NO. 45276-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DENISE LARKINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 11-1-05057-4

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

Rules and Regulations

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

1. Where the defendant failed to object or move to dismiss at trial, whether he preserved the issues of sufficiency of the charging document or statutory ambiguity for appeal?

2. Where the Legislature's 2003 amendment to the felony murder statute, and its accompanying statement of intent, make clear legislative intent that assault is a predicate felony; whether the second degree felony murder statute is ambiguous?

3. Whether a prosecuting attorney's discretion to charge felony murder instead of intentional murder violates equal protection?

4. Where no reasonable person would use a full-size SUV to ram an unarmed pedestrian, did the trial court err in declining to instruct the jury regarding self-defense?

5. Whether the trial court violated the principle of double jeopardy when it merged convictions on Counts I and II, and referred to, and sentenced on, only on the more serious charge, murder in the second degree?

B. STATEMENT OF THE CASE.

1. Procedure

On December 19, 2011, the Pierce County Prosecuting Attorney (State) filed an Information charging the defendant, Denise Larkins, with two counts of murder in the second degree regarding the death of Michelle Johnson. CP 1-2. Count I charged intentional murder. CP 1. Count II charged felony murder for the same incident, predicated on assault in the first or second degree. CP 2. On May 9, 2013, the State amended the Information to add the predicate felony of assault in the third degree to Count II. CP 4.

The case was assigned for trial before Hon. Jerry Costello. 5/29/2013 RP 4. Trial began with hearings on evidentiary matters. 1 RP 19. After hearing all the evidence, the jury found the defendant guilty of felony murder in the second degree, as charged in Count II; and manslaughter in the second degree as a lesser-included offense of intentional murder in the second degree, charged in Count I. CP 177, 176.

At sentencing, the trial court merged the manslaughter with the murder conviction. 7 RP 975. The court struck the reference to the merged manslaughter conviction on the judgment and sentence. CP 228, 229. The trial court imposed a sentence of 220 months in prison. CP 232.

The defendant timely appealed. CP 274.

2. Facts

The defendant and Michelle Johnson were friends. 3 RP 341, 5 RP 562. They were also drug users. 5 RP 564, 603.

On December 16, 2011, the defendant and Johnson picked up Johnson's daughter, Mika-Ann Jeter to drive her to Johnson's mother's home in south Tacoma. 3 RP 338, 343. Johnson was driving the defendant's vehicle, a GMC Tahoe, a large sport/utility vehicle (SUV). *Id.*, 3 RP 342.

As they drove to Tacoma, the defendant and Johnson argued. 3 RP 345. They argued mostly about Johnson's drug use. 3 RP 346. When the three arrived at the grandmother's home on South 43rd St., Jeter got out with her belongings. 3 RP 347. Johnson got out to say goodbye. *Id.*

The defendant took the wheel and began to drive off with Johnson's belongings in the SUV. 3 RP 348. Johnson grabbed onto the SUV, yelling for the defendant to stop. *Id.* The defendant stopped and got out. 3 RP 349. The defendant and Johnson began to argue and yell again. 3 RP 349 4 RP 427, 450. The defendant pointed her finger in Johnson's face. Johnson struck her. 3 RP 350.

Johnson broke off the argument and began walking down the sidewalk. 3 RP 373, 4 RP 429. The defendant slowly drove alongside her,

loudly telling Johnson that the defendant had called police and that Johnson was going to jail. 3 RP 305, 373.

Johnson approached, and stepped into, a nearby intersection. 2 RP 274, 4 RP 429. The defendant suddenly "gunned" the engine and struck Johnson as she stepped into the street. 2 RP 276, 4 RP 431. The defendant drove the SUV up and over Johnson's body. *Id*, 4 RP 431. Investigators found tire marks on Johnson's face. 3 RP 356. Grease was later found on her sweatshirt. 5 RP 613. Hair and fabric was later recovered from the SUV tires. 4 RP 517.

There was damage to the front bumper, quarter panel, and wheel well of the defendant's SUV. 4 RP 516. The dirt on the SUV had been wiped in the same places as the damage. 4 RP 518. There was a swipe of pink, wax-like substance on the hood of the SUV. 4 RP 526. Johnson's pink lip balm was found at the scene. 4 RP 527.

Johnson's skull was crushed, resulting in a "hinge fracture" which displaced the front of her skull from the back of it. 5 RP 620. Johnson died from massive blunt trauma to her head. 5 RP 619.

