Supreme Court No.: 95603-1
Court of Appeals No.: 75510-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL HENDERSON,

Respondent.

ANSWER TO STATE'S PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT AND DECISION BELOW

The unpublished Court of Appeals opinion simply applies on-point authority, including *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005) and *State v. Slaughter*, 143 Wn. App. 936, 186 P.3d 1084 (2008), to correct the trial court's error in denying a defense-requested jury instruction. As the court held, there was "no reason to diverge from this precedent." Slip Op. at 5. The opinion is neither novel nor controversial. Therefore, Michael Henderson, the respondent, asks this Court to deny the State's petition for review.

A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

Should the Court deny review of the unpublished, unanimous Court of Appeals opinion that adheres to settled precedent to hold the trial court erred in refusing to issue the requested jury instruction on excusable homicide that supported Henderson's theory of defense and was supported by at least some evidence?

C. STATEMENT OF THE CASE

The State tried Michael Henderson for felony murder predicated on assault with a deadly weapon of Abubakar Abdi. CP 1-8, 55-57; RP

(6/1/16) 804.[1] Abdi was killed late one night while he was intoxicated, had used marijuana, was carrying a screwdriver as a weapon, and was angry at an unrelated gentleman who had knocked his tooth out. RP (5/24/16) 250, 254-55, 260-65, 280-82, 323; RP (5/25/16) 426-28, 432-33. Abdi was with a group of his friends in public, arguing with Nekea Terrell. RP (5/23/16) 142-53. Henderson was friends with Terrell and, coming upon the group, gave her a hug. RP (5/23/16) 152.

Abdi's banter with Terrell escalated, causing Terrell and Abdi's friends to become fearful of him. RP (5/23/16) 155-56, 165; RP (5/24/16) 326-28; *accord* RP (6/1/16) 726-28 (Henderson thought fight would result). Abdi was gesturing with his hands, puffing out his chest, waving his arms about, moving closer in, and "bucking up." RP (5/23/16) 161, 166-67. Then, Abdi "flinched" his shoulders, lunged forward, moved his arms towards his waist, and seemed to reach for something in a pocket. RP (6/1/16) 641-44, 682, 736-39, 743-53, 789-90; Exhibit 26. In response, Henderson pulled out a gun as a warning and it fired. RP (5/24/16) 297-98; RP (6/1/16) 666, 682-83, 739-41

[1] Henderson did not contest an additional charge of unlawful possession of a firearm, and it is not at issue here. CP 1-2; RP (6/2/16) 875-77.

("[Henderson] was afraid [Abdi] was going to start shooting."), 750-52, 789-90. The bullet killed Abdi. RP (5/25/16) 519-20.

In his defense, Henderson requested jury instructions on justifiable and excusable homicide. RP (6/2/16) 820-31, 837-38. He asserted that he intentionally acted in lawful self-defense to an imminent injury when the weapon accidentally discharged (excusable homicide) and that, in the alternative, he acted in self-defense to imminent serious bodily injury or death (justifiable homicide). RP (6/1/16) 646-56; RP (6/2/16) 820-27. The evidence supported both defenses. *E.g.*, RP (6/2/16) 829 (State concedes self-defense evidence); RP (6/1/16) 683, 790 (shooting was an accident). The State conceded at trial the evidence supported an instruction on justifiable homicide: Several witnesses, including Mr. Henderson, testified to being fearful and anticipating a fight; the evidence also showed Abdi was drunk, had a screwdriver as a weapon, and made movements consistent with escalating the confrontation and reaching for a weapon. RP (6/2/16) 829 (State concedes self-defense evidence). The State has since recognized Henderson also testified he did not intentionally pull the trigger. *State v. Henderson*, No. 75510-2-I, Br. of Rep't at 5-6 (filed Jun. 12, 2017) (Henderson testified he did not intentionally pull the

trigger). Evidence also showed Henderson reasonably drew his weapon and fired a warning shot in self-defense but accidentally shot Abdi. 6/1/16 RP 683, 789-91. This evidence adequately supports the requested excusable homicide defense. *See* Slip Op. at 5-9.

