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Supreme Court No. (to be set)
Court of Appeals No. 34670-6-III
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Josephine Johnson
Appellant/Petitioner

Grant County Superior Court Cause No. 14-1-00826-3
The Honorable Judge John M. Antosz

PETITION FOR REVIEW

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Petitioner Josephine Johnson asks the Court to review the Court of Appeals' unpublished opinion entered on March 12, 2019 (attached). This case presents five issues:

1. Is expert testimony regarding battered spouse syndrome admissible when an accused person claims self-defense after shooting her abuser?
2. Is expert testimony that a person's mental condition "could have" impaired her ability to form intent sufficient to raise a diminished capacity defense?
3. Is expert testimony explaining how dementia affects memory relevant and admissible to explain radical changes in an accused person's account of a traumatic incident?
4. Must a court instruct on self-defense even when evidence supporting the defense conflicts with the accused person's trial testimony?
5. Must appellate courts review *de novo* (a) the exclusion of evidence critical to the defense and (b) the refusal to instruct on the defense theory?

STATEMENT OF THE CASE

Josephine Johnson suffers from dementia and other cognitive impairments. Ex. 25, p. 1, 3. When she was seventy-seven, she shot her abusive husband, Donald Bitterman. RP (6/17/16)[1] 54; Ex. 32; Ex. 2 (2/4/15), p. 6.[2] Before the shooting, she had repeatedly contacted the Grant County Sheriff's Department to report Bitterman's assaults and his threats to kill her and her sons. RP (6/16/16) 18, 182; RP (6/17/16) 17-18; CP 58, 61,

[1] Two volumes of transcript were filed from hearings occurring on June 17, 2016. The single volume prepared by Court Reporter Brittingham will be cited including the name.

[2] Exhibit 32 is an audio recording of Ms. Johnson's statement to police. It was admitted at trial. RP (6/17/16) 114-116. A transcript of the recording was admitted at a pretrial hearing, but not offered at trial. Ex. 2 (2/4/15). Citations to the transcript are provided here to facilitate review of Ex. 32, the recording itself.

63. She had also described the abuse to her doctor. Ex. 24, p. 7. When she sought protection orders, outlining her fear that Bitterman would kill her, her petitions were denied. RP (6/15/16) 12; RP (6/16/16) 169-170, 182; RP (6/17/16) 41; CP 67-92; Ex. 28, 30.

Just before the day of the shooting, Bitterman threatened to "blow [her] brains out."[3] RP (6/17/16) 48. Ms. Johnson told Bitterman she planned to leave him, but he told her she couldn't. RP (6/17/16) 49; Ex. 32; Ex. 2 (2/4/15), pp. 11-12. On December 23, 2014, Ms. Johnson picked up one of Bitterman's handguns and repeated that she was leaving him. CP 4; Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7. Once again, he told her she couldn't leave.[4] Ex. 32; Ex. 2 (2/4/15), p. 7.

When Ms. Johnson told her husband that he couldn't stop her from leaving, he came at her. Ex. 32; Ex. 2 (2/4/15), p. 6, 7. She feared he might grab her by the neck or take the gun and shoot her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10. She was afraid for her life. RP (2/11/15) 27.

She believed the gun was "on safe" as she backed away, but she aimed at his chest "where it would do the most good" if she shot him. Ex.

[3] This followed other threats he'd made over the preceding days. Ex. 32; Ex. 2 (2/4/15), p. 24.

[4] The Court of Appeals mischaracterized this evidence, suggesting that he "would not let her take her belongings" with her. Opinion, p. 2.

32; Ex. 2 (2/4/15), p. 5, 6, 9, 23; RP (2/11/15) 27; RP (6/17/16) 55. Bitterman grabbed at the gun, and it discharged accidentally. RP (6/17/16) 54. Ex. 32; Ex. 2 (2/4/15), p. 8.

The State charged Ms. Johnson with first-degree assault. CP 4. Her defense was self-defense, diminished capacity, and "battered spouse syndrome." CP 302. Ms. Johnson's dementia interfered with her memory of the event. RP (6/17/16) 89, 120; RP (8/19/16) 113-114, 119-120; Ex. 24, p. 15; Ex. 25, p. 3, 4. When she spoke with the police shortly after the shooting, she said she armed herself and notified Bitterman she planned to leave him. Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7. She told police that she feared Bitterman might grab her by the neck or take the gun and shoot her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10. She said the gun discharged accidentally when he came at her and tried to grab it. Ex. 32; Ex. 2 (2/4/15), p. 6, 7, 8.

In her trial testimony, she said she'd found the gun and picked it up to hide it.[5] RP (6/17/16) 52-55. She told jurors that it discharged accidentally when Bitterman tried to grab it from her.[6] RP (6/17/16) 54-55. Ms. Johnson's statement to police was introduced in its entirety, without

[5] She had made a similar statement during her interview with Dr. Cedar O'Donnell, a forensic psychologist who had evaluated Ms. Johnson at the state's behest. Ex. 25, pp. 14-15.

[6] Initially, defense counsel responded to this shift by changing the defense from self-defense to pure accident. RP (6/15/16) 40; CP 25-26, 28-32. However, when the State introduced Ms. Johnson's entire police statement, defense counsel asked the court to instruct on self-defense. CP 138-158; RP (6/17/16) 114-116; RP (6/20/16) 6, 15-20, 26-29, 32; Ex. 32.

limitation. RP (6/17/16) 114-116; Ex. 32. It provided the basis for her self-defense claim. CP 138-158; RP (6/20/16) 6, 15-20, 26-29, 32; Ex. 32.

