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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA KIONI ELLIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-04397-6
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by invoking negative racial stereotypes during voir dire.
2. The trial court erred in refusing Joshua Ellis' request to give a lesser included offense instruction on first degree manslaughter.
3. The trial court erred in refusing Joshua Ellis' request to give a lesser included offense instruction on second degree manslaughter.
4. The trial court violated Joshua Ellis' constitutional right to be free from double jeopardy when it failed to vacate one of the merged second degree murder convictions.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the prosecutor commit misconduct by repeatedly and unnecessarily invoking negative racial stereotypes during voir dire? (Assignment of Error 1)
2. When the evidence, viewed in the light most favorable to Joshua Ellis, supported an inference that Ellis' split-second reaction of blindly firing his pistol towards Wendi Traynor was a result of criminal recklessness or negligence, to the exclusion of criminal intent, did the trial court err in refusing

to instruct the jury on the lesser included offenses of first degree and second degree manslaughter? (Assignments of Error 2 & 3)

3. Where Joshua Ellis was convicted of two separate counts of second degree murder for the death of the same victim, was his right to be free from double jeopardy violated when the trial court failed to vacate one of the counts but instead “merged” the two counts and included reference to both statutory provisions in the Judgment and Sentence? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Joshua Kioni Ellis with one count of premeditated first degree murder (count 1) and one count of second degree felony murder (count 2). (CP 13-14) The State also alleged that Ellis was armed with a firearm when he committed the offenses. (CP 13-14) The alleged victim for both counts was Ellis’ girlfriend, Wendi Traynor. (CP 1-2, 3-4)

For count 1, the trial court instructed the jury on the inferior alternative crime of second degree intentional murder. (CP 117-19) But the court denied Ellis’ request to instruct the jury on the inferior

crimes of manslaughter for both first degree and second degree murder. (RP12 1838-46)¹ The trial court also instructed the jury on the law of justifiable homicide (self-defense). (CP 129)

The jury found Ellis guilty of second degree intentional murder for count 1 and second degree felony murder with a second degree assault predicate for count 2. (CP 137, 138, 140; RP14 1982) The jury also entered special verdicts finding that Ellis was armed with a firearm. (CP 139, 141; RP14 1982)

At sentencing, the trial court found that count 1 and count 2 were convictions for the same crime, and therefore merged the two counts. (CP 263-64; RP15 1992-93) The court imposed a standard range sentence totaling 280 months of confinement. (CP 144, 145, 147; RP15 2021-22) Ellis filed a timely notice of appeal. (CP 270)

B. SUBSTANTIVE FACTS

Joshua Ellis and Wendi Traynor met through mutual friends and began dating in 2016. (RP5 450; RP11 1483-84) They also lived together for a period of time. (RP5 450; RP11 1486)

Ellis and Traynor shared a common interest in firearms.

¹ The trial transcripts labeled volumes 1 through 15 will be referred to by their volume number (RP#). The remaining transcripts will be referred to by the date of the proceeding contained therein.

(RP6 577; RP8 1069; RP11 1484-85) Ellis owned a 10mm pistol. (RP8 978, 980, 1071) Traynor's friends and family knew she regularly carried a 9mm pistol in her purse. (RP5 451, 452, 453; RP6 578; RP7 788; RP8 1019; RP11 1485) Ellis and Traynor frequently went to the shooting range together to take target practice. (RP11 1484-85)

In March of 2017, Ellis decided to move to Louisville, Kentucky to be closer to his mother and his young children. (RP5 455 486-87; RP11 1488-89, 1491) Traynor soon decided to follow him there. (RP5 456; RP6 578) So Ellis returned to Washington and helped Traynor drive her car and belongings back to Kentucky. (RP11 1499-1500)

Traynor's family lived in the Tacoma area and they were in frequent contact with each other both before and after she moved to Kentucky. (RP5 446, 448, 456-57, 458, 464; RP6 574-75) In July of 2017, she flew back to Washington by herself to attend her brother's wedding, then returned to Kentucky. (RP5 459-60, 491; RP6 580, 592)