The Honorable John Chun provided the requested self-defense instruction (justifiable homicide) but denied the requested excusable homicide instruction. CP 43-70; RP (6/2/16) 831, 837-38. The trial court relied upon a Court of Appeals decision that discusses the justifiable homicide instruction to deny Henderson's requested excusable homicide instruction. RP (6/2/16) 830 (discussing *State v. Ferguson*, 131 Wn. App. 855, 129 P.3d 856 (2006) (justifiable homicide defense unavailable where defendant uses excessive force)).

After a jury convicted Henderson, the Court of Appeals reversed and remanded for a new trial in a unanimous unpublished opinion. *See* Appendix. The court simply applied authority from this Court and the Court of Appeals governing excusable homicide instructions and defense-requested jury instructions and held, "while the trial court properly instructed the jury on justifiable homicide, we agree with Henderson that the trial court erred in failing to also instruct the jury on the defense of excusable homicide." Slip Op. at 1.

D. ARGUMENT IN SUPPORT OF DENYING REVIEW

The Court of Appeals opinion is a straightforward application of settled precedent. Review should be denied.

1. The unpublished opinion follows established case law that is in keeping with long-standing statutes to hold that Michael Henderson was legally entitled to the requested excusable homicide instruction.

A defendant is entitled to an instruction on any theory that is supported by at least some evidence. *E.g.*, *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980).

In *Brightman*, this Court approved the use of an excusable homicide instruction on remand for felony murder where the defendant produced some evidence the gun discharged accidentally. 155 Wn.2d at 518-19, 524-27 (discussing case law with "reasoning . . . founded in common sense"). The State charged Brightman with felony murder based on robbery in the alternative to premeditated murder. 155 Wn.2d at 511. Brightman requested a justifiable homicide instruction, for intentional self-defense, but did not assert an excusable homicide defense. *Id*. at 511-12. The Court reversed on other grounds, for a public trial violation, and addressed the defendant's challenge to the Court of Appeals holding that the defense actually presented only a

case of excusable homicide. *Id*. at 518. The Court first held the trial court properly denied instructing the jury on justifiable homicide because Brightman "did not show that he *intentionally* used deadly force . . . or that *deadly* force was necessary to defend himself." *Id*. at 526.

However, the Court agreed with the Court of Appeals that an excusable homicide instruction would be legally available if, on remand, the evidence supported the argument that an accidental killing was precipitated by an act of self-defense. *Brightman*, 155 Wn.2d at 526. Thus pursuant to this Court's opinion, on remand, excusable homicide was a legally available defense to the charge of felony murder. *Id*. at 525-27.

Brightman's holding aligns with the statute. The legislature codified the defense of excusable homicide to apply to all homicides, without exclusion.

> Homicide—When excusable.
>
> Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

RCW 9A.16.030. The Washington Pattern Instructions likewise provide that excusable homicide is a legally available defense to all murder and manslaughter charges:

> It is a defense to a charge of *[murder] [manslaughter]* that the homicide was excusable as defined in this instruction.
>
> Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

WPIC 15.01. The Notes on Use further make explicit the excusable homicide "instruction may be used in any homicide case in which the defense of excusable homicide is an issue supported by the evidence." WPIC 15.01 (notes on use) (emphasis added). Thus, this Court correctly held in *Brightman* that excusable homicide is an available defense to felony murder, as it is to any other homicide charge.

Brightman also conformed to this Court's prior case law, which noted felony murder charges are subject to an excusable homicide defense. *State v. Harris*, 69 Wn.2d 928, 929, 932-33, 421 P.2d 662 (1966), *abrogated on other grounds as noted in State v. Leonard*, 183 Wn. App. 532, 334 P.3d 81 (2014). When this Court decided *Brightman*, it had already issued the cases the State uses to argue felony murder precludes an excusable homicide defense. Pet. for Rev. at 8-9

(citing *State v. Craig*, 82 Wn.2d 777, 782, 514 P.2d 151 (1973); *State v. Leech*, 114 Wn.2d 700, 708, 790 P.2d 160 (1990); *State v. Bolar*, 118 Wn. App. 490, 78 P.3d 1012 (2003)). Those cases do not present a basis to overrule *Brightman*.

