Filed
Washington State
Court of Appeals
Division Two

July 11, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint Petition of RONALD MENDES, Petitioner.	No. 48709-8-II UNPUBLISHED OPINION

JOHANSON, P.J. — In this timely personal restraint petition (PRP), Ronald Joseph Mendes challenges his second degree murder and four witness tampering convictions. He argues that (1) the State engaged in prosecutorial misconduct in closing argument, (2) defense counsel's failure to object to these improper arguments was ineffective assistance of counsel, (3) a conflict of interest was created when the same counsel who represented him at his first trial was appointed as counsel for his second trial after the first convictions were overturned for ineffective assistance of counsel, (4) his right to a fair trial and an impartial jury was violated when the jury heard evidence that disclosed that he was in custody, (5) the admission of the in-custody evidence was also improper because it was unfairly prejudicial, (6) defense counsel's failure to object to the in-custody evidence was ineffective assistance of counsel, and (7) appellate counsel's failure to raise the in-custody issues on appeal was ineffective assistance of appellate counsel. In addition, the

State argues that we should not address these issues because Mendes could have, but did not, raise them in his direct appeal. We hold that Mendes can raise these issues, but we deny this petition.

FACTS

I. BACKGROUND FACTS

Our Supreme Court succinctly summarized the background facts from the second trial in this case as follows:

> Mendes met Lori Palomo in October 2007, when Palomo was temporarily estranged from her long-term and live-in boyfriend, Saylor. Palomo and Mendes engaged in a three-week intimate relationship that ended when Palomo returned to live with Saylor. Even though Saylor and Palomo were back together, Mendes occasionally came to Saylor's house to see Palomo. All three were methamphetamine users.
>
> One night, while Palomo's car was parked at Saylor's house, someone vandalized it. Palomo and Saylor suspected Mendes was the vandal and thereafter, Saylor did not want Mendes to come over. Palomo asked Mendes not to come around anymore.
>
> On January 27, 2008, Mendes returned to Saylor's house armed with a loaded .45 caliber gun. Charles Bollinger, one of three house guests of Saylor's, met Mendes at the front door. Bollinger advised Mendes that he should not be at the home. Bollinger and Mendes went to a gas station and then returned to the home. During their trip to the gas station, Mendes showed Bollinger the gun. Upon returning to the house, Bollinger woke Saylor to inform him that Mendes was in the house. McKay Brown, another house guest, advised Mendes to leave, but he did not leave.
>
> Learning that Mendes was in the house, Saylor 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 [Report of Proceedings (RP)] at 324. Mendes then aimed the gun at Saylor and said, "I'll smoke you, mother fucker." 8 [RP] at 456. Saylor left the front room to find his baseball bat, and Bollinger yelled at Mendes again to leave.
>
> During this time, Mendes claims that he tried to leave but could not move quickly because of a bad hip and at one point, he paused because he thought he dropped his methamphetamine. When Saylor returned to the front room with the bat in the air, Bollinger had Mendes near the front doorway. Mendes saw Saylor coming toward him with the bat in the air. Mendes immediately shot Saylor in the chest, killing him.

State v. Mendes, 180 Wn.2d 188, 190-91, 322 P.3d 791 (2014), *cert. denied*, 135 S. Ct. 1718 (2015).

II. First Trial and Appeal, Witness Tampering

A jury found Mendes guilty of second degree murder, second degree felony murder, and unlawful possession of a firearm. *State v. Mendes*, noted at 156 Wn. App. 1059, 2010 WL 2816974, at *2 (*Mendes* I). Mendes appealed, arguing, in part, that he received ineffective assistance of counsel because defense counsel failed to request an additional jury instruction explaining that withdrawing from an altercation revives the right to self-defense. *Mendes* I, 2010 WL 2816974, at *4. Division One of this court agreed and reversed the original second degree murder and felony murder convictions based on ineffective assistance of counsel. *Mendes* I, 2010 WL 2816974, at *5.

After the appeal and before the second trial, Mendes placed several calls to witnesses using the jail telephone system. Jail personnel reported these calls to the prosecutor.

III. Second Trial

On remand, the State charged Mendes by amended information with second degree intentional murder, second degree felony murder, and four counts of witness tampering based on Mendes's calls from the jail. *Mendes*, 180 Wn.2d at 192. The testimony regarding the murder charges and Mendes's asserted self-defense is summarized in the facts above.

In addition, the jury also heard evidence that Mendes had made several phone calls to witnesses from the jail. Although Mendes raised other objections to the admission of the recorded calls, he did not object on the ground that this evidence improperly disclosed that he was in custody or that this disclosure was unfairly prejudicial.

After the evidence was presented, the parties discussed the jury instructions. The State proposed a no-duty-to-retreat instruction, which it intended to use to argue that Saylor had no duty to retreat because he was in his own home. Defense counsel objected to the no-duty-to-retreat instruction, arguing that the evidence did not support this instruction because there was no evidence "that Mr. Mendes attacked Mr. Saylor."[1] 13 RP at 1330. The trial court noted the objection for the record but concluded that the evidence supported the instruction.[2]

In closing argument,[3] the State's primary argument was that Mendes was not entitled to assert self-defense because Mendes, and not Saylor, was the first aggressor and Saylor was only defending himself in his own home.[4]

The State then described the actions leading to the altercation between Mendes and Saylor, including that Mendes entered Saylor's home despite knowing that Saylor did not want him there. The State emphasized that although Saylor left the room for 15 seconds to one minute to "look for

[1] Mendes does not challenge this instruction in this petition. His argument focuses on the State's argument that relates to this instruction.