The defendant fled the scene. 4 RP 431. The defendant then stopped in an east Tacoma neighborhood two miles away, and called 911. 4 RP 481, 5 RP 569. Police located and arrested her a short time later. 4 RP 480.

C. ARGUMENT.

1. THE SECOND DEGREE FELONY MURDER STATUTE IS NOT AMBIGUOUS; THE 2003 AMENDMENT AND ITS ACCOMPANYING STATEMENT OF INTENT MAKE CLEAR THE LEGISLATURE'S INTENT FOR ASSAULT TO BE A PREDICATE FELONY.

a. Defendant has not preserved the issue for review.

An appellate court "may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). "The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter." ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To raise an issue for the first time on appeal, an appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *Id.* at 98 quoting ***State v. Scott***, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); *see also* ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The court must then determine if the error is manifest; that is, if the asserted error had practical and identifiable consequences in the trial of the case. ***Lynn*** 67 Wn. App. at 345. Even where defendant identifies an alleged constitutional error, the Court may refuse to review it if the error is not manifest. ***State v. Haq***, 166 Wn. App. 221, 246, 268 P.3d 997 (2012).

Here, the defendant failed to object below to the charge of felony murder. For the first time on appeal, the defendant now argues that the statute by which she was charged was ambiguous. App. Br. At 10. The defendant does not claim any of the three conditions listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal. Notably, the defendant fails to claim that the alleged ambiguity in the felony murder statute is a constitutional error that may be considered for the first time on appeal. Further, the defendant fails to show that the statute *is* ambiguous.

Because the defendant failed to raise the issue in the trial court, she cannot show any error on this issue because the trial court made no ruling on it. If the defendant wished to challenge the legal sufficiency of the Information, she had the obligation to raise it in the trial court. *See, e.g.*, ***State v. Kjorsvik***, 117 Wn.2d 93, 812 P.2d 86 (1991). If the initial challenge is made for the first time on review, the defendant must meet a very high standard. *Id.*, at 105-106. If the defendant fails to raise a factual challenge to a charging document in the trial court, he waives the issue on appeal. *See* ***State v. Mason***, 170 Wn. App. 375, 285 P.3d 154 (2012).

Now, on appeal, the defendant seems to argue that she could not know "which" assault the State relied on for charging: the assault "included" in all homicides; or a separate assault which happened to result

in death. In the trial court, the defendant's remedy was to request a bill of particulars. *See* ***Mason***, at 385.

Because the defendant failed to object below and now improperly petitions the Court to review the issue for the first time on appeal, the matter is not properly before this Court.

b. A plain reading and the 2003 amendment and accompanying statement of intent make clear the legislature's intent for assault to be a predicate felony.

The purpose of statutory interpretation is to determine and carry out the intent of the legislature. ***State v. Alvarado***, 164 Wn.2d 556, 561, 192 P.3d 345 (2008). If the plain meaning of a statute is clear, the inquiry is over. *See* ***State v. Sweat***, -Wn.2d-, 322 P.3d 1213 (2014). "In discerning the plain meaning of a provision, we consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent." ***Alvarado***, 164 Wn.2d at 562. Considering the history of the felony murder statute, especially in the context of the reaction of the Legislature to the ***Andress*** decision, the plain meaning of the felony murder statute is quite clear and unambiguous: it includes assault as a predicate felony.

Until the decision in ***In Re Personal Restraint Petition of Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington State

Supreme Court consistently rejected arguments that the merger doctrine should preclude the use of a felony assault as a predicate crime for felony murder. ***State v. Wanrow***, 91 Wn.2d 301, 588 P.2d 1320 (1978); ***State v. Roberts***, 88 Wn.2d 337, 344 n.4, 562 P.2d 1259 (1977); ***State v. Thompson***, 88 Wn.2d 13, 558 P.2d 202 (1977); ***State v. Harris***, 69 Wn.2d 928, 421 P.2d 662 (1966). These decisions made it clear that the use of assault as a predicate felony presented an issue that was a question of legislative intent rather than one of constitutional dimension. *See* ***Thompson***, 88 Wn.2d at 17-18.

Moreover, early Supreme Court cases indicated that the 1975 criminal code revisions, which were effective July 1, 1976, had not changed the Court's view on whether the assault merger doctrine should be applied to Washington's felony murder statute. ***Thompson***, 88 Wn.2d at 17 ("the statutory context in question here was left unchanged."); ***Wanrow***, 91 Wn.2d at 313 (Hicks, J., concurring) (Legislature did not modify ***Harris*** rule with the new 1976 criminal code).