The trial court refused to instruct on self-defense. CP 138-158; RP (6/20/16) 6, 15-20, 26-29, 32. This stemmed from the inconsistency between Ms. Johnson's statement to police and her trial testimony.[7] RP (6/20/17) 18-19.

The court denied the defense offer of expert testimony on battered spouse syndrome. CP 138-158; RP (6/20/16) 6. Dr. Gerlock found that the syndrome applied to Ms. Johnson. Ex. 24, p. 10. Had she been allowed to testify, Dr. Gerlock would have explained why Ms. Johnson stayed with Bitterman despite the abuse. She would also have helped jurors understand Ms. Johnson's perceptions of the threat Bitterman posed on the day of the shooting. Ex. 24.

In addition, the court rejected Ms. Johnson's attempt to introduce expert testimony showing that her "cognitive difficulties could have impaired [her] ability to form intent." RP (6/17/16) 92. The court found this opinion, provided by Dr. O'Donnell, insufficient to support a diminished capacity defense.[8] RP (6/17/16) 92-98.

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[7] The trial judge believed the evidence "arguably" supported self-defense when facts from her police statement were considered along with her trial testimony. RP (6/20/17) 18-19.

[8] In an offer of proof, defense counsel told the court that he had spoken with Dr. O'Donnell and expected him to testify that Ms. Johnson's condition "could have" impaired her ability to

The court also refused to allow expert testimony explaining how Ms. Johnson's dementia impacted her memory of the shooting. RP (6/17/16) 25-26, 87-90, 120; RP (6/17/16 Brittingham) 29; Ex. 25, p. 3, 4, 16. The court did not explain this ruling.[9] RP (6/17/16) 120; RP (6/17/16 Brittingham) 29.

Ms. Johnson was convicted of first-degree assault and sentenced to 153 months in prison. CP 255, 257. She appealed, and the Court of Appeals affirmed her conviction. Opinion, pp. 1, 12.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE TRIAL COURT VIOLATED MS. JOHNSON'S RIGHT TO PRESENT A DEFENSE BY EXCLUDING CRITICAL EVIDENCE.

Ms. Johnson's self-defense claim and her diminished capacity defense rested on the expert opinions of Dr. Gerlock and Dr. O'Donnell. Defense counsel also sought to introduce Dr. O'Donnell's opinion that Ms. Johnson's dementia may have impacted her memory of the shooting. By excluding this critical evidence, the trial court violated Ms. Johnson's constitutional right to present a defense.

An accused person has a constitutional right to introduce relevant

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form intent. RP (6/17/16) 92-98; Ex. 92, 95. The written report, prepared prior to defense counsel's interview, did not support diminished capacity. *See* Ex. 25.

[9] Initially, counsel only planned to have Dr. O'Donnell testify about Ms. Johnson's memory issue if diminished capacity evidence were allowed. RP (6/17/16) 87-88. After Ms. Johnson's statement to police was introduced, he asked the court to admit the testimony even if Dr. O'Donnell was not also permitted to discuss diminished capacity. RP (6/17/16) 120.

admissible evidence.[10] *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Even minimally relevant evidence must be admitted.[11] *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). Here, the expert testimony excluded by the trial court was at least minimally relevant.

Expert testimony is admissible if it will help the jury understand the evidence or determine a fact at issue. ER 702; *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). "Helpfulness" is construed broadly, and the rule favors admission in doubtful cases. *Id; Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)).

A. Expert testimony on battered spouse syndrome was relevant to Ms. Johnson's self-defense claim and should have been admitted.

Ms. Johnson sought to introduce expert testimony regarding battered spouse syndrome. RP (6/20/16) 29-43. The proffered evidence went directly to Ms. Johnson's self-defense claim.[12] *See State v. Janes*, 121 Wn.2d 220, 239, 850 P.2d 495 (1993). *see also State v. Allery*, 101 Wn.2d 591, 597, 682 P.2d 312, 315 (1984); *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)

[10] This right stems from the Sixth and Fourteenth Amendments to the U.S. Constitution. *See Greene v. Lambert*, 288 F.3d 1081, 1090 (9th Cir. 2002).

[11] Evidence is relevant "if it has any tendency to make the existence of any consequential fact more probable or less probable." *Washington v. Farnsworth*, 185 Wn.2d 768, 782–83, 374 P.3d 1152 (2016) (citing ER 401).

[12] Indeed, without the excluded evidence, the Court of Appeals found the evidence insufficient to support instructions on self-defense. Opinion, p. 6.

Ms. Johnson suffered near constant abuse, including death threats and physical assaults. RP (6/15/16) 35; RP (6/16/16) 174, 177, 179, 182-183, 195, 197, 200-202; RP (6/17/16) 40-41, 73-75, 80-81; Ex. 32; Ex. 2 (2/4/15), p. 3, 4, 18; Ex. 24 pp. 7-8. Dr. Gerlock's testimony was critical to explain why Ms. Johnson remained in a relationship that was "both psychologically and physically dangerous." *Allery,* 101 Wn.2d at 596. In addition, Dr. Gerlock would have explained that Ms. Johnson's age, cognitive impairments, and physical difficulties made it even harder for her to escape this abusive relationship or otherwise "safely navigate her circumstances."[13] Ex. 24, p. 16.

Dr. Gerlock's testimony would also have allowed the jury to "place[ ] itself in the defendant's position" so it could "properly assess the reasonableness of [her] perceptions of imminence and danger." *Janes*, 121 Wn.2d at 239; *see also Allery,* 101 Wn.2d at 597.