Further, this Court recently relied on *Brightman* to confirm that excusable homicide applies to accidental killings committed while acting in self-defense, without limitation as to the type of charge. *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 142 & n.5, 385 P.3d 135 (2016) (quoting *Brightman* with approval for proposition that an accidental killing committed while acting in self-defense constitutes the defense of excusable homicide without limitation as to the type of homicide charged). The State presents no basis for this Court to disagree with its recent opinion in *Caldellis*.

A decade ago, the Court of Appeals followed *Brightman* to hold the trial court properly provided an excusable homicide instruction in defense to felony murder predicated on assault. *State v. Slaughter*, 143 Wn. App. 936, 945, 186 P.3d 1084, *review denied*, 164 Wn.2d 1033, 197 P.3d 1184 (2008). In *Slaughter*, the defendant argued he acted in lawful self-defense to an assault and, in the course of that lawful self-defense, accidentally killed someone. 143 Wn. App. at 941, 942. The

trial court provided the jury with an instruction on excusable homicide, accompanied by a self-defense instruction that explained the extent of the lawful use of force supporting the accidental killing. *Id*. at 941, 942-43. On appeal Slaughter disputed the lawful use of force instruction that accompanied the excusable homicide defense instruction. *Id*. at 941.

Relying on *Brightman*, the Court of Appeals upheld the trial court's decision to provide these instructions. *Id*. at 943. "In a case where a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable, homicide." *Slaughter*, 143 Wn. App. at 942 (citing *Brightman*, 155 Wn.2d at 525). The Court of Appeals again relied on *Brightman* to uphold the lawful use of force instruction because it defined the scope of the lawful act upon which the excusable homicide could be predicated. *Id*. at 942 (citing *Brightman*, 155 Wn.2d at 525 n.13).

Therefore, Slaughter's jury was properly instructed that excusable homicide is a defense to felony murder predicated on assault: "The defense of excusable homicide and the State's corresponding burden of proof were correctly stated in the excusable homicide instruction. It was that instruction which set forth the applicable

defense to the murder charge." *Id*. at 943. The Court of Appeals noted this holding was consistent with *Brightman*: "the instructions the trial court gave here were precisely what the court suggested in *Brightman*." *Id*. at 944. As noted, this Court denied review. *Slaughter*, 164 Wn.2d 1033.

The State declines to address or even cite to *Slaughter* in its petition for review, even though the Court of Appeals discussed it.

Brightman and *Slaughter* flatly preclude the State's argument that a defendant to felony murder does not have an available excusable homicide defense because the accused cannot have been committing a lawful act by lawful means. Pet. for Rev. at 9-10. As *Brightman* and *Slaughter* held, a lawful act of self-defense predicates an excusable homicide. *Brightman*, 155 Wn.2d at 525 n.13 (explaining because use of force can be lawful under RCW 9A.16.020(3) when a person is about to be injured, "a defendant *could* argue that his action that precipitated the accidental killing amounted to lawful self-defense under RCW 9A.16.020(3), even if he could not argue that an accidental killing was" justifiable self-defense); *Slaughter*, 143 Wn. App. at 944-45. Moreover, even if the jury could acquit under another theory, Henderson was still entitled to the excusable homicide instruction

because it was legally available and supported by at least some evidence. Thus, the State's contention that "an excusable homicide instruction adds nothing to the jury's analysis" seems to concede the availability of the defense but is otherwise irrelevant to whether the trial court should have provided the instruction as Henderson requested. *See* Pet. for Rev. at 9-10.

Thus, it has long been settled that an excusable homicide instruction should be provided where requested and supported by some evidence, even in defense to felony murder. Accordingly, the opinion below properly relies on *Brightman* and *Slaughter* for its uncontroversial ruling.

2. The unpublished opinion follows established precedent in holding Henderson was entitled to a legally available defense instruction on the theory of his case because it was supported by some evidence.

"Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support that theory." *Theroff*, 95 Wn.2d at 389 (citing *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968)); *accord, e.g.*, *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). "[G]iving an instruction on a party's theory of the case is required provided there is evidence to support it, and the failure

to do so . . . constitutes reversible error." *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249 (1972) (citing, *e.g.*, *State v. Ladiges*, 66 Wn.2d 273, 277, 401 P.2d 977 (1965)) (internal citations omitted). The Court of Appeals adhered to this established rule, holding that the trial court's denial of an excusable homicide instruction, one of Henderson's defense theories, required remand for a new trial. Slip Op. at 5-6, 9.

