP 16.3. Because the Court has a strong presumption that counsel provided effective assistance, the Court may presume, on appeal, that defense counsel fully advised the defendant of these issues before the defendant decided to testify. *See, State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

In *United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir.1985), cited in *Lord, supra*, the defendant was charged with an international fraud scheme. *Id.*, at 633. Her defense was one of general denial and questioning the credibility of the government witnesses. *Id.*, at 636. At the close of the government's case, Goodwin's attorney told the trial judge that his client did not intend to take the stand, and asked that Goodwin affirm that decision on the record. Outside the presence of the jury, the trial judge asked the defendant whether she had indeed decided not to testify. Goodwin vacillated. In an effort to advise or guide the defendant, the court engaged in a detailed colloquy. 770 F. 2d at 636.

*Goodwin* is an example of a trial court going too far in the direction of assuming the advisory role reserved for defense counsel. The judge discussed and opined regarding the evidence and likelihood of acquittal at the end of the government's case. After listening to the judge, Goodwin testified, against the advice of her attorney. She was convicted. Although strongly disapproving of the trial court's action, ultimately the Court of Appeals held that the defendant's will was not overborne, and that the decision to testify was her own. 770 F.2d at 637.

As illustrated by *Goodwin* and Washington cases citing it, trial courts may, in their discretion, advise a defendant or defense counsel regarding the defendant's rights. However, appellate courts are unanimous in their criticism and strongly advising against such action.

Here, while the trial court was unaware of caselaw that would permit or bar giving such an advisory opinion (12 RP 1110), the court exercised its discretion in declining to do so:

But I'm going to respectfully decline to make a ruling on whether or not a certain instruction is warranted at the end of the State's case 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. I'm not going to make what would be the equivalent of a summary judgment at this time saying as a matter of law that the defense is entitled to a self-defense instruction. Until this case is entirely over with, this Court still considers it a material issue of fact that is still on the table as to whether or not a self-defense instruction is warranted.

It may very well be that I will grant a self-defense instruction whether the defendant takes the stand or not, but I don't think it's proper or warranted to make that decision until the case has concluded.

(12 RP 1109-1110). The trial court did not abuse its discretion. It wisely declined to give an advisory ruling.

2. THE TRIAL COURT DID NOT DEPRIVE THE DEFENDANT OF HIS RIGHT TO REMAIN SILENT, NOR COMPEL HIM TO TESTIFY.

The 5<sup>th</sup> Amendment to the United States Constitution and Article 1, §9 of the Washington State Constitution protect the accused from being compelled to testify against himself at trial. The Fifth Amendment to the United States Constitution has been incorporated into the due process clause of the Fourteenth Amendment and therefore binds the state. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964). The Washington State Constitution contains a similar provision: Const. Art. 1, § 9. The Washington Supreme Court has held that the two provisions should be given the same interpretation. *State v. Unga*, 165 Wn.2d 95, 100, 196 P. 3d 645 (2008); *State v. Mecca Twin Theater and Film Exchange, Inc.*, 82 Wn.2d 87, 507 P.2d 1165 (1973); *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971). 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); *see, also, State v. Foster*, 91 Wn. 2d 466, 473, 589 P. 2d 789 (1979). The central question raised by the defendant in this case is what does “compelled” mean? And by whom?

The defendant in a criminal trial is frequently required to testify himself in order to prove an affirmative defense, tell his side of the incident, or to attempt to generally reduce or mitigate the risk of conviction. Although defendants regularly face such a dilemma of a choice between complete silence and presenting a defense, it has never been thought a violation of the privilege against compelled self-incrimination. In *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court discussed and acknowledged the difficult choice the defendant had to make when presenting an alibi defense:

The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However ‘testimonial’ or ‘incriminating’ the alibi defense proves to be, it cannot be considered ‘compelled’ within the meaning of the Fifth and Fourteenth Amendments.

399 U.S. at 83-84. Although *Williams* dealt with an alibi defense, the same remarks and reasoning can be applied to any defense, especially

affirmative defenses, such as was asserted in the present case.