Dr. Gerlock would have told jurors that Bitterman used "a system of intentional behaviors… to control [his] partner." Ex. 24, p. 12. These included physical abuse, threats to kill Ms. Johnson, and other abusive and

[13] Even without Ms. Johnson's impairments, the legal system's failure to adequately respond to domestic violence can contribute to learned helplessness, "a condition in which the woman is psychologically locked into her situation." *Allery*, 101 Wn.2d at 596–97. Here, Ms. Johnson sought help from law enforcement, her doctor, and the judicial system. RP (6/15/16) 12; RP (6/16/16) 18, 169-170, 182; RP (6/17/16) 17-18, 41; CP 58, 61, 63, 67-92; Ex. 24, p. 7; Ex. 28; Ex. 30.

coercive behaviors such as name-calling, humiliation, isolation, and property destruction. Ex. 24, p. 1-10, 12-14.

Finally, Dr. Gerlock would have explained why jurors should focus on the months preceding the shooting, how the legal system's failure to respond affects battered women such as Ms. Johnson, and why a battered woman might perceive threats and respond with violence or aggression, even though an outside observer would see no need for force. Ex. 24, p. 1, 10-11, 14, 15.

The trial judge should have allowed Ms. Johnson to introduce the testimony in support of her self-defense claim.[14] As outlined elsewhere, at least "some evidence" in the record supported the defense. *See State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). Employing circular logic, the Court of Appeals concluded that Dr. Gerlock's testimony was "irrelevant" because self-defense was "not supported by the evidence." Opinion, p. 9. According to the court, no evidence suggested that Ms. Johnson had reason to fear imminent harm. *See* Opinion, p. 6.

The Court of Appeals reached this conclusion because "Ms. Johnson never *testified* that she… [feared] imminent harm." Opinion, p. 6 (emphasis added). But a defendant may rely on "facts inconsistent with her

[14] In addition, the evidence was relevant to explain Ms. Johnson's testimony that she felt it necessary to pick up and hide Bitterman's gun despite her aversion to (and lack of experience with) firearms. CP 51-55; RP (6/15/16) 19-20.

own testimony." *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). Ms. Johnson told police that she was afraid for her life, and that she feared Bitterman might "[g]rab [her] around the neck" or take the gun and use it against her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10. These statements were introduced as substantive evidence; they provided support for her self-defense claim. *See* Ex. 32; RP (6/17/16) 114-116.

But Dr. Gerlock's testimony was relevant because it would have helped establish the defense. Dr. Gerlock would have affirmed that the history of abuse gave Ms. Johnson reason "to fear imminent harm," and to believe "that her husband was about to harm her." *See* Opinion, p. 6.

An outside observer might conclude that Bitterman posed no threat, but Ms. Johnson was afraid for her life, and believed Bitterman might "[g]rab [her] around the neck" or take the gun and use it against her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10. Dr. Gerlock would have explained the basis for these fears.

The Court of Appeals' decision conflicts with *Allery.* The *Allery* court pointed out that expert testimony helps jurors understand "the woman's perceptions and behavior at the time of the [shooting] and is central to her claim of self-defense." *Id.*, at 597. The Court of Appeals failed to recognize this.

The jury should have received "a professional explanation of the

battering syndrome and its effects." *Allery*, 101 Wn.2d at 597. This would have allowed Ms. Johnson "[t]o effectively present the situation" as she perceived it, and to convey "the reasonableness of her fear." *Id.*

The error infringed Ms. Johnson's right to present a defense. *Jones*, 168 Wn.2d at 720; *see also Greene*, 288 F.3d 1081 at 1092. Her conviction must be reversed, and the case remanded for a new trial. *Jones*, 168 Wn.2d at 720.

B. Expert testimony on diminished capacity was relevant to Ms. Johnson's diminished capacity claim and should have been admitted.

Diminished capacity negates the mental state required for conviction. *State v. Marchi*, 158 Wn. App. 823, 835, 243 P.3d 556 (2010). The defense must be supported by expert testimony. *Id*.

The expert need only testify that a mental disorder "could have" impaired the defendant's ability to form intent. *State v. Mitchell*, 102 Wn. App. 21, 27, 997 P.2d 373 (2000), *as amended on reconsideration* (Apr. 17, 2000). The expert need not opine "that the mental disorder actually did produce the asserted impairment." *Id.*

Here, the proffered testimony met this standard. According to the offer of proof, Dr. O'Donnell would have testified "that the cognitive difficulties could have impaired [Ms. Johnson's] ability to form intent," and that "it's possible that [her condition] could have impaired her ability to form the intent, but not necessarily." RP (6/17/16) 92, 95. This satisfied

the requirements outlined in *Mitchell*.

The Court of Appeals did not mention *Mitchell*. *See* Opinion, pp. 7-10. Instead, the court apparently believed that expert testimony must show actual "inability" to form the required mental state.[15] Opinion, p. 8.

The *Mitchell* court rejected this rigid approach. *Id.*, at 27; *see also State v. Crute*, No. 50366-2-II, Slip Op. at *3 (Wash. Ct. App. Feb. 20, 2019) (unpublished). An expert need only opine that a mental impairment "could have" impaired the defendant's capacity to form intent. *Mitchell*, 102 Wn. App. at 27.