The State incorrectly claims Henderson could argue the jury should acquit because he did not intentionally shoot Abdi. Pet. for Review at 13. On the contrary, the jury could have found Henderson assaulted Abdi by brandishing his firearm, an assault in the second degree, CP 57 (defining assault in the second degree), and therefore convict him of felony murder for causing Abdi's death in the course of and in furtherance of that assault, CP 56 (to convict instruction). "In this case, the instructions, as given at the trial court, only allowed the jury to find Henderson acted in self-defense in shooting Abdi." Slip Op. at 9. The trial court's instructions deprived Henderson of the opportunity to argue he intentionally drew his weapon in a lawful act of self-defense but the weapon accidentally discharged. *See Brightman*, 155 Wn.2d at 525 n.13; *Caldellis*, 187 Wn.2d at 142 & n.5.

The State's citation to defense counsel's closing argument only demonstrates Henderson could argue his theory of self-defense, but not that he acted accidentally. Defense counsel argued that the evidence supported either of two acts of self-defense: shooting in the air to frighten Abdi or shooting at Abdi to prevent Abdi from harming Henderson. RP (6/2/16) 908.[2] It is clear defense counsel was discussing self-defense because he next argued, "He had a right to be where he was . . . If you stand in his shoes, looking at what he saw, thinking what he thought, was it reasonable for him to react the way he did?" RP (6/2/16 909). While the justifiable homicide instructions supported these theories of defense, no instruction supported the requested excusable homicide defense.

Moreover, even if the defense can present evidence related to his or her theory of defense, reversal is required if the trial court was requested but declined to instruct the jury on how or whether they could consider the evidence. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). Because the instruction was denied here, reversal was required.

[2] This is the same passage the State quotes but attributes to "RP 905."

The unpublished opinion conforms to this Court's established precedent. Review should be denied.

3. There is copious case law setting forth this standard; the Court's review is not warranted.

The State finally asks the Court to accept review to settle the factual question whether some evidence in the record supported the excusable homicide instruction. Pet. for Review at 14. The threshold "some evidence" standard is well-established, it is a low threshold, and it was satisfied here. *See Brightman*, 155 Wn.2d at 520 (setting forth standard for providing requested defense instruction). There is no basis for Supreme Court review.

The State concedes "the threshold burden of production for a defense instruction is low." Pet. for Review at 14. The State further recognizes the evidence must be viewed in the light most favorable to the defendant. Pet. for Review at 14-15. The State simply contends, the evidence cannot be "nonexistent." Pet. for Review at 14.

The evidence existed here. In fact, the Court of Appeals opinion takes three pages to set forth the "some evidence" that warranted the excusable homicide instruction. Slip Op. at 6-8. For example, Henderson testified that firing the gun was an accident:

> Q. You meant to fire the gun, did you not, Mr. Henderson?
>
> A. I did fire the gun. I didn't mean to fire the gun, but I did fire the gun.
>
> Q. Was it an accident that you fired the gun?
>
> A. Yes, it was.

RP (6/1/16) 751. Henderson testified he did not intentionally pull the trigger:

> Did you purposely pull the trigger?
>
> A. No.
>
> Q. Did you purposely point the gun at Mr. Abdi –
>
> A. No.
>
> Q. -- for the purpose of shooting him and striking him with a bullet?
>
> A. No.

RP (6/1/16) 791.

This was some evidence supporting the instruction. Moreover, as this Court held in *Reese v. City of Seattle*, 81 Wn.2d 374, 384, 503 P.2d 64 (1972), an excusable homicide defense can be predicated on an accidental killing that resulted from an intentionally fired firearm. Slip Op. at 9 (discussing *Reese*). Thus, the defense was available to

Henderson even if he intentionally fired a warning shot that accidentally struck and killed Abdi.

Tellingly, at trial the prosecutor conceded Henderson testified to the accidental nature of the shooting: "the last word out of his mouth was that he accidentally fired the gun. So it was an accident." RP (6/2/16) 821. But, there was more.

