SUPREME COURT NO. 91734-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENISE LARKINS,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 45276-6-II
Pierce County No. 11-1-05057-4

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES III

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED 3

1. WHETHER THE FELONY MURDER STATUTE IS AMBIGUOUS IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE WHICH SHOULD BE REVIEWED BY THIS COURT. 3

2. WHETHER ALLOWING PROSECUTION FOR SECOND DEGREE MURDER BASED UPON AN ASSAULT PREDICATE VIOLATES EQUAL PROTECTION IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW. 8

3. THE COURT'S REFUSAL TO INSTRUCT ON SELF-DEFENSE PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT. 11

4. WHETHER THE REASONABLE DOUBT INSTRUCTION UNDERCUTS THE STATE'S BURDEN OF PROOF IS A SIGNIFICANT CONSTITUTIONAL QUESTION. 17

F. CONCLUSION 18

TABLE OF AUTHORITIES

Washington Cases

In re Bowman, 162 Wn.2d 325, 172 P.3d 681 (2007) 5, 7

In re Bratz, 101 Wn. App. 662, 5 P.3d 755 (2000) 9

In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) 3, 5, 10

Olsen v. Delmore, 48 Wn.2d 545, 295 P.2d 324 (1956) 10

Seeley v. State, 132 Wn.2d 776, P.2d 604 (1997) 8

State v. Adams, 31 Wn. App. 393, 641 P.2d 1207 (1982) 13

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) 18

State v. Berube, 171 Wn. App. 103, 286 P.3d 402 (2012) 17

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) 12

State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997) 12

State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960) 11

State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992) 8

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 17

State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), reversed on other grounds, 172 Wn.2d 671 (2011) 6

State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990) 9

State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000) 11

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) 12, 13, 16

State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990) 3, 4

State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), cert. denied sub nom Manussier v. Washington, 520 U.S. 1201 (1997) 8

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 12, 16

State v. McDaniel, ___ Wn. App. ___, 344 P.3d 1241 (2015) 6

State v. Neher, 112 Wn.2d 347, 771 P.2d 330 (1989) 3

State v. Pyles, 9 Wn. App. 246, 511 P.2d 1374, review denied, 82 Wn.2d 1013 (1973) 10

State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002) 13

State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999) 11

State v. Roberts, 117 Wn.2d 576, 817 P.2d 855 (1991) 3

State v. Tyree, 143 Wash. 313, 255 P. 382 (1927) 13

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997) 13, 17

State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997) 11

Federal Cases

Baxstrom v. Herold, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966) 9

Dandridge v. Williams, 397 US. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) 8

Statutes

Laws of 2003, ch.3 ..... 4, 6

RCW 9A.32.070 10

Rules

RAP 13.4(b)(3) 11, 17, 18

RAP 13.4(b)(4) 8

Constitutional Provisions

U.S. Const. amend. VI 18

U.S. Const., amend. XIV 8

Wash. Const. art. I, § 21 18

Wash. Const. art. I, § 22 18

Wash. Const., Article I, §12 8

A. IDENTITY OF PETITIONER

Petitioner, DENISE LARKINS, by and through her attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the April 28, 2015, unpublished decision of Division Two of the Court of Appeals affirming her conviction of second degree felony murder.

C. ISSUES PRESENTED FOR REVIEW

1. The only way to avoid an absurd and nonsensical result and comply with the rule of lenity is to interpret the current second degree felony murder statute so as to permit conviction based upon the predicate crime of assault only if the assault is not the conduct which results in the death. Should this Court so interpret the statute, and should the conviction be reversed where the predicate assault in this case was the conduct which caused the death?

2. Does the current second degree felony murder statute violate equal protection where there is no limit to the prosecutor's discretion to charge a higher crime for the same acts and no basis for treating similarly situated defendants differently? Further, does it offend fundamental principles of fairness to allow such unfettered discretion to

arbitrarily select which defendant faces far greater punishment for the exact same act?

3. The trial court declined to give Larkins's proposed self defense instructions. The court agreed that Larkins presented some evidence that she subjectively feared she was in danger and that her fear was objectively reasonable, but the court concluded that the amount of force she used was not reasonably necessary. Where Larkins presented expert testimony regarding her mental state from which the jury could find that she used the amount of force which under the circumstances appeared reasonably necessary to her, was the court required to instruct the jury on self defense?

4. The jury's role is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. Nonetheless, the jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal?

D. STATEMENT OF THE CASE

A complete statement of the case, with citations to the lengthy record, is contained in the Brief of Appellant at 3-9. Because that brief will be forwarded as part of the Court of Appeals record to this Court, to

avoid repetition, petitioner incorporates that statement by reference. Facts necessary to place the issues into context are discussed within the argument.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER THE FELONY MURDER STATUTE IS AMBIGUOUS IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE WHICH SHOULD BE REVIEWED BY THIS COURT.