By excluding Dr. O'Donnell's testimony, the trial court barred Ms. Johnson from raising her diminished capacity claim.[16] This violated her right to present a defense. *Mitchell*, 102 Wn. App. at 27; *Jones*, 168 Wn.2d at 720.

C. Expert testimony on Ms. Johnson's dementia should have been admitted because it was relevant to explain her inconsistent memories of the event.

Any fact bearing on the credibility of a witness is relevant. *State v.*

[15] In addition, the Court of Appeals apparently relied solely on Dr. O'Donnell's written evaluation. Opinion, pp. 8-9. But counsel made an offer of proof following his own conversations with Dr. O'Donnell. RP (6/17/16) 96. According to counsel, Dr. O'Donnell would have testified that Ms. Johnson's condition "could have impaired her ability to form intent." RP (6/17/16) 92, 96.

[16] Because the court excluded the evidence, Ms. Johnson did not propose an instruction on diminished capacity. Given the court's refusal to allow the evidence, her failure to propose an unsupported instruction should not be taken as a waiver. *See* Opinion, p. 8. Counsel argued in favor of admitting the evidence and asserted a diminished capacity defense. RP (6/17/16) 92-96. The error is preserved.

Mollet, 181 Wn. App. 701, 713, 326 P.3d 851, *review denied*, 339 P.3d 635 (2014). Here, the defense sought to introduce expert testimony explaining how dementia and other cognitive impairments created memory problems and confusion for Ms. Johnson. RP (6/17/16) 89, 120; RP (8/19/16) 113-114, 119-120.

According to Dr. O'Donnell, Ms. Johnson's dementia made her "unable to provide a coherent or consistent history." Ex. 25, p. 4. Dr. O'Donnell believed that her condition and her medication may have contributed to the "significant changes in Ms. Johnson's report of the incident." Ex. 25, p. 16. Without this testimony, these discrepancies likely made Ms. Johnson seem dishonest to jurors. Ex. 25, pp. 3, 4, 16.

Ms. Johnson gave two very different accounts of the shooting. She told police she intentionally armed herself when she told Bitterman she planned to leave him. Ex. 32; Ex. 2 (2/4/15). At trial, by contrast, she told jurors she found the gun sitting on the bed and picked it up intending to hide it, but that Bitterman surprised her while she was looking for a hiding place. RP (6/17/16) 52-54.

Dr. O'Donnell's testimony was at least minimally relevant to explain these discrepancies. ER 401; *Mollet*, 181 Wn. App. at 713. It would have been "helpful" to the jury and should have been admitted. ER 401; ER 702; *Philippides*, 151 Wn.2d at 393.

The Court of Appeals did not address Ms. Johnson's argument regarding this evidence. Opinion, pp. 1-12. Jurors should have heard why Ms. Johnson's account of the offense varied so dramatically. By excluding the evidence, the trial court violated her constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

D. The Supreme Court should accept review because the lower court's opinion conflicts with this court's decision in *Allery* and the Court of Appeals' decisions in *Mitchell* and *Mollet.* RAP 13.4(b)(1) and (2).

The Supreme Court will accept review if a lower court decision conflicts with a decision of the Supreme Court or with a published decision of the Court of Appeals. RAP 13.4(b)(1) and (2). Here, the lower court's decision conflicts with *Allery, Mitchell*, and *Mollet.* The Supreme Court should accept review and reverse the Court of Appeals. RAP 13.4(b)(1) and (2). The case must be remanded with instructions to admit the excluded testimony.

II. THE TRIAL COURT VIOLATED MS. JOHNSON'S RIGHT TO PRESENT A DEFENSE BY REFUSING TO INSTRUCT ON SELF-DEFENSE.

A. The record included "some evidence" of self-defense.

Where there is "some evidence" of self-defense,[17] jurors must be

[17] A claim of self-defense requires proof that the defendant subjectively feared that she was in imminent danger, that this belief was objectively reasonable given all the circumstances, and that the force used was reasonably necessary. *Werner*, 170 Wn.2d at 337. Where the defendant has been abused, the jury must consider self-defense "from the defendant's perspective in light of all that she knew and had experienced with [her abuser]." *Allery*, 101 Wn.2d at 595.

instructed on it. *Werner*, 170 Wn.2d at 337. An accused person is constitutionally entitled to such instructions.[18] *Fisher*, 185 Wn.2d at 848.

Evidence supporting the defense "may come from 'whatever source.'" *Fisher*, 185 Wn.2d at 848 (citation omitted). The evidence must be viewed in a light most favorable to the defendant. *Id.*, at 848-49. The defendant may rely on "facts inconsistent with her own testimony." *Id.*, at 849-850. This may include evidence introduced by the State, including "portions" of the defendant's prior statements. *Id.*, at 849-851.

Here, the jury's role was to determine if Ms. Johnson "acted reasonably, given [her] experience of abuse." *Janes*, 121 Wn.2d at 239. There is at least "some evidence" showing that she did. *Werner*, 170 Wn.2d at 337. Bitterman repeatedly threatened to shoot Ms. Johnson and her sons. RP (6/17/16) 41, 75, 80; Ex. 32; Ex. 25, p. 3, 4. He was often armed with a loaded handgun and had once considered shooting her while she worked in the kitchen. RP (6/17/16) 78-79; Ex. 32; Ex. 2 (2/4/15), p. 4, 23. Bitterman sometimes sat with his gun in an armchair, leading Ms. Johnson to fear that he'd come to her bedroom to shoot her.[19] RP (6/17/16) 47, 48; Ex. 32; Ex. 2 (2/4/15), p. 16, 23. He slapped her on the head, pushed her,

[18] This is so even if the defendant presents inconsistent defenses. *Fernandez-Medina*, 141 Wn.2d at 460.