Henderson further testified that other bystanders touched his arm or interfered with his movement such that the firearm accidentally discharged:

> Q. You said that the shooting was an accident and that you had intended to give a warning shot. Do you remember whether or not Mr. Shamo, by his body or his arm, struck your arm?
>
> [objection overruled]
>
> THE WITNESS: Yes.
> . . .
> Q. Do you remember whether or not Ms. Terrell, who was standing to your left, moved forward and touched you or interfered with your movement?
>
> A. Yes, I do.
>
> Q. Did that have any effect on how your arm and the hand with the gun was moved?
>
> A. I believe it did. The situation occurred so fast as Ms. Terrell went forward. I stood to my left and grabbed her to step back.

. . .

> Q. If your arm had not been hit, do you think you would have struck him with a bullet?
>
> [objection overruled]
>
> THE WITNESS: I don't believe so.

RP (6/1/16) 789-91.

Although it conceded to the trial court that the evidence showed the shooting "was an accident," the State asks this Court to sit as factfinder to determine the credibility of the evidence. *Compare* RP (6/2/16) 821 *with* Petit. for Review at 16-17 ("In light of this testimony, Henderson's attempts to characterize the shooting as 'a warning shot' or 'an accident' were simply not credible."). But, Henderson was entitled to have the jury assess the credibility of the evidence in light of his excusable homicide theory of defense. *See, e.g.*, *State v. Fernandez-Medina*, 141 Wn.2d 448, 460-61, 6 P.3d 1150 (2018) (in evaluating the adequacy of the evidence to support a proposed instruction, the court cannot weigh the evidence because the jury determines questions of weight and credibility); *State v. Pearson*, 37 Wash. 405, 407, 79 P. 985 (1905) ("We do not think an appellate court should invade the province of a jury, and attempt to weigh the evidence of witnesses or pass upon their credibility; but we may examine the record, and ascertain whether,

upon the evidence as presented and admitted, the jury was properly instructed."). Because Henderson was denied this opportunity, the Court of Appeals applied settled precedent to reverse and remand. This Court's review is not warranted.

If the Court disagrees, grants review, and reverses the Court of Appeals, the case should be remanded back to the Court of Appeals to decide the reversible misconduct, over defense counsel's objection, where the prosecutor misstated the law and encouraged the jury to consider the appropriateness of the law as well as the issues raised in Henderson's statement of additional grounds, each of which the Court of Appeals explicitly declined to address. Slip Op. at 10.

E. CONCLUSION

This Court should deny the State's request to review the Court of Appeals decision, which adheres to settled precedent.

DATED this 11th day of April, 2018.

Respectfully submitted,

s/ Marla L. Zink_____
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID HENDERSON, Appellant.	)	No. 75510-2-I DIVISION ONE UNPUBLISHED OPINION FILED: February 12, 2018

MANN, J. — Michael Henderson appeals his felony murder conviction for the shooting of Abubakar Abdi. Henderson argues that the trial court erred in failing to instruct the jury on both defenses of justifiable homicide and excusable homicide. While the trial court properly instructed the jury on justifiable homicide, we agree with Henderson that the trial court erred in failing to also instruct the jury on the defense of excusable homicide. We reverse and remand for a new trial.

FACTS

On October 11, 2015, Abdi instigated a verbal altercation with Nekea Terrell at a gas station. Both were intoxicated. Terrell and Abdi were both with a group of friends. The verbal altercation continued as Terrell, Abdi, and their friends moved across the street. Terrell and Abdi's friends attempted to calm them down. Terrell testified that

she thought that there was going to be a fight between herself and Abdi, and was ready to fight him.

Henderson knew Terrell, and at some point, joined the group that was gathered around Abdi and Terrell as they continued arguing. Henderson and Abdi exchanged words, and Abdi asked Henderson if he wanted "to get into it, too?" One of Abdi's friends stood between Abdi and Henderson. Terrell testified that Abdi was acting physically aggressive.