The felony murder statute is ambiguous and therefore must be interpreted in Larkins's favor. Under the rule of lenity, where a statute is ambiguous and thus subject to several interpretations, the Court is required to adopt the interpretation most favorable to the defendant. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Further, when interpreting a statute, a reviewing court must try to construe it in order to effect its purpose, but "'strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided.'" State v. Leech, 114 Wn.2d 700, 708-709, 790 P.2d 160 (1990) (quoting State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989)). In addition, because it is presumed that the Legislature does not intend absurd results, courts will not construe a statute to allow such a result. In re the Personal Restraint of Andress, 147 Wn.2d 602, 610, 56 P.3d 981 (2002); see State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1985).

After the decision in Andress, the Legislature amended the second degree felony murder statute to provide, in relevant part:

> A person is guilty of murder in the second degree when ... he or she commits or attempts to commit any felony, including assault ... 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(1)(b); Laws of 2003, ch.3, § 1 (statute amended in response to Andress). Although the statute does not specify whether it applies to an assault which is the act resulting in death or only to separate assaults, this Court has examined the "in furtherance of" language in another context and held that it means that the death has to be "sufficiently close in time and place" to the underlying felony so as "to be part of the res gestae of that felony." Leech, 114 Wn.2d at 706.

In Andress, the Court applied Leech and held that the language of the felony murder statute requiring the death to be "in the course of and in furtherance of the predicate felony, or in immediate flight therefrom," meant that the Legislature could not have intended to include assault as a predicate felony, because:

> the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to that assault to be part of the res gestae of the assault. *It is nonsensical to speak of a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act since the conduct*

> *constituting the assault and the homicide are the same.* Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide.

Andress, 147 Wn.2d at 610 (emphasis added). It was necessary to reject this "absurd" interpretation, the Court held, because otherwise "the 'in furtherance of' language would be meaningless as to that predicate felony" as "the assault is not independent of the homicide." 147 Wn.2d at 610. Indeed, as the Court later noted, the "felony murder statute is intended to apply when the underlying felony is distinct from, yet related to, the homicidal act." In re Bowman, 162 Wn.2d 325, 331, 172 P.3d 681 (2007).

Although the new statute specifically includes reference to assault as the predicate felony, it still contains the same "in furtherance of" language which this Court found in Andress would be rendered superfluous by allowing conviction for felony murder based upon an assault which causes death. And the statutory language is still nonsensical if applied to such situations, because it still speaks of "a criminal act—an assault, that results in death as being part of the res gestae of that same criminal act," even though "the conduct constituting the assault and the homicide are the same." Andress, 147 Wn.2d at 610

Because the statute does not specify whether it applies to all assaults, or only to those which are separate from the act which causes the

death, but it still contains the "in furtherance of" language, it is ambiguous. Applying the rule of lenity and the rules of statutory construction against absurd results, and assuming the Legislature did not intend such results, the Court is required to interpret the statute to apply only to assaults which are separate from the act causing death. This is the only way to avoid rendering superfluous the "in furtherance of" language or requiring an absurd result. It is also the only way to honor the Legislature's apparent desire to include at least some assaults as predicate felonies for second-degree felony murder while following these mandates of statutory construction.

The Court of Appeals rejected this argument, relying on its decision in State v. McDaniel, ___ Wn. App. ___, 344 P.3d 1241 (2015), and Division One's decision in State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), reversed on other grounds, 172 Wn.2d 671 (2011). Op. at 4. Those cases concluded that the second degree felony murder statute is not ambiguous. McDaniel, 344 P.3d at 1243-44; Gordon, 153 Wn. App. at 529.

But this conclusion ignores the very language of the statute. The language used by the 2003 Legislature did not clarify which assaults it intended to qualify as predicate felonies, because it still included the "in furtherance of" language in the statute. See Laws of 2003, ch.3. Further,

in amending the statute, the 2003 Legislature specifically stated that the purpose of the second degree felony murder statute was to punish those who "commit a homicide in the course and in furtherance of a felony," which the Legislature said meant the death was to be "sufficiently close in time and proximity to the predicate felony." Laws of 2003, ch. 3, § 1 (emphasis added). Thus, the mere fact that the Legislature included the word "assault" in the statute does not answer the question raised by the statute's ambiguity, contrary to the Court of Appeals' conclusion.

Further, the Court of Appeals' holding ignores this Court's holding in Bowman, supra, that the felony murder scheme is intended to apply "when the underlying felony is distinct from, yet related to, the homicidal act"—a distinction which is lost if the underlying felony is the assault which results in death but not if the underlying felony is an assault and a different act causes the death. Bowman, 162 Wn.2d at 331. Because the Court of Appeals' decision is not well-reasoned and ignores fundamental law and principles, it should not be followed by this Court.

The only way to interpret the post-Andress RCW 9A.32.050(1)(b) to make sense of all of the language, avoid absurdity, and follow the rule of lenity as required is to hold that the statute applies only when the predicate assault is an assault separate from the act which caused the

death. This Court should grant review to clarify this issue of substantial public importance. RAP 13.4(b)(4).