Later decisions likewise applied the ***Harris*** reasoning to the current felony murder statute. ***State v. Crane***, 116 Wn.2d 315, 333, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991) (citing ***Wanrow*** and ***Thompson*** and refusing to reconsider assault merger rule or constitutional challenges to felony murder); ***State v. Leech***, 114 Wn.2d 700, 712, 790

P.2d 160 (1990) (refusing to reconsider ***Wanrow*** and constitutional challenges to felony murder rule); ***State v. Johnson***, 92 Wn.2d 671, 681 n.6, 600 P.2d 1249 (1979) (recognizing that the ***Harris*** interpretation applied to new statute because the Legislature did not act to overrule it); ***State v. Davis***, 121 Wn.2d 1, 7, n.5, 846 P.2d 527 (1993) (recognizing third degree assault could be predicate for felony murder); ***State v. Tamalini***, 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (recognizing second and third degree assault as predicate offenses for felony murder).

In ***In Re Personal Restraint of Andress***, however, the Court made it clear that the comments it had made in ***Wanrow***, ***Thompson***, and ***Roberts*** were not equivalent to actually analyzing the changes to the statutory language and held that it had not, in fact, previously analyzed whether the changes to the statute enacted in 1975 somehow signaled a legislative intent to exclude felony assault as a predicate for felony murder. ***Andress***, 147 Wn.2d at 609-616. The Court in ***Andress*** interpreted that the legislative addition of the "in furtherance of" language to the felony murder statutes signaled an intent by the legislature to remove assault as a predicate felony from the felony murder rule. *Id.* at 616.

Following the ***Andress*** decision, however, the Legislature amended the second degree felony murder statute, effective February 12,

2003, expressly declaring that assault is, and always had been, included among the predicate crimes under the second degree felony murder statute. Laws of 2003, ch. 3, § 2. The statute proscribing felony murder in the second degree now reads, in the relevant part:

> (1) A person is guilty of murder in the second degree when:
>
> (b) He or she commits or attempts to commit *any* felony, *including assault*, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050 (emphasis added). The word "any" in a statute means "every" and "all." ***State v. Westling***, 145 Wn.2d 607, 612, 40 P.3d 669 (2002).

In Washington, the determination of whether felony assault can be a predicate felony for the felony murder statute has always been an issue of legislative intent rather than a constitutional question:

> [W]e are now firmly convinced that adoption of the merger doctrine is not compelled either by principles of sound statutory construction or by the state or federal constitutions, and that adoption of the doctrine by this court would be an unwarranted and insupportable invasion of the legislative function in defining crimes. We therefore reaffirm this court's refusal to apply the doctrine of merger to the crime of felony-murder in this state.

Wanrow, 91 Wn.2d at 303.

Thus, whether a felony assault can act as a predicate for felony murder is a question of legislative intent. *See also* ***In Re Personal Restraint of Bowman***, 162 Wn.2d 325, 335, 172 P.3d 681 (2007). The Legislature made its intent in amending RCW 9A.32.050 even clearer by including an intent statement; stating, in part:

> The legislature finds that the 1975 legislature clearly and unambiguously stated that *any felony, including assault*, can be a predicate offense for felony murder. The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. The legislature does not agree with or accept the court's findings of legislative intent in State v. Andress,[sic] Docket No. 71170-4 (October 24, 2002), and *reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.*

Laws of 2003, ch. 3, § 1 (emphasis added).

Thus, for crimes committed after February 12, 2003, it is beyond dispute that the Legislature intended "that assault is included as a predicate crime under the second degree felony murder statue." ***Bowman***, 162 Wn.2d at 335; Laws of 2003, ch. 3, § 1. It is equally clear that the Legislature did not agree with the ***Andress*** court's interpretation of its prior intent and sought to nullify the impact of the ***Andress*** decision with the 2003 amendment.

Thus, the defendant's argument, which seeks to interpret the current felony murder statute in accord with the principles stated in the ***Andress*** decision, *see* App.Br. at 10-12, ignores the legislative statement of intent. The Legislature did not intend to incorporate the principles announced in ***Andress***, it intended to render them moot. The Legislature does not agree with the majority opinion in ***Andress*** that including assault as a predicate felony for felony murder leads to "absurd results." Laws of 2003, ch. 3, § 1. The "legislative branch has the power to define criminal conduct and assign punishment for such conduct," ***State v. Calle***, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing ***Whalen v. United States***, 445 U.S. 684, 689, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)), and the Legislature has made its intent clear that it intends felony assault to function as a predicate offense for the felony murder statue.