Henderson testified that Abdi "flinched" his shoulders and lunged forward, then stepped backward, and moved his arm towards his waist, seeming to be reaching for a weapon. Henderson drew a handgun out of his pants pocket, pointed it in the direction of Abdi, and fired. The bullet hit and killed Abdi. The shooting was captured on surveillance tape.

The State charged Henderson with second degree felony murder, based on assault in the second degree with a deadly weapon, and with unlawful possession of a firearm. At trial, Henderson requested a justifiable homicide instruction and an excusable homicide instruction. After hearing arguments from both sides, the trial court agreed to include only the justifiable homicide instruction. The jury found Henderson guilty of all charges. Henderson appeals.

ANALYSIS

Excusable homicide instruction

Where a trial court has refused to give a justifiable homicide, excusable homicide, or self-defense instruction, the standard of review depends upon why the trial court did so. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the trial

court's refusal was based on a factual dispute, we review the decision for abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). If the trial court's refusal to give the requested instruction was based on a ruling of law, our review is de novo. Brightman, 155 Wn.2d at 519.

At trial, Henderson argued that the inclusion of the excusable homicide instruction was supported under Brightman and State v. Slaughter, 143 Wn. App. 936, 941, 186 P.3d 1084 (2008). Henderson argued that "there is testimony given by Mr. Henderson that allows for consideration of both an excusable and an accidental and a justified claim for lawful use of force." The trial court agreed to instruct the jury on self-defense using deadly force based on Washington Pattern Jury Instruction (WPIC) 16.02.[1] The trial court declined, without explanation, to instruct the jury on the defense of excusable homicide based on WPIC 15.01.

The parties agree the trial court did not analyze whether the excusable homicide instruction was factually supported on the record. Without factual analysis or conclusions with which to review the trial court's decision, we consider de novo whether, as a matter of law, "excusable homicide" is available as a defense to felony murder, and whether the facts in this case support such a defense. Brightman, 155 Wn.2d at 519.

An excusable homicide defense is available only when "committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." RCW 9A.16.030; WPIC 15.01. A justifiable homicide defense is available when the homicide was committed in the lawful defense of the

[1] 11 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.02 (4th ed. 2016) (WPIC).

slayer when the slayer "reasonably believes he or she is threatened with death or great personal injury." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); WPIC 16.02.

The State argued before the trial court that Henderson could not request both a self-defense and an excusable homicide defense instruction. This was incorrect. Washington courts have repeatedly held instructions for self-defense and excusable homicide "are not invariably inconsistent and mutually exclusive." State v. Callahan, 87 Wn. App. 925, 932-33, 943 P.2d 676 (1997); Slaughter, 143 Wn. App. at 945. Inconsistent defenses may be permitted so long as sufficient evidence is presented by either party to affirmatively establish the defendant's theory. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); see also Brightman, 155 Wn.2d at 526, n.14 (acknowledging that if there is evidence that excusable homicide was predicated on self-defense both instructions are available).

The State now argues that excusable homicide should not be allowed as a defense to felony murder "because the felony murder doctrine is intended to punish accidental killings committed during the course of a felony." The State's argument misunderstands the use of excusable homicide in felony murder cases and the cases that have applied it. While it is true that the fundamental feature of felony murder is that the killing was an unintended consequence of the underlying felony, Washington courts do recognize the defense of excusable homicide in such cases when the defendant argues the felony was committed in self-defense but the killing was an accident.

In Brightman, our Supreme Court explained, "[e]xcusable homicide is the defense that by its plain language is intended to apply to accidental killings, while

justifiable homicide by its plain language applies to killings in self-defense. While a defendant may take actions in self-defense that lead to an accidental homicide, one cannot actually kill by accident and claim that the homicide was justifiable." Brightman, 155 Wn.2d at 525. Thus, in a case where a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable, homicide. Brightman, 155 Wn.2d at 525. The court explained,

> RCW 9A.16.020(3) establishes that the use of force is lawful when the person is about to be injured, so long as the force used is not more than necessary, a defendant could argue that his action that precipitated the accidental killing amounted to lawful self-defense under RCW 9A.16.020(3), even if he could not argue that an accidental killing was a justifiable homicide under RCW 9A.16.050.

Brightman, 155 Wn.2d at 525 n.13.