2. WHETHER ALLOWING PROSECUTION FOR SECOND DEGREE MURDER BASED UPON AN ASSAULT PREDICATE VIOLATES EQUAL PROTECTION IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Both Article I, §12, of the Washington constitution and the Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 US. 471, 518, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).[1] When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). Although physical liberty is an important liberty interest, this Court has held that it implicates only the "rational relationship" test. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), cert. denied sub nom Manussier v. Washington, 520 U.S. 1201 (1997). Under that test, the courts ask 1) whether the classification applies to all members of the class, 2) whether there was some rational basis for distinguishing between those within and those outside the class, and 3) whether the challenged classification bears a

[1] Washington courts have thus far construed the Washington clause as "substantially identical" to the federal clause, and use the same analysis. See State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

"rational relationship" to the legitimate state objective which must be the basis for the classification. In re Bratz, 101 Wn. App. 662, 669, 5 P.3d 755 (2000).

While identical treatment is not required in all circumstances, it is still required that any distinction "have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Further, even a seemingly valid law will violate equal protection if it is administered in a manner which unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

Here, Larkins is in a class of defendants who commit second degree assault which results in death. Under the statutes, the prosecution is given the astounding choice of charging such persons with either second degree felony murder or the much lesser crime of manslaughter, as this Court noted in Andress and Bowman. Yet there is absolutely no distinction between the people who would be subject to the far disparate punishments and higher crimes, save for the prosecutor's unfettered discretion. The complete lack of any standards for treating similarly situated defendants who commit exactly the same acts so differently cannot possibly serve any legitimate state objective, so that the "rational

relationship" test was not met and concepts of fundamental fairness were violated.

This Court has stated that, under equal protection principles, the prosecution should not be permitted the discretion to choose "different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations." Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956).

For example, if a defendant commits an intentional assault and unintentionally but recklessly inflicts substantial bodily harm which results in death, the prosecution can charge either second degree murder or manslaughter, with the resulting differences in punishment and consequence. Similarly, with assault as the predicate felony for second degree felony murder, "a negligent third degree assault resulting in death can be second degree murder," although RCW 9A.32.070 provides that a person who with criminal negligence causes the death of another is guilty only of second degree manslaughter." Andress, 147 Wn.2d at 615; RCW 9A.32.070(1).

Equal protection principles are offended when the prosecutor is allowed to make a choice of which comparable crime to charge when one is far more serious. State v. Pyles, 9 Wn. App. 246, 511 P.2d 1374, review denied, 82 Wn.2d 1013 (1973); State v. Collins, 55 Wn.2d 469, 348

P.2d 214 (1960). By giving the prosecution this expansive discretion to charge a higher or lesser crime for the same conduct, RCW 9A.32.050 as currently written violates the prohibitions against equal protection. Review is appropriate under RAP 13.4(b)(3).

3. THE COURT'S REFUSAL TO INSTRUCT ON SELF-DEFENSE PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

The defense requested instructions on self defense based on evidence that Johnson had assaulted Larkins and that Larkins was afraid Johnson had a gun and was reaching in her purse for it. 7RP 832; 8RP 874; CP 111-125. The court acknowledged this evidence but found there was no evidence that a reasonable person, even knowing what Larkins knew, would have felt it was necessary to strike Johnson with a car. 8RP 879. The court declined to give the proposed self defense instructions. Id. The Court of Appeals agreed with the trial court. Opinion at 10-11.

Each party is entitled to have the jury instructed on its theory of the case if there is evidence to support it. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Jury instructions are constitutionally sufficient only if they permit each party to argue its theory and properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The trial court's determination of whether the defendant produced sufficient evidence to raise a claim of self defense is a matter of law. State v. Janes, 121 Wn.2d 220, 238 n.7, 850 P.2d 495 (1993). Where the trial court refuses to give a self defense instruction based on a ruling of law, review is de novo. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

A defendant is entitled to instructions on self defense when the record contains some evidence, from whatever source, which tends to prove the defendant acted in self defense. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); State v. Roberts, 88 Wn.2d 337, 345, 562 P.2d 1259 (1977). Self defense is at issue when there is evidence that (1) the defendant subjectively feared that he was in imminent danger of injury; (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).

The defense's threshold burden of production is low. The defendant is not even required to present evidence which would be sufficient to create a reasonable doubt; rather, any evidence that the defendant acted out of fear of injury will suffice. Janes, 121 Wn.2d at 237; McCullum, 98 Wn.2d at 488; State v. Adams, 31 Wn. App. 393, 396-

97, 641 P.2d 1207 (1982). Only where no plausible evidence appears in the record upon which a claim of self defense might be based may the trial court refuse a self defense instruction. McCullum, 98 Wn.2d at 488; Adams, 31 Wn. App. at 395.

Evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." Janes, 121 Wn.2d at 238. The degree of force which may be used in self defense depends on what a reasonable person would find necessary under the circumstances as they appeared to the defendant. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). It is not the amount of force the jury might say is reasonably necessary, but what appeared reasonably necessary to the defendant under the circumstances, which is relevant to a self defense determination. Adams, 31 Wn. App. at 396 (quoting State v. Tyree, 143 Wash. 313, 316, 255 P. 382 (1927)). Thus, in determining whether to give self defense instructions, the court must consider all the facts and circumstances known to the defendant and then determine what a reasonable person in the same situation would have done. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

In this case, the defense presented evidence that Larkins's perceptions of the circumstances surrounding Johnson's death were

colored significantly by her mental disorder. Dr. Gagliardi testified Larkins has been diagnosed with complex PTSD, which predisposes her to a number of other conditions, including depression, anxiety disorders, and substance abuse disorders, and it handicaps her interpersonal relationships. 7RP 701. She also has a serious substance abuse problem that figures prominently in this situation. 7RP 702. Over the years she has been diagnosed with schizophrenia, experiencing psychotic symptoms like hallucinations and delusions, and depression. 7RP 702. With these conditions Larkins may periodically lose touch with reality or go in and out of a psychotic frame of mind. 7RP 704.

Because of the conflicted interpersonal situation between Larkins and Johnson, during which Larkins was actually assaulted, Larkins felt seriously threatened. 7RP 712. Gagliardi explained that one characteristic of PTSD is hyper-vigilance, which causes Larkins to always be on edge, afraid something bad is going to happen, and expect the worst from others. 7RP 712-13. Her PTSD impairs her ability to appraise danger and predisposes her to react impulsively and emotionally, not reflecting on what is going on. 7RP 713. Gagliardi explained that the tape of the 911 call Larkins made at the time showed she was very scared and disorganized to the point of not being able to follow directions to stop the

car and identify her location. She also expressed a lot of beliefs that were clearly untrue or delusional. 7RP 720.

In addition, Larkins's verbal IQ is only 78, which is substantially below normal. Gagliardi testified that on that basis alone her ability to appraise situations is impaired. A conflict situation with high emotionality further degrades her ability to make decisions and foresee consequences. 7RP 715-16. Gagliardi testified it is very plausible that, because of Larkins's mental disorder, she could hit someone with a car and believe it would not hurt that person very much. 7RP 715. There was good reason to question whether she understood that hitting Johnson with her car would cause great bodily harm. 7RP 718, 739.

Like Gagliardi, Young explained that one feature of PTSD is hyperarousal, which in circumstances of stress, violence, or threat can cause panic and impaired thinking. 7RP 764. In this case, Larkins was in total panic with disorganized, fragmented thinking. 7RP 765. In that state her capacity to think through the nature of an act and the likely consequences was terribly impaired. 7RP 765-66. Young also testified that the 911 call confirmed Larkins's delusional mental state. 7RP 766-67. Young's opinion was that not only was her mental state impaired, but she was also defending herself, believing she needed to act quickly. 7RP 768.

The expert testimony regarding Larkins's perceptions of the circumstances surrounding the charged act allows the jury to make the "critical determination of the degree of force which a reasonable person in the same situation, seeing what she sees and knowing what she knows, then would believe to be necessary." See Janes, 121 Wn.2d at 239 (internal quotations and ellipses omitted). Viewing the evidence in the light most favorable to the defense, the jury could find that Larkins perceived an imminent danger of great harm from Johnson. She not only believed that Johnson was reaching for a gun, but she also believed Johnson's gang-related family and friends were closing in on her. She was terrified and perceived the need to act quickly so that she could escape the situation. In her disorganized state of reasoning, she believed she could tap Johnson with the car to stop her without actually doing any serious harm. Given Larkins's perceptions of danger and necessity, the jury could find that she acted reasonably. Thus, the evidence meets the threshold standard of "some evidence" of self defense.

"The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." McCullum, 98 Wn.2d at 488. Because Larkins produced some evidence that she acted in self defense, she was entitled to have the jury instructed not only on the law

regarding self defense but also on the State's burden of proving the absence of self defense beyond a reasonable doubt. Walden, 131 Wn.2d at 473-74. The court's failure to so instruct the jury in this case denied Larkins her right to present a defense and relieved the State of its burden of proof. The court's instructional error requires reversal and remand for a new trial. This Court should grant review under RAP 13.4(b)(3).

4. WHETHER THE REASONABLE DOUBT INSTRUCTION UNDERCUTS THE STATE'S BURDEN OF PROOF IS A SIGNIFICANT CONSTITUTIONAL QUESTION.

The trial court instructed the jury that "If, from such consideration [of the evidence or lack of evidence], you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 144. A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn. App. 103, 120, 286 P.3d 402 (2012) ("...truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the jury instruction blurs the critical role of the jury.

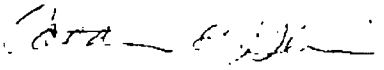
The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id. This Court should find that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the State's burden of proof, confuses the jury's role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22. Review should be granted under RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals' decision.