[2] The trial court also noted that in the first appeal, the Court of Appeals had not disapproved of this no-duty-to-retreat instruction. In the first appeal, when discussing whether Mendes's counsel should have requested the revised self-defense instruction, Division One of this court stated,

> The facts supported the revived self-defense instruction. Although Saylor did not have a duty to retreat because he was in his own home, *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999), he had in fact retreated. Saylor had left the room.

Mendes I, 2010 WL 2816974, at *4. Although Division One mentions there is no duty to retreat, it did not comment on whether a no-duty-to-retreat instruction was required or appropriate.

[3] We describe the portions of the argument Mendes challenges in this petition in more detail below.

[4] Mendes did not object to any of the State's closing argument or rebuttal argument.

something, anything he can to get this intruder out of his house," Mendes never put his gun away and did not take any "affirmative action to get out of Dodge." 13 RP at 1348.

The State also argued that there was "no question in this case that the defendant murdered Danny Saylor" because the State had proven the elements of the offense beyond a reasonable doubt and that the real question was whether Mendes had acted in self-defense. 13 RP at 1351-52. The State then discussed the self-defense, first aggressor, no-duty-to-retreat, and revised self-defense instructions and the evidence that it found relevant to those instructions.

The State then turned to the felony murder charge and discussed the difference between felony and intentional murder. It also discussed the crime supporting the felony murder charge, second degree assault, and how the felony murder was committed during the flight from the assault.

The State then reiterated that a key aspect in this case was Mendes's self-defense claim and commented that the question was whether Mendes "should be accountable for" Saylor's death:

> My guess -- and this might not happen -- is that your jury deliberations will actually ultimately focus your attention on the self-defense part of this case, not necessarily the police or the forensics or anything like that. We don't have a who-done-it here. We know who did it. *It's just a matter of whether or not the defendant should be accountable for what he did*.

13 RP at 1364 (emphasis added).

At the close of its argument, the State summarized,

> I'm going to ask that you ferret out the truth from the lies and come up with a verdict that reflects the truth. Again, this case is about the defendant's choices. If the defendant didn't make the choices he did that night, Danny Saylor would be alive today. *Danny Saylor did absolutely nothing wrong, and the defendant should be held for killing him on January 28th*.

13 RP at 1366 (emphasis added).

In response, defense counsel argued that Mendes was acting in self-defense—first when he drew his gun after Saylor initially attacked him and then again when Saylor came after him with the baseball bat. Defense counsel further argued that even if Mendes was initially the first aggressor, his right to self-defense was revived because he withdrew from the altercation before Saylor came back with the baseball bat. Without referring to the no-duty-to-retreat instruction, defense counsel also argued that Saylor had the opportunity to stop the altercation but instead chose to return with the baseball bat.

In rebuttal, the State argued,

> Counsel also suggests that if the roles were changed, that we'd be prosecuting Danny Saylor. Again, take that back with you knowing that Danny *Saylor actually has a legal right to be where he is*. *He had no duty to retreat whatsoever.* And as a homeowner, he has absolutely the right to defend himself in his own home. *We see these types of cases during the year a few times, and the homeowner gets to defend themselves*. Again, no duty to retreat on Danny Saylor's part.

13 RP at 1396 (emphasis added).

The State then reiterated its burden in relation to the self-defense claim and argued that the evidence did not support the claim:

> Counsel also brings up that the State has the burden of proving -- disproving beyond a reasonable doubt -- that it was not self-defense. That's jury Instruction 18. I agree. That's laid out; that's the law. But in this case, it's fairly simple for the State to disprove it because the defendant doesn't even get to the third prong in this, which was, again, *would you have done what the defendant did if you knew what he knew*? That's what it comes down to. *It comes down to that reasonable person's standard*, not the standard of somebody who wants to put their head in the sand, not the standard of somebody who wants to ignore warnings that were given to him. Again, I totally agree with defense counsel on that note.

13 RP at 1399 (emphasis added).

The second jury convicted Mendes of second degree felony murder, a firearm sentencing enhancement, and four counts of witness tampering. *State v. Mendes*, noted at 174 Wn. App. 1074, 2013 WL 2107022, at *2 (*Mendes* II), *aff'd*, 180 Wn.2d 188, *cert. denied*, 135 S. Ct. 1718 (2015). Mendes appealed his second degree felony murder conviction. *Mendes* II, No. 2013 WL 2107022, at *2.

IV. SECOND APPEAL

We affirmed the convictions in an unpublished opinion.[5] Our Supreme Court also affirmed.[6] *Mendes*, 180 Wn.2d at 196. The United States Supreme Court denied certiorari on April 2, 2015. *Mendes v. Washington*, 135 S. Ct. 1718.