In *Foster, supra*, the defendant was charged with assault in the first degree. He contended that he acted in self defense. He testified in his own behalf to negate the element of intent. On appeal, he argued that he was compelled; that he would not have testified had he known that the jury would be instructed on second-degree negligent assault. *Foster*, 91 Wn. 2d at 472. The Supreme Court rejected this argument. *Id.*, at 473. It further noted that there was no evidence of compulsion to testify. Instead, the record reflected that the defendant voluntarily testified to exculpate himself. The Court found that this was an example of a tactical decision made by the defendant in consultation with his attorney. *Id.*

*State v. Van Auken, supra*, is another example of a case where the defendants were required to make the difficult decision of whether to testify in the light of the evidence admitted previously in the trial. The defendants were charged with theft by embezzlement. They left Washington and were arrested in California. 77 Wn. 2d at 137. A police officer who accompanied the defendants back to Washington overheard incriminating statements made by the defendants. 77 Wn. 2d at 138. Those statements were admitted in evidence at trial.

The defendants argued that the admission of the officer's testimony forced them to take the witness stand and testify against themselves, contrary to the mandate of Washington Constitution Art. 1, §9. *Id.*, at 138.

The Supreme Court held that admission of the officer's testimony did not operate to 'compel' the defendants to testify in the constitutional sense of that term. *Id.* The Court remarked: "To hold otherwise could create the incongruous result that the state could not introduce otherwise valid evidence simply because defendants might feel a need to take the stand and contradict or explain it." *Id.* Although the defendants did not want to testify, they decided that they were "required" to in order to put forward their theory of the case. This is not "compelled" testimony in the sense of the 5<sup>th</sup> Amendment or Washington Constitution Art. 1, §9.

The element of compulsion or involuntariness is central to the right against self-incrimination: a defendant's voluntary production of testimonial evidence is not protected by the Fifth Amendment. *South Dakota v. Neville*, 459 U.S. 553, 562, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983); *Seattle v. Stalsbrotten*, 138 Wn. 2d 227, 232, 978 P. 2d 1059 (1999) (Supreme Court discussing 5<sup>th</sup> Amendment in context of whether evidence of refusal to perform field sobriety tests in a DUI investigation was "compelled" self-incrimination).

In the present case, before the State rested, the defendant asked the court whether the court was going to give an instruction on self defense. 12 RP 1104. The defendant cited no cases as authority to support this request. *Id.* The trial court cannot give an opinion regarding the strength of an argument for self defense. "It is not the trial court's prerogative to resolve the question of whether the defendant in fact acted in self

defense.” *State v. George*, 161 Wn. App. 86, 100, 249 P. 3d 202 (2011).

Here, the defendant was in the same position as those in *Foster*, *Van Auken*, and many other defendants in a criminal trial. He had to make the tactical decision, in consultation with his attorney, whether or not to take the stand in his defense. He had to decide if the evidence presented so far was enough to argue his theory of the case. He had to balance the potential benefit and risk of taking the stand.

Here, the defendant had a rare advantage over most defendants making this decision at trial. This was a retrial upon remand; so the defendant knew what the evidence and testimony would be. He decided to testify in the first trial. He had the same attorney at both trials; so he had discussed the risks and advantages of taking the stand before, in light of the same evidence.

The record reflects that the defendant did not move to dismiss for insufficiency of the evidence at the close of the State’s evidence. He did not move to dismiss on the grounds that the State had failed to disprove self defense.

The defendant essentially wishes to "blame" the court for the defendant's decision to testify in his own defense. The record does not show that the court “forced” or required the defendant to testify. The court did not require, suggest, or even imply that the defendant should or must testify. *Cf. Goodwin, supra*. The record does not show that the defendant’s testimony was “exacted under compulsion”. The decision to testify was a

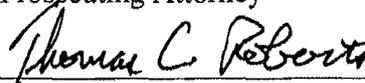
tactical one; voluntarily made by the defendant in consultation with his attorney. There was no violation of the defendant's rights under the federal or state Constitutions.

D. CONCLUSION.

The trial court wisely avoided any involvement in the defendant's decision whether to testify. The defendant made a tactical, voluntary decision to testify in his defense. The State respectfully requests that the judgment be affirmed.

DATED: November 1, 2013.

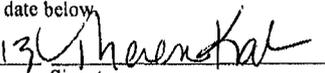
MARK LINDQUIST  
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate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

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Date Signature

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St. v. Mendes  
No. 88945-7  
Submitted by: T. Roberts  
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Please call me at 253/798-7426 if you have any questions.

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Legal Assistant to T. Roberts