DATED this 24th day of May, 2015.

Respectfully submitted,



CATHERINE E. GLINSKI
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Attorney for Petitioner

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Today I caused to be mailed a copy of this Petition for Review directed to:

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Washington Corrections Center for Women
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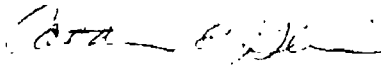

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DENISE LASHON LARKINS, Appellant.	No. 45276-6-II UNPUBLISHED OPINION

MELNICK, J. — Denise Larkins appeals from her jury trial conviction for felony murder in the second degree. Larkins argues that (1) the felony murder statute should not apply to an assault that causes death, (2) the felony murder statute violates constitutional guarantees of equal protection and fundamental fairness, (3) the trial court erred by declining to give a self-defense instruction, (4) the trial court improperly instructed the jury on reasonable doubt, and (5) the trial court violated Larkins's double jeopardy protections when it refused to vacate her conviction for the lesser included offense of manslaughter. We reject all of Larkins's claims and affirm the trial court. However, we remand to the trial court to correct a scrivener's error on Larkins's judgment and sentence.

FACTS

On December 16, 2011, Larkins was a passenger in a large sport utility vehicle (SUV) driven by her friend Michelle Johnson. The two women picked up Johnson's daughter and set out toward the daughter's paternal grandmother's house. On the way, Larkins and Johnson began to argue.

When Larkins and Johnson arrived at their destination, Johnson exited the SUV and Larkins moved to the driver's seat. Larkins attempted to drive away, but Johnson held on to the

vehicle because her belongings were still in the car. Larkins stopped, exited the vehicle, and began arguing with Johnson again. Johnson struck Larkins in the head twice. Johnson retrieved her belongings from the car and began walking away.

Larkins called 911 to report that she had been hit in the head and was bleeding. While still on the phone, Larkins drove the SUV alongside Johnson and the two women continued to yell at each other. Larkins told the 911 operator that she feared Johnson and believed that Johnson had retrieved a gun from the house.[1] Larkins also told the 911 operator, and later detectives, that she had at one point seen Johnson digging in her purse. The operator told Larkins not to follow Johnson.

Larkins continued following Johnson to a nearby intersection. As soon as Johnson entered the intersection, Larkins "gunned" the engine, turned sharply, and ran over Johnson with the SUV. IV Report of Proceedings (RP) at 431. Johnson died from blunt force trauma to the head. Larkins saw Johnson lying in the road in her rear-view mirror, but believed that Johnson was attempting to use a "ploy" to "set her up to maybe come back." V RP at 571. Larkins immediately drove away.

The police contacted Larkins soon afterward. Larkins told the police that she felt unsafe because she believed Johnson's family was "[i]nvolved in gangs and weapons." IV RP at 498. Larkins said she was afraid of the "assaultive and argumentative behavior" Johnson had exhibited throughout their friendship. V RP at 594. Larkins also said she had post-traumatic stress disorder (PTSD) and suffered from anxiety and panic attacks. Larkins denied running over Johnson. Larkins said that she drove away because she feared Johnson's "gangster ass kid with guns." V

[1] The record does not indicate whether a gun was found on Johnson's person.

RP at 597. Larkins appeared surprised when the police informed her that Johnson died from the impact.

PROCEDURAL HISTORY

The State charged Larkins in two separate counts with intentional murder in the second degree[2] (count I), and felony murder in the second degree predicated on an assault in the first, second, or third degree[3] (count II).

Larkins's jury trial commenced and she presented a defense of diminished capacity, offering evidence that she suffered from complex PTSD, depression, anxiety disorders, and substance abuse disorders. As a result of her PTSD, Larkins was "always on edge," prone to react impulsively and emotionally, and had an impaired ability to appraise danger. VI RP at 712. Larkins also "experienced psychotic symptoms from time to time." VI RP at 704. Larkins had a low intelligence quotient (IQ), which could plausibly lead her to believe that hitting a person with a car would not hurt him or her very much. An expert testified that Larkins was "in a total panic with disorganized fragmented thinking" at the time she killed Johnson, which impaired her ability to form a criminal intent. VI RP at 765.

At the close of trial, Larkins offered a self-defense instruction. But the trial court refused to give the instruction because no reasonable person would have acted as Larkins did.

The jury returned a guilty verdict on count II, as well as the lesser included offense of manslaughter in the second degree under count I. At sentencing, Larkins asked the trial court to vacate the manslaughter conviction. The trial court stated that it "would be unjust" to vacate the manslaughter conviction outright. VII RP at 976. Instead the trial court merged the manslaughter

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[2] RCW 9A.32.050(1)(a).

[3] RCW 9A.32.050(1)(b).

conviction with the felony murder conviction, entering judgment only on the felony murder conviction. Because Larkins's judgment and sentence was preprinted with both convictions, the trial court struck out references to the manslaughter conviction. The trial court imposed a standard range sentence of 220 months on the felony murder charge. Larkins appeals.