Mendes filed this timely PRP in March 2016.[7]

ANALYSIS

I. REVIEWABILITY OF NEWLY RAISED ISSUES

Relying on *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999), the State initially argues that we should not reach several of the issues in the PRP because Mendes *could have* raised them in his direct appeal but failed to do so. Although a petitioner cannot raise an issue in a PRP that was raised and decided on the merits in a direct appeal,[8] this

[5] Mendes did not raise any of the issues he now raises in this PRP.

[6] Mendes did not raise any of the issues he now raises in his PRP.

[7] Mendes's direct appeal became final on April 2, 2015, when the United States Supreme Court denied his petition for certiorari. RCW 10.73.090(3)(c). He filed this petition in March 2016, less than one year later. Accordingly, this petition is timely. RCW 10.73.090(1).

[8] *Gentry*, 137 Wn.2d at 388; *see also In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

prohibition does not extend to all issues the petitioner could have potentially raised on direct appeal.

The State reads *Gentry* too broadly. In *Gentry*, our Supreme Court was addressing whether it must consider only "issues already resolved on direct review." 137 Wn.2d at 384. In addressing whether it could consider an issue raised and resolved on direct review, the court stated,

> We take seriously the view that a collateral attack by PRP on a criminal conviction and sentence should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not *or* could not have been raised in the principal action, to the prejudice of the defendant.

137 Wn.2d at 388-89 (emphasis added). The court held,

> In PRPs, we ordinarily will not review issues previously raised and resolved on direct review. In order to renew an issue rejected on its merits on appeal, the petitioner must show the ends of justice would be served by reexaming the issue.

Gentry, 137 Wn.2d at 388. At no point does *Gentry* examine whether a petitioner may raise new, unresolved issues on collateral review if those issues were available to the petitioner but not raised on direct appeal.

Furthermore, in saying that the collateral attack "should not simply be reiteration of issues finally resolved at trial and direct review," *Gentry* is merely supporting its conclusion that petitioners cannot raise issues in a PRP that were previously raised and addressed on the merits. 137 Wn.2d at 388; *see also In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994) ("[A] personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue."). This statement does *not* suggest that a petitioner is precluded from raising issues that petitioner could have but did not raise in the principal action, which is what the State is arguing here.

Instead, *Gentry* says that the petition "*should* raise new points of fact and law that" (1) were not raised in the principal action *or* (2) could not have been raised in the principal action.[9] Nothing in this language suggests a petitioner *must* raise all potential issues on direct appeal or forever hold their peace.[10] 137 Wn.2d at 388-89 (emphasis added). We hold that Mendes is not prohibited from raising new issues in this PRP.

We next determine whether Mendes is now raising any issues that were addressed and rejected on appeal. Our Supreme Court has clarified what qualifies as a new issue in *In re Personal Restraint of Davis*:

> A petitioner may . . . raise new issues on collateral attack, including errors of constitutional or nonconstitutional magnitude. A "new" issue is not created merely by supporting a previous ground for relief with different factual allegations or with different legal arguments.

152 Wn.2d 647, 671, 101 P.3d 1 (2004) (footnote omitted).

Mendes did not raise his conflict of interest issue or in-custody evidence issues in his direct appeal. They are entirely new issues, and we address them.

A closer question is whether his prosecutorial misconduct claims are barred. A petitioner cannot simply recast an issue by supporting it with different legal arguments or using different language to avoid this procedural bar—he must allege a new ground for relief. *See In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). For instance, in *Stenson*, our Supreme

[9] Examples of issues that *could not* have been raised in the principal action include claims based on newly discovered evidence that was not available before the appeal and issues that are outside the record and would not have been considered on direct appeal.

[10] If the conjunction between the two prongs was "and" rather than the disjunctive conjunction "or," the State's argument might have merit, but that is not the case here.

Court initially refused to consider "[w]hat was formerly a substitution of counsel issue" that had been addressed on direct appeal after Stenson "recast [the issue] as a claim of irreconcilable conflict causing ineffective assistance of counsel."[11] 142 Wn.2d at 723. In both claims, the underlying ground remained the same.

Here, although Mendes previously raised a prosecutorial misconduct claim in his direct appeal, that claim was based on an alleged violation of a pretrial order prohibiting mention of his "prior trial." *Mendes* II, 2013 WL 2107022, at *6. Mendes's new prosecutorial misconduct arguments do not merely support his direct appeal argument that this violation of a pretrial order was error. Instead, he is raising entirely new prosecutorial misconduct claims based on distinct legal grounds. This argument does not simply recast his prior ground, and we will consider the new prosecutorial misconduct claims as well.

II. PRP STANDARDS

In most cases, to be entitled to relief, the petitioner must show either a constitutional error that resulted in actual and substantial prejudice or a nonconstitutional error that constituted a fundamental defect that inherently results in a complete miscarriage of justice. *In re Pers. Restraint of Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984).

III. PROSECUTORIAL MISCONDUCT AND RELATED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Mendes argues that the State engaged in prosecutorial misconduct throughout closing argument by presenting a variety of inappropriate arguments. He also contends that defense

[11] The court ultimately considered the issue because it found that there had been an intervening change in the law that was sufficient to justify revisiting the issue. *Stenson*, 142 Wn.2d at 724.

counsel provided ineffective assistance of counsel because he failed to object to the alleged inappropriate arguments. These arguments fail.