Essentially, the defendant is now asking this Court to find that the principles articulated in the majority opinion of ***Andress*** should be applied to this conviction despite the fact that this offense date was December 16, 2011, years after the legislative amendments designed to stop the impact of ***Andress*** went into effect. Thus, the defendant asks this Court to re-interpret the Legislature's clear intent and limit felony murder to instances where assault is separate from the act causing death. This Court should

decline such an invitation to violate the separation of powers; and affirm defendant's conviction.

Indeed, this was precisely the holding of Division 1 of this Court in ***State v. Gordon***, 153 Wn. App. 516, 526-529, 223 P.3d 519 (2009), *rev'd on other grounds*, 172 Wn.2d 671, 260 P.3d 884 (2011). In ***Gordon***, a case which also arose from Pierce County Superior Court, the Court rejected virtually the same argument advanced by the defendant here. There, as here, the defendant argued that "under canons... of statutory construction and the rule of lenity, this court should interpret the second degree felony murder statute to allow assault to serve as the predicate felony only where the assault is not also the act that causes the death." ***Gordon***, 153 Wn. App. at 527. Compare Br.App. at 19–21. However, the Court concluded that:

> [t]he [second-degree felony murder] *statute is not ambiguous*. But, even if we assume the statute was ambiguous and look at the legislative history of the statute as Gordon urges, we see that the res gestae issue is no longer problematic. The reasoning in ***Andress*** concerning res gestae involved statutory construction principles to derive the legislature's intent. The 2003 amendment in response to the holding in ***Andress*** and *its accompanying statement of intent make it clear the legislature wants assault to be a predicate felony.*

Id. at 529 (emphasis added).

The defendant argues that ***Gordon*** "was not well-reasoned and does not withstand scrutiny." App. Br. at 13. But the court's opinion in ***Gordon*** simply reemphasized what the Legislature already made clear when it enacted its statement of intent in 2003 and expressly rejected ***Andress***' findings of legislative intent: "[A]ssault has always been and still remains a predicate offense for felony murder in the second degree." Laws of 2003, ch. 3, § 1. The ***Gordon*** court incorporated, rather than ignored, the Supreme Court's holding in ***Bowman***, which recognized that "following our decision in ***Andress***, the legislature amended the second degree felony murder statute, effective February 12, 2003, to clarify that assault is included as a predicate crime under the second degree felony murder statute." ***Bowman***, 162 Wn.2d 325 at 335. As with ***Gordon***, this Court should similarly decline this defendant's invitation to usurp a legislative function and impose the merger doctrine by judicial fiat. It should affirm defendant's conviction.

2. A PROSECUTING ATTORNEY'S DISCRETION TO CHARGE FELONY MURDER INSTEAD OF INTENTIONAL MURDER DOES NOT VIOLATE EQUAL PROTECTION.

Where the prosecuting attorney has the discretion to charge crimes that require proof of different elements, there is no equal protection violation. ***State v. Leech***, 114 Wn.2d at 711; ***State v. Wanrow***, 91 Wn.2d

at 311. This is true where the elements of felony murder differ from those of first degree manslaughter. ***State v. Parr***, 93 Wn.2d 95, 97, 606 P.2d 263 (1980). This is true where the prosecuting attorney chooses between alternative means of the same crime. *See* ***State v. Belleman***, 70 Wn. App. 778, 784, 856 P.2d 403 (1993) (alternative means of assault in the third degree); and ***State v. Armstrong***, 143 Wn. App. 333, 178 P.3d 1048 (2008) (alternative means of murder in the second degree).

Defendant's equal protection argument was adversely decided in ***Armstrong***. Armstrong was charged with second-degree intentional murder and felony murder predicated on assault arising from the same act. The jury found him guilty.

As in the current case, Armstrong argued that the statute permitted the prosecutor to arbitrarily charge felony murder rather than intentional murder. ***Armstrong***, 143 Wn. App. at 339; App. Br. at 20. Armstrong also argued that it was unfair and overly harsh for felony murder and intentional murder to be punished equally. *Id.* at 343.

In holding that the felony murder statute does not violate equal protection, the Court of Appeals found that those charged under the statute do not constitute a suspect or semi-suspect class. 143 Wn. App. at 335. In ***Armstrong***, the Court of Appeals noted that the Washington Supreme Court has previously ruled against equal protection challenges to the

felony murder statute in ***Wanrow*** and ***Leech***. There, the defendants also complained of the prosecutor's discretion to charge felony murder instead of manslaughter.