ANALYSIS

I. FELONY MURDER STATUTE

Larkins argues that under the rule of lenity, the felony murder statute should not be interpreted to apply to an assault that causes the victim's death. We recently addressed and rejected an identical argument in *State v. McDaniel*, No. 44972-2, 2015 WL 686800, at *2-3 (Wash. Ct. App. Feb. 18, 2015). In *McDaniel*, we held that the felony murder statute was not ambiguous, the plain language of the statute clearly includes assault causing death as a predicate offense, and that the rule of lenity does not apply. 2015 WL 686800, at *2-3. Division One of this court also rejected an argument identical to Larkins's in *State v. Gordon*, 153 Wn. App. 516, 527-29, 223 P.3d 519 (2009), *rev'd on other grounds*, 172 Wn.2d 671, 260 P.3d 884 (2011). Following our precedent in *McDaniel* and *Gordon*, we reject Larkins's argument.

II. EQUAL PROTECTION AND FUNDAMENTAL FAIRNESS

Larkins argues that her prosecution for felony murder predicated on assault violated the equal protection clause of the state and federal constitutions, as well as the due process guaranty of fundamental fairness, because the prosecutor had unfettered discretion to charge her with two crimes for the same conduct. We disagree.

To the extent Larkins argues that the murder statute violates equal protection because it allows the prosecutor to arbitrarily charge felony murder rather than intentional murder when a person assaults another that results in death, we rejected that exact argument in *State v. Armstrong*,

143 Wn. App. 333, 339-44, 178 P.3d 1048 (2008). The State charged Larkins with both intentional murder in the second degree and felony murder in the second degree. In *Armstrong*, the defendant was charged with intentional murder in the second degree and felony murder in the second degree predicated on felony of second degree assault. 143 Wn. App. at 336. The *Armstrong* court held that because the "intent to commit the assault (which proximately causes death) and the intent to cause a death are different, requiring different proof," the two statutes criminalizing conduct as intentional murder in the second degree and felony murder in the second degree do not violate equal protection. 143 Wn. App. at 341-42 (boldface omitted) (emphasis omitted). In accordance with *Armstrong*, 143 Wn. App. at 339-44, we hold that the prosecutor's choice to charge a defendant with intentional murder in the second degree, felony murder in the second degree, or both, does not violate equal protection.

To the extent Larkins argues that where a person commits an assault which results in death, the prosecution's unfettered discretion to choose between a charge of felony murder in the second degree or *manslaughter* violates equal protection. We disagree.

A. Equal Protection

Both the state and federal constitutions mandate that similarly situated persons receive like treatment under the law. WASH. CONST. art. I, § 12;[4] U.S. CONST., amend. XIV.[5] Our Supreme Court has consistently construed the federal equal protection and state privileges and immunities

[4] "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

[5] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

clauses identically and considered claims arising under them to be one issue. *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991).

The right to equal protection of the laws may be violated when two statutes criminalize the same acts, but penalize them differently. *State v. Leech*, 114 Wn.2d 700, 711, 790 P.2d 160 (1990). However, "there is no equal protection violation when a statutory scheme proscribes crimes that 'require proof of different elements.'" *Armstrong*, 143 Wn. App. at 338 (quoting *Leech*, 114 Wn.2d at 711). "When the crimes have different elements, the prosecutor's discretion is not arbitrary, but is constrained by which elements can be proved under the circumstances." *Armstrong*, 143 Wn. App. at 338. Accordingly, we consider whether "the crimes that the prosecuting attorney has the discretion to charge require proof of different elements." *Leech*, 114 Wn.2d at 711.

The elements of felony murder predicated on assault are different from the elements of manslaughter. RCW 9A.32.050(1)(b); RCW 9A.32.060(1)(a); RCW 9A.32.070(1). The felony murder in the second degree statute provides:

> A person is guilty of murder in the second degree when: . . . 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(1)(b). As an element of the crime, the State must prove the defendant committed the predicate felony. Here, the State alleged assault in the first, second, or third degree as the predicate felonies. The elements of assault in the first degree, as charged here include: "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: . . . Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). The elements of assault in the second degree,

as charged here include: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . Assaults another with a deadly weapon." RCW 9A.36.021(1)(c). And, the elements of assault in the third degree, as charged here include: "A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: . . . With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d).

A person is guilty of manslaughter in the first degree when that person "recklessly causes the death of another person." RCW 9A.32.060(1)(a). And, a person is guilty of manslaughter in the second degree when "with criminal negligence" that person causes the death of another person. RCW 9A.32.070(1).