A. STANDARDS OF REVIEW

"The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error." *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). To prevail on a prosecutorial misconduct claim, Mendes must show that the alleged misconduct was either a constitutional error that resulted in actual and substantial prejudice or a fundamental defect that resulted in a miscarriage of justice. *In re Pers. Restraint of Lui*, No. 92816-9, slip op. at 9-10 (Wash. June 22, 2017) (citing *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 676-77, 327 P.3d 660 (2014)). In analyzing prejudice, we examine the allegedly improper conduct in the context of the total argument, the issues in the case, the evidence, and the jury instructions. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Because Mendes did not object to any of the arguments he now challenges, he has waived these issues on appeal unless the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice and this prejudice cannot be cured by a jury instruction. *Fisher*, 165 Wn.2d at 747.

To prove ineffective assistance of counsel, Mendes must show that (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This standard is "highly deferential and courts will indulge in a strong presumption of reasonableness" until the defendant shows in the record the absence of legitimate or tactical reasons supporting trial counsel's conduct. *Thomas*, 109 Wn.2d at 226 (citing

Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In a PRP, if the petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

B. "COMPARATIVE DETERMINATION"

Mendes first argues that the State mischaracterized the jury instructions by arguing "that self-defense was a comparative determination, requiring jurors to evaluate whether the deceased was acting unlawfully" and suggesting that Saylor had "increased rights" because he was in his own home.[12] PRP at 4. He also argues that defense counsel provided ineffective assistance of counsel because he failed to object to this argument. We reject these arguments because the State's argument was not improper.

Mendes appears to challenge these specific sections of the State's closing argument:

> First, we can't lose sight of what this case was about. This case was about Danny Saylor. Danny Saylor has been reduced to an exhibit. Danny Saylor is now Exhibit 1. Why did Danny Saylor die? Well, the defendant would have you believe that Danny Saylor died because it was Danny Saylor's own fault, that it was Danny Saylor's own actions. . . . Danny did nothing but defend himself in his own home on the night of January 28th of 2008.

13 RP at 1345.

> When Danny came back out with the bat, *Danny was defending himself in his own home against an intruder who at this point had come into his house uninvited by him and now actually pointed a gun at him.* These were all the defendant's actions. Again, this is a defendant who had been warned not to go there in the first place.
>
> So at that point, *the defendant shot Danny while Danny was doing what anyone else may have done in that same situation. What any other homeowner may*

[12] Mendes is *not* challenging the actual jury instructions.

> *have done in that same situation was defend themselves and the other people in their house and their home and property*.
>
> Now, the defendant is trying to lay the blame on Danny Saylor. Now, remember, the defendant is the one who made choices, and that's why he's here today. We are not here to decide if the defendant is necessarily a bad person. We are here to decide whether or not the choices that he made on January 28th amounted to guilt of murder. Danny was simply minding his own business in his own home.

13 RP at 1350-51.

> Another jury instruction that's important here is the no-duty-to-retreat instruction. It's Instruction No. 28. This is basically a-man's-home-is-his-castle instruction. *This jury instruction applies to Danny Saylor.* It's not up to Danny Saylor to retreat. In this case, he did not retreat. He does not have to retreat. He is in his own home. Danny Saylor went to the back of his house to look for a weapon, but at no time did Danny Saylor retreat and at no time does the law require a homeowner to retreat. Danny Saylor has the right to stand his ground in his own home just like any homeowner can do. He has the right to protect it and whoever's inside. In this case, Danny did that. All of Danny's actions were, again, reactions to every move the defendant made. They were in conformity of the law. Danny had the right [to] do what he needed to do to get an unwanted person out of his house. When that unwanted person pulled a gun, Danny had the right to stand his ground and react.

13 RP at 1354-55.

> Counsel also suggests that if the roles were changed, that we'd be prosecuting Danny Saylor. Again, take that back with you knowing that Danny Saylor actually has a legal right to be where he is. He had no duty to retreat whatsoever. And as a homeowner, he has absolutely the right to defend himself in his own home. *We see these types of cases during the year a few times, and the homeowner gets to defend themselves*. Again, no duty to retreat on Danny Saylor's part.

13 RP at 1396 (emphasis added).

> I'm going to ask that you ferret out the truth from the lies and come up with a verdict that reflects the truth. Again, this case is about the defendant's choices. If the defendant didn't make the choices he did that night, Danny Saylor would be alive today. *Danny Saylor did absolutely nothing wrong, and the defendant should be held for killing him on January 28th*.