Here, the defendant correctly cites ***Armstrong*** for the proposition that "[w]hen the crimes have different elements, the prosecutor's discretion is not arbitrary, but is constrained by which elements can be proved under the circumstances." App. Br. at 18. However, defendant overlooks that ***Armstrong*** found that manslaughter and felony murder have different elements and that "second degree intentional murder and second degree felony murder based on assault have different elements." ***Armstrong***, 143 Wn. App. at 341. ***Armstrong*** continued, "[t]he intent to commit the assault (which proximately causes death) and the intent to cause a death are different, requiring different proof" and concluded that "[b]ecause the two statutes require proof of different elements, *they do not violate equal protection* under this alternative test." ***Armstrong***, 143 Wn. App. at 341–342 (emphasis added).

Charging intentional murder or felony murder, or both in the alternative, is not charging different crimes with different punishments. They are alternative means of committing the same crime. *See* ***State v. Ramos***, 163 Wn.2d 654, 184 P.3d 1256 (2008). They have the same punishment. *See* RCW 9.94A.525(9). The harshness of the sentence is a

matter of public policy for the Legislature to decide. It is not an equal protection violation.

3. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE A SELF DEFENSE INSTRUCTION.

The decision to decline to instruct on self-defense is reviewed for abuse of discretion when it is based on factual reasons, but is reviewed de novo if based on a legal reason. If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo. ***State v. Read***, 147 Wn.2d 238, 53 P.3d 26 (2002); ***State v. Walker***, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998); *see also* ***State v. Brightman***, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

A criminal defendant is entitled to have the trial court instruct upon his or her theory of the case so long as there is evidence to support the theory. ***State v. Hughes***, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The defendant is not entitled to a self-defense instruction unless there is

"'some evidence which tends to prove that the [defensive act] occurred in circumstances amounting to self-defense.'" ***State v. Walker***, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (quoting ***State v. Janes***, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). The Court must view the evidence in the light most favorable to the defendant. ***State v. Callahan***, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). However, "[i]f any one of the elements of self-defense is not supported by the evidence, the self-defense theory is not available to a defendant, and the defendant cannot present the theory to a jury." ***Walker***, 136 Wn.2d at 773 (citing ***State v. Griffith***, 91 Wn.2d 572, 575, 589 P.2d 799(1979)).

A valid claim of self-defense requires (1) that the defendant subjectively feared that he or she was in imminent danger of bodily harm, (2) that this belief was objectively reasonable, and (3) that the defendant exercised no more force than was reasonably necessary. ***State v. Werner***, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). The defendant may employ no greater force than "what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." ***State v. Walden***, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). Deadly force—defined as "the intentional application of force through ... means reasonably likely to cause death or serious physical injury," RCW 9A.16.010(2)—is justified only when the threat perceived is of death or great bodily harm. ***Walden***,

131 Wn. 2d at 474. Where the evidence demonstrates that the defendant's use of force under the circumstances is excessive as a matter of law, the trial court does not err by declining to instruct the jury on self-defense. ***Griffith***, 91 Wn.2d at 575; ***State v. Brigham***, 52 Wn. App. 208, 210, 758 P.2d 559 (1988).

Brightman discussed similar issues as in this case. There the defendant testified that he accidentally killed the victim by striking him with a gun while resisting a robbery. 155 Wn.2d at 510. In reviewing RCW 9A.16.050(2), the court concluded that deadly force was only justified when it was necessary. *Id.*, at 521. Older case authority construing the statute likewise had concluded that even when a serious felony such as robbery was in progress, use of deadly force to repel the offense was not justified unless the defendant was threatened with death or great bodily injury. *Id.* at 522. The trial court could conclude as a matter of law that deadly force was not necessary under the facts of ***Brightman***, at 523–524.

To be entitled to a self-defense instruction, the defendant was required to produce, or point to, some evidence regarding the elements of a reasonable apprehension of great bodily harm and imminent danger. ***State v. Janes***, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (citing RCW 9A.16.050; ***State v. Acosta***, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984);

In addition, there needed to be evidence presented that the defendant used or offered to use force to prevent the imminent harm. ***State v. Callahan***, 87 Wn. App. 925, 943 P.2d 676 (1997).