The mental state required to prove felony murder predicated on assault is different from the mental state required to prove manslaughter. We do not compare mental state elements in isolation; rather we examine mental states as they necessarily relate to the defendant's acts. *State v. Gamble*, 154 Wn.2d 457, 467, 114 P.3d 646 (2005). None of the requisite mental state elements of the predicate assaults charged here requires the State to prove Larkins caused the death of another person with a reckless or criminally negligent state of mind as is required for manslaughter convictions. *See* RCW 9A.32.060(1)(a) (manslaughter in the first degree); RCW 9A.32.070(1) (manslaughter in the second degree).

Our criminal code defines the "recklessness" and "criminal negligence" mental states as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a *wrongful act* may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

. . . .

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a *wrongful act* may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(c), (d) (emphasis added). In the context of manslaughter, the "wrongful act" caused by a defendant's actions is homicide. *State v. Henderson*, No. 90154-6, 2015 WL 847427, at *5 (Wash. Feb. 26, 2015); *Gamble*, 154 Wn.2d at 467. To obtain a manslaughter conviction, the State must prove that the defendant (1) knew of and disregarded a substantial risk that a *death* may occur or (2) failed to be aware of a substantial risk that a *death* may occur. RCW 9A.32.060(1)(a); RCW 9A.32.070(1). On the contrary, to obtain a felony murder conviction, predicated on assault, as charged here, the State was required to prove that the defendant (1) acted with intent, i.e., the objective or purpose,[6] to inflict great bodily harm, RCW 9A.36.011(1)(a) (assault in the first degree), (2) assaulted another with a deadly weapon, RCW 9A.36.021(1)(c) (assault in the second degree), or (3) failed to be aware of a substantial risk that bodily harm may occur, RCW 9A.32.031(1)(d) (assault in the third degree).

Significantly, the assault statutes do not contemplate a risk of death as required by the manslaughter statutes. In fact, a felony murder in the second degree charge does not require the State to prove any mental state element as to the resulting death itself, whereas manslaughter does require proof of a mental state element vis-à-vis the resulting death. *See Gamble*, 154 Wn.2d at 468-69; RCW 9A.32.060(1)(a) (recklessness); RCW 9A.32.070(1) (criminal negligence). Because these crimes do not have the same elements, the authority of the prosecuting attorney to

[6] "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

charge Larkins with felony murder in the second degree predicated on assault as charged here rather than manslaughter does not violate equal protection. *See Leech*, 114 Wn.2d at 712; *Armstrong*, 143 Wn. App. at 342.

B. Fundamental Fairness

Larkins also argues that a prosecutor's decision to charge either manslaughter or felony murder for an assault resulting in death violated the guaranty of fundamental fairness inherent in the due process clause of the Fourteenth Amendment article 1, section 3 of the Washington Constitution because the effect is to impose different punishments for the same criminal conduct. But as discussed above, the two crimes require different states of mind, and thus different proof. Contrary to Larkins's assertions, it is not only the prosecutor's discretion that determines whether a defendant will be punished for manslaughter or for felony murder, but the strength of the prosecution's proof and the jury's judgment. Regardless of which offense the prosecutor charges, he or she must still prove the elements of the crime beyond a reasonable doubt to a fact finder. The felony murder statute does not result in arbitrary punishment, and Larkins fails to show that the felony murder statute violates due process.

III. SELF-DEFENSE

Larkins argues that the trial court violated her right to present a defense when it refused to instruct the jury on self-defense. Because no evidence supported her theory of self-defense, we disagree.

A defendant is entitled to have the jury instructed on self-defense if there is some evidence to support the theory. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Self-defense has three elements: (1) the defendant subjectively feared that she was in imminent danger of great bodily harm, (2) the defendant's belief was objectively reasonable, and (3) the defendant exercised

no more force than reasonably necessary. *State v. Werner*, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010). Self-defense involves both subjective and objective elements. *State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002). The subjective element considers the defendant's acts "in light of all the facts and circumstances the defendant knew when the act occurred." *Read*, 147 Wn.2d at 243. The objective elements consider "what a reasonable person would have done if placed in the defendant's situation." *Read*, 147 Wn.2d at 243.

The standard of review depends on the reason the trial court refused to grant the self-defense instruction. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). If the trial court declines the self-defense instruction based on a factual dispute, we review its decision for abuse of discretion. *Walker*, 136 Wn.2d at 771-72. But if the trial court declines the self-defense instruction based on a ruling of law, we review its decision de novo. *Walker*, 136 Wn.2d at 772. Here, the trial court refused to give a self-defense instruction because it found no reasonable person in Larkins's shoes would have acted as she did. This ruling involves an issue of law we review de novo. *Read*, 147 Wn.2d at 243.

A defendant may only use as much force in self-defense as "what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." *Walden*, 131 Wn.2d at 474. Deadly force may be used only if the defendant reasonably believes that he or she is threatened with death or great personal injury. *Walden*, 131 Wn.2d at 474.