13 RP at 1366 (emphasis added).

A prosecutor has wide latitude in closing arguments to draw reasonable inferences from the facts in evidence and to express such inferences to the jury. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). Considering the State's closing argument as a whole, it is clear that these portions of the State's argument addressed Mendes's self-defense claim. The State's argument that Mendes's acts, rather than Saylor's acts, were the acts of aggression relates directly to whether Mendes was the first-aggressor, which was in turn relevant to whether the State had disproved Mendes's self-defense claim. In context, the State's references to Saylor having no duty to retreat were relevant to whether Saylor became the aggressor after leaving the room and then returning with the baseball bat. This is proper argument. *See State v. McKenzie*, 157 Wn.2d 44, 56-57, 134 P.3d 221 (2006) (State's references to defendant's guilt were proper argument when the argument was made in response to defense counsel's interpretation of the evidence and was emphasizing facts that supported the State's case theory).

We hold that Mendes does not show that this argument was improper, and thus Mendes does not establish prosecutorial misconduct on this ground. Furthermore, we hold that because the argument was proper, there was no basis upon which defense counsel should have objected and Mendes does not establish that defense counsel's representation was deficient because he failed to object on this ground.

C. PERSONAL OPINION

Citing the portion of the State's rebuttal argument in which the State argues, "We see these types of cases during the year a few times, and the homeowner gets to defend themselves," 13 RP at 1396, Mendes further argues that the State's reference to the fact the prosecutor's office frequently sees these cases was an attempt to "invoke[ ] the integrity and special expertise of the prosecutor's entire office, assuring jurors that they reviewed shootings that take place in a person's home and that this was a case, like those, where the homeowner was acting within his rights." PRP at 7. In his reply, he rephrases this argument, stating, "In other words, the prosecutor argued that the prosecutor's office has facts that the jury does not and jurors should rely on that expertise."[13] Reply Br. of Pet'r at 4.

Essentially, it appears that Mendes is arguing that the State was expressing its personal opinion. He also raises a related ineffective assistance of counsel claim. We reject these arguments because Mendes does not show that the argument was so flagrant and ill intentioned that it could not have been cured by a proper instruction and it would have been a reasonable tactical decision for defense counsel to not object to avoid drawing attention to the improper argument.

Washington courts have "long recognized[that] a prosecutor may not properly express an independent, personal opinion as to the defendant's guilt." *McKenzie*, 157 Wn.2d at 53. We examine the argument in context, considering the total argument, the evidence being addressed in argument, and the jury instructions, to determine whether the challenged argument demonstrates that the State was "'trying to convince the jury of certain ultimate facts and conclusions to be

[13] The State does not respond to this argument. It appears to discuss the allegations related to only the self-defense and no-duty-to-retreat arguments.

drawn from the evidence.'" *McKenzie*, 157 Wn.2d at 54 (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)). But such argument is improper if "it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." *McKenzie*, 157 Wn.2d at 54 (emphasis omitted) (quoting *Papadopoulos*, 34 Wn. App. at 400). It is also improper for the State to argue facts not in evidence. *See State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Here, the State's reference to the frequency with which the prosecutor's office sees cases in which the homeowner was entitled to defend himself or herself was clearly not a reference to the evidence. Instead, it communicated to the jury that the prosecutor believed that this case was similar to other cases in which a homeowner was legally acting defensively. At the very least, the State was arguing facts that were not in evidence when it mentioned the fact that the prosecutor's office saw these types of cases frequently. Furthermore, its assertion that this case was like those cases goes beyond the evidence and expresses personal opinion. Thus, this argument was improper.

We next consider whether the improper argument was so flagrant and ill intentioned that it evinces an enduring and resulting prejudice and this prejudice cannot be cured by a jury instruction. *Fisher*, 165 Wn.2d at 747. Although this argument touched on Mendes's self-defense claim, the jury was properly instructed on the self-defense claim, this was a minor comment given the length of argument, and defense counsel could have moved for an instruction directing the jury to not consider this argument and reminding the jury that the State's argument was not evidence. Because of this, we hold that this argument fails.

Regarding the related ineffective assistance of counsel claim, given this was one single statement, defense counsel could have had reasonable tactical reasons for not objecting such as not wanting to draw attention to this brief statement. *See State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008) ("The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel."). Thus, we also reject the ineffective assistance of counsel claim based on this ground.

D. REASONABLE PERSON STANDARD

Mendes next contends that the State's argument that the jurors should equate a reasonable person with what they (the jurors) would do misstated the law and lowered the State's burden of proof.[14] Although this argument was improper, we hold that this improper argument was not so flagrant and ill intentioned that it could have been cured with a proper instruction. Mendes also argues that defense counsel provided ineffective assistance of counsel because he failed to object to this argument. Because there was a reasonable tactical reason as to why defense counsel would not have objected to this argument, we also hold that Mendes fails to establish ineffective assistance of counsel on this ground.

The State's argument must be confined to the law stated in the trial court's instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). If the prosecutor mischaracterizes the law and there is a substantial likelihood that this misstatement affected the jury verdict, the defendant is denied a fair trial. *Walker*, 164 Wn. App. at 736.

Mendes directs us to the following rebuttal argument:

[14] The State does not directly address this ground.

> Counsel also brings up that the State has the burden of proving -- disproving beyond a reasonable doubt -- that it was not self-defense. That's jury Instruction 18. I agree. That's laid out; that's the law. But in this case, it's fairly simple for the State to disprove it because the defendant doesn't even get to the third prong in this, which was, again, *would you have done what the defendant did if you knew what he knew*? That's what it comes down to. It comes down to that reasonable person's standard, not the standard of somebody who wants to put their head in the sand, not the standard of somebody who wants to ignore warnings that were given to him. Again, I totally agree with defense counsel on that note.