Traynor considered moving back to Washington several times. In June of 2017, her cousin, Jennifer Jones, planned to fly to Kentucky to help Traynor move back, but Traynor decided instead

to stay. (RP5 460; RP6 579; RP7 789) Then on August 9, Traynor began the drive back to Washington by herself. (RP5 461-62; RP6 580; RP9 1260-61) Traynor drove as far as Colby, Kansas. (RP9 1260-61) Ellis and Traynor communicated by telephone during the drive. (RP9 1267; RP11 1512-13) Eventually Traynor turned around and drove east, while Ellis drove west, and they met along the way in Manhattan, Kansas. (RP9 1261-64, 1266; RP11 1512-13) Traynor and Ellis then returned together to Louisville. (RP5 1461-62; RP9 1270; RP11 1513)

But on October 3, 2017, Traynor finally left Kentucky for good and drove back to Washington. (RP5 463-64, RP6 580-81; RP8 1015; RP9 1271-75) She began looking for a job and an apartment. (RP5 467) She also began dating her friend's roommate, Sean Bryant. (RP5 491; RP8 1018, 1036)

On October 17, Ellis texted and called Traynor's mother. (RP6 581-82) He sounded agitated and wanted to know why Traynor had not been communicating with him. (RP6 582) She told Ellis that she did not know, but that he should probably just give Traynor some space. (RP6 582) Traynor called her mother a few minutes later and was upset that she had spoken to Ellis, because Traynor told Ellis that she was returning to Washington

because her mother was sick. (RP6 584-85) Traynor was worried that Ellis would be mad that she had lied to him, and seemed concerned about what Ellis might do. (RP6 584-85)

Ellis drove to Washington on October 24, 2017. (RP7 791; RP8 1019; RP9 1275; RP11 1536) A few days later, Ellis and Traynor walked hand-in-hand into Salty's restaurant in Des Moines, Washington. (RP10 1382, 1430; RP11 1539-40) There they met up with Ellis' friend, Otis Stevenson, who let them, along with Ellis' new puppy, stay at his home in Federal Way while they looked for their own apartment. (RP10 1384, 1385, 1386; RP11 1540-41)

Ellis and Traynor also worked together with friends Aaron and Shaunte Moetului at a fundraising event on October 28. (RP1073-74, 1094RP11 1540) Everything between Ellis and Traynor seemed to be fine and they gave the impression they were still dating. (RP8 1074, 1077, 1099, 1100) Ellis told the Moetulus that he and Traynor were planning to move in together. (RP8 1073)

With her father as a co-signer, Traynor entered into a lease for an apartment at the Surprise Lake Village apartment complex in Milton, Washington. (RP5 467; RP9 1117-18, 1122) Ellis was with her when she went to pick up the keys and take possession of the

apartment on November 1, 2017. (RP9 1121, 1124; RP11 1542-43) Traynor told the leasing agent that Ellis was her boyfriend. (RP9 1124, 1130)

Beginning in the afternoon of November 3, 2017, all texts and phone calls to Traynor from her friends and family went unanswered. (RP5 470-71, RP7 791-92; RP8 1054-55) On November 10, Jennifer Jones contacted Shaunte Moetului through Facebook and asked if she had heard from Ellis and Traynor. (RP7 793-94; RP8 1094-95) Moetului then called Ellis, who told her that Traynor was fine and that he would tell Traynor to contact her worried parents. (RP8 1098)

That same day Traynor's father and uncle went to Traynor's apartment to see if she was home. (RP5 474-75, 500) First they knocked on Traynor's front door, but no one answered. (RP5 476, 502-03) They could hear the sound of a puppy barking from inside the apartment, and noticed a bag of garbage on the ground by the door. (RP5 477, 479, 480, 502) Then they unlocked the door and deadbolt and stepped inside, where they saw a lifeless Traynor lying on the floor in a pool of dried blood. (RP5 481, 482, 503, 504; RP6 669; Exh. P14, P15)