If placed in the situation Larkins faced, no reasonably prudent person would have believed himself or herself to be in imminent danger of death or great personal injury. Nor would any reasonably prudent person have believed it necessary to strike Johnson with the automobile to defend against the perceived danger in these circumstances. Although Larkins believed that Johnson possessed a gun and had been digging in her purse while walking, Johnson was not

brandishing a gun or threatening Larkins with a gun. In fact, Larkins never saw Johnson with a gun. Rather, Johnson was walking away from Larkins at the time Larkins ran over her. Larkins also believed that Johnson's family would hurt her. But Johnson's family members were not present at the scene. Any threat that Johnson's family posed to Larkins was not imminent and could not have justified Larkins killing Johnson. *See Read*, 147 Wn.2d at 242-43.

The objective test for self-defense is not met here. Therefore, we hold that the trial court did not err by denying Larkins a self-defense instruction.

IV. REASONABLE DOUBT INSTRUCTION

Larkins argues that the trial court's reasonable doubt instruction undercut the State's burden of proof by erroneously inviting the jury to search for the truth. We disagree.

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." *Pirtle*, 127 Wn.2d at 656. "We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole." *Pirtle*, 127 Wn.2d at 656.

The instruction that Larkins complains of has never been held to be improper. To the contrary, our Supreme Court has directed the use of WPIC 4.01 to instruct juries of the nature of the government's burden. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The trial court did exactly that, reproducing WPIC 4.01 verbatim:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Clerk's Papers (CP) at 144; *see also* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3rd ed. 2008).

Larkins argues that WPIC 4.01 improperly suggests that the jury's role is to search for the truth. But WPIC 4.01 does not tell the jury to find the truth—it tells the jury to acquit the defendant *unless* the government convinces the jury of the truth of the charge. WPIC 4.01 does not misstate the State's burden, and therefore, we hold that the trial court did not err by giving the WPIC 4.01 instruction.

V. DOUBLE JEOPARDY

Larkins argues that the trial court violated her double jeopardy protections when it merged her manslaughter conviction with her felony murder conviction, rather than vacating the lesser offense. We disagree.

A violation of double jeopardy is a question of law we review de novo. *State v. Fuller*, 169 Wn. App. 797, 832, 282 P.3d 126 (2012). The double jeopardy clauses of the Fifth Amendment to the United States Constitution and the Washington Constitution, article 1, section 9, protect defendants against multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). A conviction alone may constitute punishment, even if it does not carry a sentence. *State v. Turner*, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010). Therefore, a trial

court may not enter multiple convictions for a single offense, even if it imposes only one sentence. *Fuller*, 169 Wn. App. at 832.

Double jeopardy does not prohibit the State from prosecuting a defendant for alternative means of committing the same crime. *Fuller*, 169 Wn. App. at 832-33. But when the 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. *Fuller*, 169 Wn. App. at 833. Furthermore, the trial court may not *conditionally* dismiss a guilty verdict on a lesser charge, such that the State could reinstate the lesser conviction if the greater conviction were later overturned. *Fuller*, 169 Wn. App. at 833. Also, the trial court cannot refer to the validity of the lesser charge in the judgment and sentence, in any order attached thereto, or at sentencing. *Turner*, 169 Wn.2d at 464-65.

Here, the jury returned guilty verdicts on both manslaughter and felony murder. The trial court entered a judgment on the felony murder charge only (count II), striking out references to the manslaughter conviction (count I) from the "current offense(s)" and "sentencing data" sections of the preprinted judgment and sentence. CP at 228-29. However, the "confinement" section of the judgment and sentence still contains a notation that count I merges with count II. CP at 232.

Larkins argues that the trial court openly recognized the validity of the manslaughter conviction by leaving this notation in the judgment and sentence and stating that it would not "vacate . . . the manslaughter conviction outright, because . . . [t]he jury came back with that verdict." VII RP at 976. But the trial court's notation and statement did not work to hold the manslaughter conviction in abeyance, to be reinstated if the felony murder conviction failed. *See State v. Womac*, 160 Wn.2d 643, 659, 160 P.3d 40 (2007). The trial court did not make "any reference to the possible reinstatement of a vacated lesser conviction" or opine that the manslaughter conviction was *valid*. *Turner*, 169 Wn.2d at 466, 464.

The trial court's passing reference to the manslaughter verdict and the errant notation on the judgment and sentence did not operate to punish Larkins twice. As a result, we hold that no double jeopardy violation occurred. However, the notation on the confinement section of Larkins's judgment and sentence is a scrivener's error that must be corrected. The trial court did not enter judgment on the manslaughter conviction. The trial court struck count I from the "current offense(s)" and "sentencing data" sections of the preprinted judgment and sentence. CP at 228-29. Quite literally, Larkins's judgment and sentence does not include a "count I." Therefore, the notation in the confinement section that count I merged with count II is an errant reference to a count that does not exist. Accordingly, we remand to the trial court to correct this scrivener's error by striking the remaining reference to count I on Larkins's judgment and sentence. We affirm in all other respects.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

Melnick, J.

We concur:

Maxa, J.

Maxa, P.J.

Lee, J.

Lee, J.