[19] At times, Bitterman prowled the house at night with his gun. RP (6/16/16) 179, 197; Ex. 24 p. 8.

and poked her in the chest while swearing and calling her names.[20] RP (6/17/16) 40, 73, 81; Ex. 32; Ex. 2 (2/4/15), p. 18.

Ms. Johnson sought help from law enforcement,[21] her doctor, and the court system. Ex. 32; Ex. 2 (2/4/15), p. 2, 4, 17. She was afraid her husband would shoot her if he found out she'd requested a protection order. Ex. 32; Ex. 2 (2/4/15), p. 17-18.

Bitterman threatened her on the day before the incident, and the day before that, and the prior weekend. Ex. 32; Ex. 2 (2/4/15), p. 24. He said he'd "blow [her] brains out." RP (6/17/16) 48. Hoping to leave him, she found an apartment. RP (6/17/16) 47. The day before the alleged offense, she told him she intended to leave him. RP (6/17/16) 49; Ex. 32; Ex. 2 (2/4/15), pp. 11-12. He told her she couldn't. RP (6/17/16) 49.

This history provides the "contextual circumstances" that must be considered in assessing the need for instructions on self-defense. *State v. George*, 161 Wn. App. 86, 99, 249 P.3d 202 (2011). Taken in a light most favorable to Ms. Johnson, the facts establish a danger that was "'hanging threateningly over [her] head; menacingly near'" in the period leading up to the incident. *Id.* (quoting *Janes,* 121 Wash.2d at 241) (citation omitted).

[20] Ms. Johnnson's son observed at least three incidents of "hostile physical contact." RP (6/17/16) 81.

[21] Police referred her to a domestic violence agency, but Bitterman stopped her from calling. Ex. 32; Ex. 2 (2/4/15), p. 24.

On the day of the shooting, Ms. Johnson armed herself and went to tell Bitterman she was going to leave.[22] Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7. He told her she couldn't leave or call anyone. Ex. 32; Ex. 2 (2/4/15), p. 7.

She told police that he came at her and that she was afraid he might "[g]rab me around the neck." Ex. 32; Ex. 2 (2/4/15), p. 6, 8. She also believed he might take the gun and use it against her. Ex. 32; Ex. 2 (2/4/15), p. 6, 10. She told the police that she was afraid for her life. RP (2/11/15) 27. Although she didn't intend to shoot him and didn't want to hurt him, she pointed the gun at his chest "where it would do the most good." Ex. 32; Ex. 2 (2/4/15), p. 5, 6, 9, 23; RP (6/17/16) 55.

As she backed away from him, Bitterman tried to get the gun from her. RP (6/17/16) 54. Ex. 32; Ex. 2 (2/4/15), p. 8. The gun went off as he tried grab it.[23] RP (6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6.

The "contextual circumstances"[24] and Ms. Johnson's statement to police provide at least "some evidence" of self-defense. *Werner*, 170 Wn.2d at 337. She reasonably feared for her safety, armed herself before telling Bitterman of her plan to leave him, and aimed the gun at his chest

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[22] Ms. Johnson suffered dementia and gave a different account at trial. *See* RP (6/17/16) 52-53, 89, 120, RP (8/19/16) 113-114, 119-120; Ex. 25, pp. 3, 4, 16. However, the Supreme Court has made clear that a defendant is entitled to rely on evidence inconsistent with her trial testimony. *Fisher*, 185 Wn.2d at 849.

[23] Self-defense and accident "are not mutually exclusive." *Werner*, 170 Wn.2d at 337. Even if they were, Ms. Johnson was entitled to assert both. *Fernandez-Medina*, 141 Wn.2d at 460.

[24] *George*, 161 Wn. App. at 99.

when he came at her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8. She told police that she thought he might grab her by the neck or take the gun and shoot her, and that she feared for her life. Ex. 32; Ex. 2 (2/4/15), pp. 5, 6, 8, 9, 10, 23; RP (2/11/15) 27; RP (6/17/16) 54-55.

Although Ms. Johnson's dementia and shifting memories produced conflicting accounts of the event, the evidence should have been assessed in a light most favorable to her. *Fisher*, 185 Wn.2d at 849. When viewed in this light, at least "some evidence" supported a self-defense claim. *Werner*, 170 Wn.2d at 337. This is so even if the self-defense theory was inconsistent with her trial testimony. *Fisher*, 185 Wn.2d at 849-850; *see also State v. Callahan*, 87 Wn. App. 925, 931-934, 943 P.2d 676 (1997).

Ms. Johnson was constitutionally entitled to instructions on her theory of the case. *Fisher*, 185 Wn.2d at 848. The trial court violated her right to present a defense by refusing to let the jury consider her self-defense claim. *Id.*

B. The Court of Appeals' decision conflicts with the Supreme Court's opinion in *Fisher*.

The record is replete with evidence showing that Ms. Johnson acted in self-defense. Instead of acknowledging this evidence, the Court of Appeals noted that "Ms. Johnson never *testified* that she believed she needed to point a gun at, let alone shoot, her husband due to fear of imminent harm." Opinion, p. 6 (emphasis added).

This approach conflicts with *Fisher.* Under *Fisher,* evidence of self-defense "may come from 'whatever source.'" *Fisher*, 185 Wn.2d at 848 (citation omitted). Ms. Johnson was entitled to rely on "facts inconsistent with her own testimony." *Id.,* at 849-850.