Traynor was slumped on her left side near the entryway to

the apartment, and she had suffered a fatal gunshot wound to her head. (RP5 505, 541-42; RP6 644) She was wearing a jacket, and her purse strap was around her arm. (RP5 507, 508-09; RP6 679-80; Exh. 66, 67) Her left hand was in her left jacket pocket, and her 9mm pistol was sticking out of her right jacket pocket. (RP5 506, 547, 648; RP6 679-80)

The medical examiner noted an entrance wound on the right side of the back of Traynor's head, and an exit wound behind Traynor's left ear. (RP7 911) The bullet traveled from right to left and forward. (RP7 919) Due to decomposition of the body, the medical examiner was unable to say with certainty whether the gun was in contact with Traynor's head when it was fired, but he believed it was more likely than not in contact. (RP7 916)

Traynor would have been incapacitated and would have died instantly. (RP7 927, 929-30) She could not have voluntarily moved after impact, but could have moved or shifted her limbs as a result of the impact or fall. (RP7 929-30) The medical examiner opined that Traynor was not facing her assailant when she was shot but he could not otherwise be certain about Traynor's stance or position at that moment. (RP7 936-37) Although her assailant was likely a few steps inside the entry, the medical examiner could not be sure

of the exact location or position of the assailant or the gun. (RP6 730; RP7 936-37, 940)

Ellis' puppy was confined in a kennel inside Traynor's apartment. He seemed energetic and healthy, and did not appear to have been deprived of food or water for a week. (RP5 482; RP6 629; RP9 1235, 1237) Two of Traynor's neighbors testified they saw the puppy outside sometime between November 3 and November 10. One of the neighbors saw what appeared to be a large male open the door of Traynor's apartment and let the puppy out to go to the bathroom. (RP7 846-47) Another neighbor saw a man she identified as Ellis walking a puppy on the grass near Traynor's apartment. (RP7 951-53, 954-55) A third neighbor heard a puppy barking intermittently during the week, and also noticed garbage bags piling up next to Traynor's door. (RP7 861, 862, 862, 863)

In the evening of November 3, Otis Stevenson was approached by Ellis in the parking lot of Salty's. (RP10 1387-88) Ellis seemed upset and teary-eyed, and told Stevenson he "had fucked [his] life up," was in trouble and was returning to Kentucky. (RP10 1390, 1392, 1393, 1397) Ellis stayed with Stevenson for the next few days, but never explained to Stevenson what had

happened. (RP10 1401, 1405, 1408) On November 11, Ellis took responsibility for Traynor's death and turned himself in to the police. (RP9 1186)

Ellis testified that Traynor was upset when he originally decided to move to Kentucky, and that he did not encourage her to follow him because he was concerned she would be lonely there without any friends or family. (RP11 1490-91, 1496-97) When she decided to move, he drove her car from Washington to Kentucky because he wanted her to have freedom and flexibility there. (RP11 1499-1500)

His concerns for her welfare were justified, because Traynor was not happy in Kentucky. She was upset because she felt she had sacrificed significantly for their relationship, and she wanted Ellis to work less and spend more time with her. Traynor did not have a job and did not leave the apartment much, and she seemed to become depressed. (RP11 1502-03, 1504, 1505, 1511)

Traynor also began drinking alcohol more frequently. (RP11 1505) Ellis testified about one incident where he found a highly intoxicated Traynor sitting on the bathroom floor crying and drinking from a bottle of vodka. (RP11 1506-07) Traynor said she was having issues with her family, then said, "I'm going to go, and

you're going to go with me.” (RP11 1508) When Ellis asked her what she meant, Traynor picked up her gun and pointed it at Ellis. (RP11 1508) Ellis was afraid and ran from the room. (RP11 1509) He told Traynor to slide the gun on the floor towards him, and she complied. (RP11 1509)