In Slaughter, this court also approved the use of excusable homicide as a defense to a felony murder charge predicated on assault. 143 Wn. App. at 941. In Slaughter, the trial court gave an instruction on excusable homicide and an instruction defining lawful force as it related to self-defense, explaining that the "lawful force" instruction was included to explain the term "lawful" in the excusable homicide instruction. Slaughter, 143 Wn. App. at 942. This court held the instructions were proper as they affectively allowed Slaughter to argue his theory of the case: "accidental homicide precipitated by an act of self-defense." Slaughter, 143 Wn. App. at 944. We see no reason to diverge from this precedent, and similarly hold that excusable homicide was legally available as a defense to felony murder in this case.

We must next decide whether the evidence supports instructing the jury on the defense of excusable homicide. A defendant is entitled to an affirmative defense

instruction when he or she has raised some evidence, from whatever source, to establish that the killing occurred in circumstances that meet the requirements of that defense. Brightman, 155 Wn.2d at 520; State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court must view the evidence in the light most favorable to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. Because the defendant is entitled to the benefit of all the evidence, his defense may be based upon facts inconsistent with his own testimony. Callahan, 87 Wn. App. at 933 (citing State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986)).

Here, the trial court included the justification defense, allowing the jury to find Henderson shot Abdi in self-defense. The question therefore is whether Henderson presented evidence to support his theory that he intentionally fired a warning shot but accidentally shot Abdi.

Henderson consistently testified at trial that he did not intend to shoot Abdi. During direct examination, Henderson testified, "When [Abdi] lunged and I saw him reaching, I fired a warning [shot]. It just so happened it lined up in the direction of Mr. Abdi."[2] When asked what his intention was, he said it was "Basically, to get everybody calmed down. You know what I'm saying? You fire a warning shot, everybody will stop arguing. You look around and get the attention of everybody." Throughout direct examination, Henderson testified that he intended to fire the gun, but did not intend to aim at and shoot Abdi.[3]

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[2] Report of Proceedings (RP) (June 1, 2016) at 683.
[3] RP (June 1, 2016) at 683-84.

This was reiterated on cross-examination, when the prosecutor asked Henderson what happened after he saw Abdi reach for his waist:

> Q. At that point, you pulled out your gun to fire a warning shot?
> A. Yes.
> Q. How were you intending on firing this warning shot, Mr. Henderson?
> A. In the air.
> . . .
> Q. It's true, is it not, Mr. Henderson, that when you initially pulled the gun out, you pointed at Mr. Abdi?"
> A. Yes.
> . . .
> Q. You moved the gun after initially pointing it at Mr. Abdi, correct?
> A. No.
> Q. So you pulled the gun, and you just fire?
> A. Yes.
> Q. And you believe you are firing in the air?
> A. Yes.
> Q. You feel your hand go up in the air, and you fire?
> A. Yes.[4]

The prosecutor continued,

> Q. And so when you pulled the gun out, you fully intended on firing, correct?
> A. Yes.
> Q. It wasn't an accident that you pulled the trigger?
> A. Yes.
> Q. And your testimony is that your intent was simply to fire it in the air?
> A. Yes.[5]

Henderson later admitted he aimed directly at Abdi before he fired, however, he maintained he intended only to fire a warning shot:

> Q. I'm going to back it up one more time. When you first pull the gun out, isn't it true you first raise it above your shoulder, point it at Mr. Abdi, and then reposition the gun below so as not to shoot Mr. Shamo?
> A. Yes, it is.
> Q. Because you were aiming the gun at Mr. Abdi?
> A. Yes, I was.
> Q. It was not a warning shot, was it, Mr. Henderson?

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[4] RP (June 1, 2016) at 740-41.
[5] RP (June 1, 2016) at 742-43.