13 RP at 1399 (emphasis added).

Although Mendes does not mention it, the State made a similar argument earlier in its closing argument:

> Third and finally and what I think is the most important part of self-defense is that the defendant employed such force and means as a reasonably prudent person would use under the same or similar circumstances as they reasonably appear to the defendant taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident. *The short story for that is would you have done what the defendant did if you knew what he knew*. Again, here we use a reasonable person's standard, and you can't ignore the warnings that the defendant got prior to going to Danny Saylor's house. You can't ignore the fact that the defendant was even in the -- in Danny Saylor's house, not with Danny Saylor's permission, but with his own permission.

13 RP at 1357-58.

At least one earlier case has recognized that arguing that the jurors should consider what they would have done if they knew what the defendant knew is a misstatement of the law because it ignores the objective nature of the reasonable person standard. *Walker*, 164 Wn. App. at 735-36. Thus, Mendes is correct that this was improper argument.

We next consider whether the improper argument was so flagrant and ill intentioned that it evinces an enduring and resulting prejudice and this prejudice cannot be cured by a jury instruction. *Fisher*, 165 Wn.2d at 747. Here, the trial court could have cured the improper argument by

directing the jury to the jury instructions, which contained the correct reasonable person standard.[15] Although there is always a risk that repetition of an improper argument can result in prejudice that cannot be cured, and the State made a similar argument earlier in the course of its closing argument, the challenged argument was a minor comment during a lengthy argument. The State also advised the jury of the proper standard, and the jury instructions gave the jury the proper standard. Given this, we reject this argument because the improper argument was not so flagrant or ill intentioned that it could not have been cured.

Furthermore, regarding whether defense counsel's failure to object to this improper argument amounted to ineffective assistance of counsel, defense counsel could have chosen not to object to these brief misstatements of the law in order to avoid drawing attention to this improper argument. *See Kolesnik*, 146 Wn. App. at 801. Because there is a legitimate tactical reason for not objecting to this argument, we hold that Mendes does not establish ineffective assistance of counsel on this ground.

---

[15] Instruction 18 provided in part,

> [T]he slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

Resp. to PRP, App. B, at 21. In addition, the State argued that the instructions stated that the third element of self-defense was

> that the defendant employed such force and means as a reasonably prudent person would use under the same or similar circumstances as they reasonably appear to the defendant taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

13 RP at 1357. So the record shows that the jury received proper instruction.

E. MURDER AND ACCOUNTABILITY STATEMENTS

Mendes next argues that the State "improperly told the jurors that there was no question that [he] 'murdered' Saylor and that jurors had to determine if Mendes would be held 'accountable' for his actions." PRP at 6. He contends that this argument mischaracterized the evidence and minimized the right to self-defense. He also argues that defense counsel provided ineffective assistance of counsel because he failed to object to this argument. Again, we disagree because Mendes fails to show this was improper argument.

In closing argument, the State argued, "There's no question in this case that the defendant murdered Danny Saylor. Those elements have been proven beyond a reasonable doubt." 13 RP at 1351-52. The State also argued, "In this case, there's no doubt that the defendant murdered Danny Saylor intentionally." 13 RP at 1356. But considered in context, the State was arguing that it had proven the elements of the murder charge and that it had disproven Mendes's self-defense claim. *See McKenzie*, 157 Wn.2d at 56-57 (State's references to defendant's guilt were proper argument when the argument was made in response to defense counsel's interpretation of the evidence and was emphasizing facts that supported the State's case theory). This argument is proper, so we hold that Mendes fails to establish prosecutorial misconduct on this ground. Furthermore, we hold that because the argument was proper, there was no basis upon which defense counsel should have objected, and Mendes does not establish that defense counsel's representation was deficient because he failed to object on this ground.

The State also argued, "We don't have a who-done-it here. We know who did it. It's just a matter of whether or not the defendant should be *accountable* for what he did." 13 RP at 1364 (emphasis added). Essentially, Mendes is arguing that the reference to accountability was an

appeal to the jurors' passions and prejudice and invited them to convict Mendes based on a sense of social responsibility and to send a message.

It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals. *State v. Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). But considered in context, the State was arguing that it had disproved Mendes's self-defense claim and that the jury should not excuse Mendes's actions. This argument was not an appeal to the jurors' passions and prejudice. Again, because the argument was not improper, we hold that Mendes fails to establish prosecutorial misconduct on this ground. Furthermore, we hold that because the argument was proper argument, there was no basis upon which defense counsel should have objected, and Mendes does not establish that defense counsel's representation was deficient because he failed to object on this ground.[16]

F. FELONY MURDER/SELF-DEFENSE ARGUMENT

Mendes next argues that the State's argument regarding felony murder improperly precluded him from asserting self-defense in relation to that charge. He cites to the following argument:

> The defendant, as you know, has also been charged with what we call felony murder, which is Count II. A felony murder is different than intentional murder because felony murder happens when somebody causes the death of another in the course of or in immediate flight from a particular felony crime. In this case, assault in the second degree. In this case, the defendant -- the defendant pointed a gun at

[16] Mendes also cites to *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012), for the premise that it is improper for the State to tell the jury that it can acquit only if the jury believed the defendant, because this "'shows the prosecutor's failure to prosecute this case as an impartial officer of the court.'" PRP at 7 (quoting *Glasmann*, 175 Wn.2d at 714). But Mendes points to no specific argument where the State suggests the jury can find self-defense only if it believed Mendes. We refuse to address this issue.