Ellis and his step-sister, Jordan Daugherty, testified about another incident at a Louisville bar where Traynor was intoxicated and acted inappropriately. (RP11 1516; RP12 1813) Ellis was talking to a woman he had known in high school, when Traynor became enraged and began yelling at the woman and threatening to shoot her. (RP11 1516-18; RP12 1813-14) Even after they were kicked out of the bar, Traynor continued to yell and threaten the woman, saying she would shoot her in the kneecaps. (RP11 1518-19; RP12 1815, 1833) Daugherty recorded the tail end of the incident on her phone, and Traynor can be heard laughing about shooting the woman. (RP11 1519-20; RP12 1815, 1829; Exh. 138)

Ellis never tried to stop Traynor from moving back to Washington. (RP11 1515) When she first left Kentucky in August, he did not follow her until she called him upset and crying from Kansas. Upon her request, only then did he drive to Kansas to meet her and escort her back to Kentucky. (RP11 1512-13)

Ellis returned to Washington in October because he was having trouble finding work in Kentucky. (RP11 1534-36) He contacted Traynor, who asked him to move in to the Surprise Lake Village apartment with her. (RP11 1537) He initially agreed, but after a few days he began to miss his children and regret his decision to leave Kentucky. (RP11 1546)

While Traynor was at a job interview in the morning of November 3, he began to pack his belongings into his car so he could leave before she returned. (RP11 1846-48) But Traynor returned before he was finished. (RP11 1549) Traynor was upset, but Ellis continued to pack his belongings. (RP11 1549-50)

Traynor found a note that Ellis intended to leave for her, and she became hysterical. (RP11 1550) Ellis decided to leave and go to a nearby 7-11 store to buy cigarettes. (RP11 1551) Then he went back to the apartment to get the puppy and to calmly talk with Traynor. (RP11 1551) When he arrived, Traynor had changed her clothes and put on a jacket and purse, and told Ellis they should go make him a copy of the apartment key then go out for a date-night dinner. (RP11 1552-53)

Ellis explained to Traynor that he was moving back to Kentucky and that their relationship was over. (RP11 153) Traynor

tried to convince Ellis to stay, and she became more angry and aggressive. (RP11 1554-55) Ellis testified that they were in the bedroom when Traynor pulled her gun out of her purse, pointed it at him and said, "I can't let you leave." (RP11 1555) Ellis smacked the gun out of her hand and walked towards the front door. (RP11 1555-56)

Just as he reached the door, he heard Traynor quickly approaching. (RP11 1556) He paused and looked back at Traynor, who began pacing back and forth in front of him. (RP11 1557) Ellis did not know what she intended to do and was scared, so he said to Traynor, "this is not funny." (RP11 1557-58)

Ellis was worried that Traynor might shoot him. (RP11 1558) Then he saw her start to pull her gun out of her jacket pocket, and Ellis thought she was going to shoot him. (RP11 1558; RP12 1783-84) Ellis reached into his coat pocket for his gun and fired a shot without aiming or looking at where he was aiming. (RP11 1557, 1558) Ellis's arm was close to Traynor, but he did not place the gun against her head. (RP11 1559)

Ellis testified that he was in shock and could not believe what had happened. (RP11 1560-61, 1563) He left the apartment and never returned. (RP11 1561, 1743) He knew he needed time

to figure out his best course of action, so he stayed with Stevenson for a few days and talked to several attorneys, then turned himself in to the police. (RP11 1563, 1567) He threw away his gun because he was upset about what had happened and thought he might use it to commit suicide. (RP11 1562, 1568)

Ellis testified that he did not plan to shoot Traynor and did not want to kill her, and that he only fired his gun because he believed Traynor was going to shoot him and he was afraid for his life. (RP11 1570, 1741; RP12 1796)

IV. ARGUMENT & AUTHORITIES

A. THE PROSECUTOR IMPROPERLY AND PREJUDICIALLY APPEALED TO THE JURY'S PASSIONS AND PREJUDICES DURING VOIR DIRE.

The prosecutor committed misconduct during voir dire when he repeatedly invoked racial stereotypes under the guise of attempting to uncover jurors' unconscious bias.