The Supreme Court should accept review, reverse the Court of Appeals, and direct the trial court to instruct on self-defense should the case be retried. RAP 13.4(b)(1).

III. THE COURT OF APPEALS APPLIED THE WRONG STANDARD WHEN REVIEWING MS. JOHNSON'S CONSTITUTIONAL CLAIMS.

A. The Supreme Court should clarify the standard for reviewing a trial court's refusal to instruct on the defense theory.

Constitutional issues are reviewed *de novo. State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017). The sufficiency of evidence to support self-defense instructions is an issue of law, reviewed *de novo*. *Fisher,* 185 Wn.2d at 849.

Under *Fisher,* review is *de novo* where "the basis for the trial court's refusal to give [a] requested jury instruction appears to be lack of evidence." *Id.* The Court of Appeals did not reference *Fisher* and did not apply this standard. Opinion, p. 6.

Fisher's de novo standard supersedes precedent erroneously suggesting that "[a] trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion." *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

This oft-cited language from *Walker*[25] contradicts the well-established prohibition against judicial factfinding. There can be no "factual dispute" regarding the need for instruction, because the evidence must be taken in a light most favorable to the instruction's proponent. *Fisher*, 185 Wn.2d at 849. By law, any "factual dispute" is resolved in favor of the party proposing the instruction.[26] *Id.*; *see also State v. O'Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015); *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

The Supreme Court should clarify that review is *de novo* when a refusal to instruct on the defense theory rests on perceived insufficiency of the evidence supporting that theory. This presents a significant issue of constitutional law of substantial public interest; furthermore, the Court of Appeals' decision conflicts with *Fisher*. RAP 13.4(b)(1), (3), and (4).

B. The Supreme Court should accept review and clarify the proper standard applicable to discretionary rulings that infringe constitutional rights.

Appellate courts review constitutional issues *de novo*. *Armstrong*, 188 Wn.2d at 339. The Supreme Court has applied this standard to discretionary decisions that would otherwise be reviewed for abuse of discretion. *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). However, the Supreme Court has not applied this rule consistently. For example, one month prior to its decision in *Jones*, the

[25] Here, the Court of Appeals relied on precedent derived from *Walker*. Opinion, p. 6 (citing *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002)).

[26] When deciding if an instruction is supported by the record, a judge may not weigh or evaluate evidence. *State v. Fernandez-Medina*, 141 Wn.2d 448, 460-61, 6 P.3d 1150 (2000).

court used an abuse-of-discretion standard to review a nearly identical issue. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

The court has not found that the *Jones/Iniguez* standard is incorrect, harmful, or so problematic that it requires reversal. *See Armstrong*, 188 Wn.2d at 340 n. 2. The Supreme Court should accept review and determine the appropriate standard for reviewing discretionary decisions that violate an accused person's constitutional rights.

The lower court applied an abuse-of-discretion standard to Ms. Johnson's claim that she was denied her right to present a defense. Opinion, p. 7-9. The Court of Appeals' decision conflicts with *Jones* and *Iniguez.* In addition, this case raises significant issues of constitutional law that are of substantial public interest. Review is appropriate under RAP 13.4(b)(1), (3), and (4).

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review, reverse Ms. Johnson's conviction, and remand the case for retrial.

Respectfully submitted April 5, 2019.

BACKLUND AND MISTRY

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Josephine Johnson
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and I sent an electronic copy to

Grant County Prosecuting Attorney
gdano@grantcountywa.gov
kmccrae@grantcountywa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 5, 2019.

_____
Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Published Opinion, filed on March 12, 2019.

Renee S. Townsley
Clerk/Administrator

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CASE # 346706
State of Washington v. Josephine Ellen Johnson
GRANT COUNTY SUPERIOR COURT No. 141008263

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. John M. Antosz
c: Josephine Ellen Johnson
PO Box 671
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FILED
MARCH 12, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JOSEPHINE ELLEN JOHNSON, Appellant.	)))))))))	No. 34670-6-III UNPUBLISHED OPINION

KORSMO, J. — Josephine Johnson appeals from her conviction for first degree assault of her husband, arguing that the trial court erred in refusing to instruct on self-defense, in excluding expert testimony, and in receiving and instructing the jury concerning the special verdicts. We affirm.

FACTS

Josephine Johnson shot her husband, Donald Bitterman, on December 23, 2014. How and why she did so are questions to which she gave varying answers over time. Those varying answers present the basis for several of her arguments in this appeal.

According to Bitterman, Ms. Johnson walked up to him after overhearing a telephone conversation he was having with his sister, said "I don't want to do this, but I

have to," and then pulled out a gun and shot him. Johnson's son, Arthur Osborn, said that she ran into his nearby trailer still holding the gun. Osborn took the gun from her and went to the house to aid Bitterman.

Johnson told the police that afternoon that she was planning to leave Bitterman that day, but that her husband would not let her take her belongings. She could not take it anymore, so she got a gun out of a bedroom drawer and pointed it at his chest where it would "do the most good." Bitterman tried to grab the gun and it went off. She acknowledged that she should not have shot him.

At the omnibus hearing, defense counsel gave notice of reliance on self-defense, diminished capacity, and battered spouse syndrome defenses. Dr. April Gerlock, an expert on battered spouse syndrome, interviewed Ms. Johnson and opined that she was a battered spouse. Dr. Gerlock did not indicate whether Ms. Johnson had the ability to form the intent to shoot her husband.