> Danny Saylor and threatened to shoot him. In fact, he said, I'll kill you, mother fucker. That's an assault in the second degree.
>
> It was when the defendant was fleeing from that assault in the second degree did he then shoot and kill Danny Saylor. Because it was in the flight therefrom, the law says that you can be held accountable for someone's death when you are immediately fleeing from another felony. In this case, assault in the second degree. The defendant created that reasonable fear of bodily injury in Danny.

13 RP at 1359-60.

Mendes argues,

> This argument eliminated Mr. Mendes's right to self-defense by applying that instruction[17] only to the early threat and not to the shooting. Put another way, the argument created strict liability for the death of Saylor, if jurors found only that Mendes had committed an earlier assault—even if jurors concluded that Mendes killed in self-defense.

PRP at 8.

To the extent Mendes asserts that the State's argument told the jury that it could not consider whether his shooting Saylor was in self-defense because he shot Saylor while attempting to flee and not during the initial assault, Mendes fails to consider this argument in context. At this point during its argument, the State was discussing the elements of felony murder, it was not addressing whether Mendes's self-defense claim applied equally to the intentional and felony murder charges.

To the extent Mendes argues that the State should not have referred to jury instruction 19, the State was arguing the jury instructions that the trial court gave the jury, and Mendes does not directly challenge jury instruction 19 in this PRP.

[17] This appears to refer to the jury instruction given addressing self-defense/felony murder, instruction 19, which stated, "It is a defense to a charge of assault (applies to Count II, Felony Murder only) that the force used was lawful as defined in this instruction." Resp. to PRP, App. B, at 22.

We hold that this was not improper argument and, therefore, Mendes fails to establish prejudice on this ground. Furthermore, we hold that because the argument was proper argument, there was no basis upon which defense counsel should have objected, and Mendes does not establish that defense counsel's representation was deficient because he failed to object on this ground.

IV. CONFLICT OF INTEREST

Mendes next argues that allowing the same counsel to represent him at his second trial created a conflict of interest because this court previously held that counsel had provided ineffective assistance of counsel during the first trial and a second conviction would "vindicate[ ]" counsel. PRP at 10. We hold that this argument fails.

The Sixth Amendment to the United States Constitution guarantees the right to the assistance of an attorney free from conflict of interest. *Dhaliwal*, 150 Wn.2d at 566 (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)). To warrant reversal of a conviction on this ground, the defendant bears the burden of proving that an actual conflict of interest *adversely affected the attorney's performance*. *Dhaliwal*, 150 Wn.2d at 573 (citing *Mickens v. Taylor*, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). A possibility of a conflict of interest or mere speculation about whether the conflict of interest adversely affected the attorney's performance is not enough to warrant reversal. *Dhaliwal*, 150 Wn.2d at 573.

Even presuming that this issue was properly preserved[18] and that a potential conflict of interest existed, Mendes fails to show that this alleged conflict of interest adversely affected defense counsel's performance. *See Dhaliwal*, 150 Wn.2d at 573. Mendes's assertion that a second conviction would vindicate counsel may explain why there was a potential conflict of interest, but it does not demonstrate an adverse effect. Apart from the ineffective assistance of counsel claims discussed above, Mendes does not state what, if anything, his counsel should have done differently during the second trial. It is mere speculation that defense counsel's conflict of interest adversely affected counsel's performance.

Furthermore, Mendes fails to show that any potential conflict of interest resulted in actual and substantial prejudice, which is required on collateral review. *Haverty*, 101 Wn.2d at 504. Although Mendes argues that we should "presume prejudice," he does not cite to any authority requiring a presumption of prejudice in this context. Because he fails to cite to any authority showing that we should apply a different prejudice standard, we do not further consider this argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

We hold that this argument fails.

V. IN-CUSTODY EVIDENCE

Finally, Mendes argues that his right to a fair trial was violated when the jury heard evidence that he made the calls supporting the witness tampering charges from jail, revealing that he was in custody and impinging on his right to an impartial jury and on the presumption of innocence. In addition, he suggests that this evidence was inadmissible because it was unfairly

[18] RAP 2.5.

prejudicial. He further argues that defense counsel provided ineffective assistance of counsel by failing to object to this evidence and that appellate counsel provided ineffective assistance of appellate counsel by failing to raise these issues in his direct appeal.

During trial, Mendes did not object to this evidence on these grounds. But even if Mendes had preserved these alleged errors for review, we hold that these arguments fail.