A. It was a warning shot.
Q. It was a warning shot intended to warn Mr. Abdi that you had a bullet in the gun?
A. No, it was a warning shot to let him know to calm down whatever he was reaching for.
Q. You pointed your arm directly at Mr. Abdi and fired, correct?
A. Yes.
. . .
Q. You meant to fire the gun, did you not, Mr. Henderson?
A. I did fire the gun. I didn't mean to fire the gun, but I did fire the gun.
Q. Was it an accident that you fired the gun?
A. Yes, it was.
Q. Previously, you testified when you fired the warning shot that you intentionally pulled the trigger to fire that warning shot. Are you now changing your testimony?
A. No. I said I meant to fire the gun.
Q. I asked you earlier if you intentionally pulled the trigger to fire a warning shot, and you said yes. Now you are saying no?
A. Yes. I'm saying yes.
Q. So you did intentionally pull the trigger?
A. Yes.[6]

On redirect, defense counsel asked Henderson to clarify what happened, and Henderson stated, "Mr. Abdi came forward and Shamo tried to intervene. And I pushed him out of the way and fired a shot, which was supposed to be a warning shot."[7] Defense counsel then clarified and asked, "Did you purposely pull the trigger?" and Henderson said no.[8] Henderson also claimed that someone had bumped his arm, possibly causing him to shoot directly at Abdi.[9]

On appeal, Henderson argues that his testimony was sufficient to support the defense of excusable homicide because he testified that he intentionally acted in lawful self-defense to an imminent injury when he drew his gun and attempted to fire a warning shot, but that the weapon accidentally discharged while it was pointed at Abdi.

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[6] RP (June 1, 2016) at 750-52.
[7] RP (June 1, 2016) at 790.
[8] RP (June 1, 2016) at 790.
[9] RP (June 1, 2016) at 789-90.

In this case, the instructions, as given at the trial court, only allowed the jury to find Henderson acted in self-defense in shooting Abdi. Henderson's requested instructions would have allowed the jury to determine that Henderson reasonably drew his gun and fired a "warning shot" in self-defense, and then accidentally shot Abdi. A defendant need only demonstrate "some evidence" in support of an affirmative defense instruction. Walden, 131 Wn.2d at 473; State v. Fisher, 185 Wn.2d 836, 851, 374 P.3d 1185 (2016). Henderson's testimony is evidence in support of the instruction and the jury was "entitled to believe" his testimony. Reese v. City of Seattle, 81 Wn.2d 374, 384, 503 P.2d 64 (1972)

The State maintains excusable homicide is unavailable because Henderson testified he intentionally fired the gun. In Reese, our Supreme Court upheld the giving of an excusable homicide instruction even when "the firing of the gun was not by accident." 81 Wn.2d at 384. The court held excusable homicide was still available as a defense because "the officer was entitled to use deadly force" and the officer testified that he had "aimed at the tires intending to disable the vehicle in which the two occupants were fleeing, and that the shooting of Reese was not intended." Reese, 81 Wn.2d at 384. Thus, intentionally firing the gun does not bar the instruction.

Viewing the evidence in the light most favorable to Henderson, we hold there was some evidence to support the excusable homicide instruction, and the trial court erred in failing to include it. A trial court's failure to instruct the jury on a party's theory of the case, where there is evidence supporting that theory, is reversible error. State v. Birdwell, 6 Wn. App. 284, 297, 492 P.2d 249 (1972).

State v. Townsend

Henderson argues, for the first time on appeal, that this court should overturn State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) because it is "incorrect and harmful." State v. Kipp, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014) (before an established rule may be abandoned it must be shown to be both incorrect and harmful). In Townsend, our Supreme Court held it was error to inform jurors of possible sentencing during voir dire, specifically whether the death penalty was being sought. Henderson argues this rule is harmful because it results in the trial court unnecessarily excluding jurors that are otherwise qualified because they oppose the death penalty.

Although the State agrees that the rule in Townsend should be overturned, the State maintains Henderson waived this issue on appeal. We agree that the issue was waived. Moreover, it is not this court's role to overrule established Supreme Court precedent. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("Once [the Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts until [the Supreme Court overrules] it.").

Additional Assignments of Error

Henderson also argues the prosecutor committed misconduct during closing arguments and raises several other issues in his statement of additional grounds. Because we reverse on other grounds, we do not address these issues.

We reverse and remand for a new trial.

WE CONCUR:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. MICHAEL HENDERSON, Respondent.	)))))))))	NO. 95603-1

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OFAPRIL, 2018, I CAUSED THE ORIGINAL **ANSWER TO PETITION FOR REVIEW** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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