Dr. Cedar O'Donnell of Eastern State Hospital evaluated Ms. Johnson for diminished capacity due to evidence that she had suffered traumatic brain injury in a vehicle accident years earlier. The doctor determined that Ms. Johnson had "a documented history of deficits in memory, judgment, and reasoning." However, O'Donnell's report concluded that her actions at the time of the incident were "consistent with the capacity for intentional behavior."

On the first day of trial, defense counsel advised the court that he would forego self-defense and pursue the case on a theory of accident. He still desired to introduce evidence of prior instances of domestic violence and the battered spouse syndrome to explain why Ms. Johnson picked up the gun. The trial court found that the battered spouse diagnosis was no longer relevant since the defense had abandoned the theory of self-defense, but that some of the individual acts of domestic violence that Ms. Johnson testified about during a motion-in-limine were admissible. Dr. Gerlock's testimony was, thus, excluded.

The court also granted the State's motion-in-limine to exclude testimony from Dr. O'Donnell since there was no basis to instruct on diminished capacity. Defense counsel agreed that there was ample evidence that his client understood what she was doing at the time of the incident.

Ms. Johnson testified at trial that the gun accidentally discharged and was cross-examined about discrepancies between her original story to the police and her current version. A video copy of the police interview was admitted into evidence in rebuttal. Ex. 32. At the conclusion of the case, defense counsel then proposed an instruction on self-defense, arguing that the video provided a factual basis for the instruction. The trial court denied the instruction, ruling that there was no factual basis for Ms. Johnson subjectively believing that she needed to use force at that time.

The defense argued the case to the jury on a theory of accident. Nonetheless, the jury convicted Ms. Johnson of first degree assault. When the jury initially returned with its verdict, the court discovered that none of the three special verdict forms had been filled out. The judge instructed the jury to complete the special verdicts. When the jury returned, it answered "yes" on all of the special verdict forms.

The court imposed a standard range sentence that included a firearm enhancement. Ms. Johnson timely appealed to this court and was allowed to remain out of custody during the appeal. A panel heard oral argument of the appeal.

ANALYSIS

Ms. Johnson argues that the trial court violated her right to present a defense by denying the self-defense instruction and excluding evidence by Dr. Gerlock and Dr. O'Donnell. She also argues that the court erred by coercing the special verdicts and in its instructions concerning the special verdicts. We address the four issues in the stated order.

Self-Defense Instruction

Ms. Johnson first argues that the trial court erroneously rejected her self-defense instruction, contending that Exhibit 32 provided a basis for the instruction. We agree with the trial court that there was insufficient evidence to submit the issue to the jury.

The governing law is well settled. Trial courts have an obligation to provide instructions that correctly state the law, are not misleading, and allow the parties to argue

their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). A court should give an instruction only if it is supported by substantial evidence. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

Self-defense is evaluated "from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees." *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). This analysis involves both subjective and objective components. *Id*. at 242-243. For the subjective component, the jury must "place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred." *Id*. at 243. For the objective component, the jury must "determine what a reasonable person would have done if placed in the defendant's situation." *Id*.

These two components of self-defense break down into four elements: "(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable"; "(3) the defendant exercised no greater force than was reasonably necessary"; and "(4) the defendant was not the aggressor." *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). If a jury is instructed on self-defense, the State is required to disprove the defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-616, 683 P.2d 1069 (1984). Disproof of any one of these elements negates the self-defense claim. *Callahan*, 87 Wn. App. at 929.

When a trial court refuses to give a self-defense instruction because it finds no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, the standard of review on appeal is abuse of discretion. *Read*, 147 Wn.2d at 243. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The failure to provide a self-defense instruction when supported by the evidence is reversible error. *State v. George*, 161 Wn. App. 86, 100-101, 249 P.3d 202 (2011).[1]

Here, the trial court rejected the instruction due to Ms. Johnson's failure to establish that she subjectively feared she was in imminent danger of great bodily injury. We review that decision for abuse of discretion. *Read*, 147 Wn.2d at 243. There were tenable reasons for declining to give the instruction. Ms. Johnson never testified that she believed she needed to point a gun at, let alone shoot, her husband due to fear of imminent harm. She also did not present any evidence that her husband was about to harm her, or that she even had any reason for believing that might be the case. In short, there were multiple reasons for concluding that the first element was not established.[2]

The court did not abuse its discretion by rejecting the self-defense instruction.

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[1] For this reason, we need not separately consider Ms. Johnson's argument that her right to present a defense also was violated by the refusal to give a self-defense instruction.

[2] For that reason, we need not address the reasonableness of the need to act, nor the proportionality of that behavior to any alleged threat.

Excluded Testimony

Ms. Johnson next argues that her right to present a defense was violated by the exclusion of the diminished capacity defense and testimony from Dr. O'Donnell and Dr. Gerlock. Because the proposed testimony did not support any defense that was before the jury, there was no error.

We review this claim under familiar standards. The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014); *State v. Strizheus*, 163 Wn. App. 820, 829, 262 P.3d 100 (2011). "An erroneous evidentiary ruling that violates the defendant's constitutional rights, however, is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." *Franklin*, 180 Wn.2d at 377 n.2. Both the Sixth Amendment of the United States Constitution and article I, § 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); *Strizheus*, 163 Wn. App. at 829-830. But a criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Diminished capacity is a common law defense in Washington. It can be raised "whenever there is substantial evidence of such a condition and such evidence logically

and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged." *State v. Griffin*, 100 Wn.2d 417, 419, 670 P.2d 265 (1983). A defendant is entitled to a diminished capacity instruction if (1) the crime charged includes a particular mental state as an element, (2) the defendant presents evidence of a mental disorder, and (3) expert testimony logically and reasonably connects the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001). The testimony of an expert witness is necessary to present a diminished capacity defense. *State v. Stumpf*, 64 Wn. App. 522, 526, 827 P.2d 294 (1992).