A. RIGHT TO JURY TRIAL AND PRESUMPTION OF INNOCENCE

Mendes argues that his right to a fair trial was violated when the jury heard evidence that he made the calls supporting the witness tampering charges from jail, revealing that he was in custody and impinging on his right to an impartial jury and on the presumption of innocence. This claim has no merit.

The Washington Constitution guarantees criminal defendants a fair and impartial trial. WASH. CONST. art. I, §§ 3, 22. Inherent in this right is the presumption of innocence, including the right to "the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (right to fair trial violated when defendant appeared before jury in physical restraints). "Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial." *Finch*, 137 Wn.2d at 845. We review an alleged violation of the right to an impartial jury and the presumption of innocence de novo. *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005).

To protect a defendant's right to a presumption of innocence, courts try to minimize any indications that the defendant is "a particularly dangerous or guilty person," such as shackling or handcuffing the defendant. *Finch*, 137 Wn.2d at 845. But jurors must be expected to know that a person awaiting trial will at some point be in custody, particularly when the defendant is charged

with something as serious as murder. *See State v. Mullin-Coston*, 115 Wn. App. 679, 693-94, 64 P.3d 40 (2003) (jurors must be expected to know that a person awaiting trial will also do so in custody), *aff'd*, 152 Wn.2d 107, 95 P.3d 321 (2004). Here, the jury heard only that Mendes was at some point being held in jail; Mendes does not allege that he was ever seen in restraints. Given the severity of the charges, it was likely the jury would have understood that Mendes would have been confined to the jail at some point, and Mendes cannot show that this information violated his right to a fair trial or eroded the presumption of innocence.[19] Accordingly, we hold that this claim has no merit.

B. EVIDENTIARY ISSUE

To the extent Mendes is arguing that this evidence was inadmissible because it was unfairly prejudicial, we hold that this argument also fails.

We review the admission of evidence for an abuse of discretion. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). "An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds." *Griffin*, 173 Wn.2d at 473.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. ER 403 has a presumption in favor of the admissibility

[19] Mendes cites to *State v. Jaime*, 168 Wn.2d 857, 864, 233 P.3d 554 (2010), for the premise that "jurors reasonably view a jail as a high-security place that houses individuals *who need to be in custody*." PRP at 12. But *Jaime* does not address whether knowledge that a defendant had at one point been held in jail was improper—it addressed whether holding trial in a jail courtroom was inherently prejudicial. 168 Wn.2d at 863-64. Although our Supreme Court distinguished courthouses from jails, noting that a jail's purpose is "singularly utilitarian" and that jails are intended to "isolate from the public a segment of the population whose actions have been judged grievous enough to warrant confinement," the court at no point addressed whether the mere knowledge that a defendant had spent time in custody in the jail was improper. *Jaime*, 168 Wn.2d at 863. Accordingly, *Jaime* does not support Mendes's argument.

of relevant evidence and the burden of establishing unfair prejudice is on the party seeking exclusion. *See Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994).

First, Mendes never objected on this ground, so he waived this issue. RAP 2.5(a). Second, even if we presume that the error was preserved, it has no merit. Again, a jury could reasonably have been expected to know that Mendes spent at least some time in jail given the serious nature of the charges. And the fact that Mendes made the calls from jail and knew they were being monitored could have provided context that may have explained what he was discussing with the calls' recipients.[20] Thus, we hold that Mendes does not show that this evidence should not have been admitted.

C. INEFFECTIVE ASSISTANCE CLAIMS

Mendes further argues that defense counsel was ineffective for failing to object to the in-custody evidence and that appellate counsel was ineffective for failing to raise this issue on appeal. These arguments fail.

Regarding whether defense counsel was ineffective, given this in-custody evidence was generally within the jury's knowledge, it is unlikely that the trial court would have sustained any objection on this ground.

Regarding whether appellate counsel was ineffective,[21] Mendes asserts that if appellate counsel had raised the constitutional issues on direct appeal, he would have been entitled to a

[20] The transcripts or recordings do not appear to be part of this record.

[21] "[A] criminal defendant has a right to have effective assistance of counsel on his first appeal of right," and a defendant's first opportunity to raise an ineffective assistance of appellate counsel claim is often on collateral review. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004). To prevail on such a claim, a petitioner must show that (1) the legal issue appellate counsel failed to raise had merit and (2) petitioner was actually prejudiced by the failure

presumption of prejudice that is part of the constitutional harmless error analysis. Constitutional error is subject to the constitutional harmless error analysis in which the defendant is presumed to have shown prejudice, and the State must overcome that presumption by showing that the error was harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d at 859. But as discussed above, it is unlikely Mendes could have established error, so the presumption of prejudice would not have benefitted him. Accordingly, we hold that these ineffective assistance of counsel claims fail.

In sum, we hold that Mendes does not show that he is entitled to relief on any of the grounds he has alleged. Accordingly, Mendes' petition is denied.

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.

Johanson, J.
JOHANSON, P.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.

to raise or adequately raise the issue. *Dalluge*, 152 Wn.2d at 787. A petitioner can show that he was actually prejudiced in this context if he can show that there is a reasonable probability that but for his appellate counsel's unreasonable failure to raise the issue, he would have prevailed on his appeal. *Dalluge*, 152 Wn.2d at 787-88.