Here, no reasonably prudent person in the defendant's circumstances would find the use of deadly force in the form of running the victim over/using a large SUV as a ram to be necessary to meet the alleged threat posed by Johnson. The defendant and Johnson had engaged in a mutual, unarmed, altercation. There was no evidence that Johnson posed a threat after the altercation ceased. Here, as in ***Brightman***, 155 Wn. 2d at 510, Johnson had broken off the conflict. She was walking away from the defendant. 3 RP 369, 5 RP 571, 4 RP 429-431. The defendant slowly drove next to Johnson, taunting her. *Id.* The defendant was on the phone with 911 at the time. The 911 operator told the defendant not to follow Johnson; to wait for police to arrive. 5 RP 571.

The defendant emphatically denied that she even struck Johnson with the SUV. 5 RP 571. She told police that she merely turned the SUV in front of Johnson; she did not know that there was contact between Johnson and the SUV. 5 RP 571-572. The defendant looked in the rear-view mirror and saw Johnson lying in the street. 4 RP 486, 5 RP 572. The defendant thought Johnson was faking; that it was a "ploy." *Id.* According to the defendant's account, at most, Johnson's death was an accident. Self-

defense is an intentional act. *See* ***Brightman***, 155 Wn.2d at 526. If the death was accidental, the defendant does not get an instruction on self-defense. *Id.*

When the defendant moved to ram Johnson with the SUV, the character of their encounter had changed from a common altercation to a violent assault by the defendant upon Johnson. The defendant rammed Johnson, crushing Johnson as the defendant fled the scene. There was no evidence adduced from which the jury could determine that the defendant perceived a threat of death or great bodily harm from Johnson, and accordingly, as in ***Brightman*** and ***Brigham***, the defendant's use of potentially lethal force was excessive as a matter of law.

The trial court considered the evidence in the light most favorable to the defendant. 7 RP 878-879. The court observed that the altercation had broken off and then the defendant used deadly force where there was no apparent danger. 7 RP 880. The court used the correct legal standard, and reviewed Walker on the record. 7 RP 878, 880. The evidence failed to support an instruction on self-defense. The court committed no error.

4. THE TRIAL COURT PROPERLY MERGED THE MANSLAUGHTER AND MURDER CONVICTIONS.

The State may charge and prosecute a defendant for alternative means of committing the same crime. ***State v. Womac***, 160 Wn.2d 643, 660 n. 9, 160 P.3d 40 (2007). But where a jury finds a defendant guilty on the basis of more than one alternative means, the trial court may only sentence the defendant for one conviction. ***State v. Trujillo***, 112 Wn. App. 390, 410–11, 49 P.3d 935 (2002). Thus, the trial court "'should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.'" ***State v. Turner***, 169 Wn.2d 448, 463, 238 P.3d 461 (2010) (quoting ***Trujillo***, 112 Wn. App. at 411, 49 P.3d 935).

A trial court does not violate double jeopardy if it merges multiple convictions for the same offense into a single count and sentence only on one count. ***State v. Fuller***, 169 Wn. App. 797, 835, 282 P.3d 126 (2012); ***State v. Meas***, 118 Wn. App. 297, 304–305, 75 P.3d 998 (2003).

Here, as in ***Meas*** and ***Fuller***, the sentencing court recognized that double jeopardy principles prohibited the defendant from being convicted of and punished for both second degree murder and manslaughter for killing Johnson. The court specifically cited and followed ***Meas***. 7 RP 975. The court struck the references in the judgment and sentence to Count I

and merger. CP 228, 229. The court then entered a written judgment and sentence which reflected that the defendant had been convicted of one count of second degree murder. *Id.*

The sentencing court's order listed one conviction and one sentence. *See* ***Meas***, 118 Wn. App. at 305–304; ***State v. Johnson***, 113 Wn. App. 482, 488-489, 54 P.3d 155 (2002). The court did not "preserve" Count I by entering judgment on both convictions, but sentencing on only one, as the court did in ***Womac***, 160 Wn.2d at 647. The trial court did not try to "conditionally dismiss" Count I, as the trial courts did in ***Turner***, 169 Wn.2d at 452, 453. "[A] judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing." ***Turner***, at 464-465.

Here, the trial court intentionally complied with ***Turner***, ***Womac***, and ***Meas***. It did not violate double jeopardy principles.

D. CONCLUSION.

The defendant failed to raise or litigate the meaning of the felony murder statute at trial. She cannot do so now. She fails to demonstrate that the statute is ambiguous, and that she was denied equal protection of the laws. The evidence did not support a jury instruction on self-defense. For

the reasons argued in this brief, the State respectfully requests that the conviction be affirmed.

DATED: JUNE 13, 2014

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

6/13/14 D Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

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Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

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