It is doubtful that any claim related to diminished capacity was preserved in the trial court. The trial court granted the motion-in-limine excluding the defense *after* defense counsel eschewed reliance on the defense. Moreover, no instruction was ever proposed concerning the topic. The defense lost its relevance because Ms. Johnson decided not to pursue the defense.

Nonetheless, even if diminished capacity is properly before this court, the trial court correctly determined there was no basis for presenting evidence on the topic. Critical to the defense is the testimony of an expert who could explain why Ms. Johnson, by reason of mental disease or defect, lacked the ability to intend her actions. *Stumpf*, 64 Wn. App. at 526. Dr. O'Donnell did not propose to offer that testimony. Indeed, the

evaluation concluded that Ms. Johnson did have capacity to intend her actions. Dr. Gerlock did not even opine on the topic.[3] Thus, one of the critical foundation elements to a diminished capacity defense was lacking. The trial court did not abuse its discretion in excluding the defense. Because there was no basis for pursuing diminished capacity, Dr. O'Donnell's testimony was irrelevant.[4] The constitutional right to present a defense was not implicated. *Hudlow*, 99 Wn.2d at 15.

The same conclusion applies to Dr. Gerlock's testimony. Her proposed testimony on battered spouse syndrome related to the self-defense theory. *E.g.*, *State v. Allery*, 101 Wn.2d 591, 597, 682 P.2d 312 (1984). However, that theory, as discussed earlier, was not supported by the evidence. Testimony concerning the battered spouse syndrome was, therefore, irrelevant. The trial court understandably excluded the evidence. That action did not constitute a violation of Ms. Johnson's right to present a defense.

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[3] Defense counsel admitted that there was plenty of evidence that his client had the capacity to act intentionally, and did not suggest there was any evidence that she lacked capacity. Report of Proceedings (RP) (June 17, 2016) at 99.

[4] Ms. Johnson also contends that evidence of her dementia was relevant to explain her varying stories about the incident. However, this claim was raised only in support of possible sur-rebuttal and was never explained to the trial court, nor was it ruled on by the trial judge. RP (June 17, 2016) at 120 *et seq*; RP (June 20, 2016) at 1-43. The defense rested without calling Dr. O'Donnell or asking to be allowed to do so. RP (June 20, 2016) at 59. The opportunity to present this evidence was waived. Potential evidence explaining prior testimony also does not itself constitute a defense to a crime nor present an issue of constitutional magnitude that can be addressed for the first time on appeal. RAP 2.5(a).

Each of the claimed defenses lacked evidentiary support. The trial court did not err in excluding irrelevant testimony relating to legally insufficient defenses.

Special Verdicts

Lastly, Ms. Johnson contends that the trial court erred both in accepting the special verdicts and in the form in which the instructions were presented. Her arguments fail to establish error.

When the jury initially returned with its verdict on the assault charge, none of the special verdict forms had been filled out. The court directed the jury to return to deliberations and "attend" to the special verdict forms. Defense counsel did not object to the court's action. Ms. Johnson's claim that the trial court improperly interfered with the special verdicts is unpersuasive. She had the right to have the jury return a verdict free of coercion by the trial judge. *E.g.*, *State v. Boogaard*, 90 Wn.2d 733, 736-737, 585 P.2d 789 (1978). However, nothing in this record suggests that the judge behaved coercively by telling the jury to return to deliberations. This contention simply is without merit.

Ms. Johnson also contends that the three special verdicts were erroneously returned because none of the verdict forms expressly stated that the jury needed to be unanimous to answer the special verdict. She points out that the pattern instruction verdict forms now state the unanimity requirement. From these facts, she argues that her right to a unanimous finding was violated. It was not.

Her argument ignores jury instruction 2, which states in part:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict.

Clerk's Papers (CP) at 163.

Similarly, the concluding instruction told jurors that they must deliberate in order to reach a unanimous verdict on the charge of first degree assault and the two included assault offenses. CP at 191-192. While she correctly notes that the concluding instruction did not mention the special verdicts, she can point to no competing instructions that would have suggested nonunanimity was possible on the special verdicts. The only instructions given to the jury required unanimity in order to return a verdict. There was no reason to think that jurors could have applied a different standard to the special verdicts.

If these verdict forms constituted constitutional error, the error was harmless beyond a reasonable doubt because each question presented involved an uncontested factual issue. Both parties testified that they were married to each other and living together at the time of the incident; it simply was not a contested factual question that the two were involved in a domestic relationship. The fact that the assault was committed with a firearm likewise was not a disputed issue.

The jury's verdict on the first degree assault charge necessarily answered the remaining special verdict. The special interrogatory concerning the assault having been

committed with intent to commit great bodily harm was a restatement of the elements of the first degree assault charge; once the jury unanimously concluded that Ms. Johnson intentionally assaulted Mr. Bitterman, that answer necessarily compelled the same response to the special interrogatory. CP at 173, 199.

Ms. Johnson has not established that she was prejudiced by the alleged errors relating to the return of the special verdicts.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, C.J.

BACKLUND & MISTRY

April 05, 2019 - 5:38 PM

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