First, the prosecutor introduced the topic of institutional racism, then asked the prospective jurors:

So the question becomes this? Can everybody promise that it won't matter whether this was a male and female thing versus any other combination if when and how you reach a decision? Meaning your decision won't be affected against Mr. Ellis because he killed a woman who is a lot smaller than him, and for him because he's African-American and she's

white, or for him because he finally killed that woman who needed killing. That' one of those impolitically correct things to say.

(RP4 277) The prosecutor then posed this hypothetical:

[PROSECUTOR]: So, folks, I want you to close your eyes and I want you to picture something for me. Okay. Tacoma, Washington, Pierce County has a history of some gang violence. I want you to picture that the person sitting to your left is dressed entirely in blue. It's a male and he or she has the word Crips in the –

[DEFENSE COUNSEL]: I'm going to object to this hypothetical, Your Honor.

THE COURT: Overruled.

[PROSECUTOR]: -- in black letters on the forehead. Sitting on your right side is someone dressed entirely in red and they have the word Bloods written on their face. Everybody got that? Okay. Open your eyes again. How many of you would be uncomfortable having those people on your left and right? ... What if one of them had something in their pocket that was hard and bumped against your leg while they were sitting there? ... Now, here's the question that I really want the answer [to], and I want the placards up. How many of you pictured at least one of those two black, African-American.

(RP4 277-29)

Later, the prosecutor made the following statement when explaining his role in the criminal justice system:

The last subject I want to cover with you guys is part of what we've already covered, and that is in some states the most notorious case of all time for this example is The People versus O.J. Simpson[.]

(RP4 283) Defense counsel again objected but was overruled.

(RP4 284)

Towards the end of the prosecutor's questioning, he explained his motivation for bringing up the issue of institutional racism: he wanted to be sure that the jury would not engage in nullification. He asked the jurors to promise they would not say to themselves:

We've had institutional racism in our country for a long time, and therefore in this particular case where it's an African-American defendant and a Caucasian female, we will find him not guilty anyways because that will help.

(RP4 281)

The prosecutors statements appeared designed to appeal to the passion or prejudice of the jury and to focus attention on Ellis' and Traynor's ethnicity, potentially exacerbating, rather than identifying or neutralizing, unconscious bias. This appeal to the emotions of the jury was misconduct and prejudicial.

Article I, section 22, of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a right to a fair trial with an impartial jury. *State v. Strange*, 188 Wn. App. 679, 685, 354 P.3d 917 (2015). Prosecutors have a duty to the defendant to ensure their rights to a fair trial are upheld. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is

improper for a prosecutor to make comments designed to appeal to the passion and prejudice of the jury, or encourage a verdict based on emotion rather than evidence. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

“Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). “To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury’s verdict.” *Brown*, 132 Wn.2d at 561.

The underlying goal of the jury selection process is “to discover bias in prospective jurors” and “to remove prospective jurors who will not be able to follow ... instructions on the law,” and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness. *State v. Davis*, 141 Wn.2d 798, 824-26, 10 P.3d 977 (2000). The nature and scope of voir dire is left largely to the discretion of the trial court. See, e.g., *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 2917, 177 L. Ed. 2d 619 (2010); *Davis*, 141 Wn.2d at 825. But the scope of this process “should be coextensive with its purpose.” *State v. Laurcano*, 101 Wn.2d 745,

758, 682 P.2d 889 (1984).²

Voir dire should be conducted “in such a manner to eliminate a reasonable possibility that racial or ethnic prejudice might influence the jury’s evaluation of the evidence[.]” *Llach v. United States*, 739 F.2d 1322, 1333 (8th Cir. 1984). Voir dire must “have created ‘a reasonable assurance that prejudice could be discovered if present.’” *United States v. Cassel*, 668 F.2d 969, 971 (8th Cir. 1982) (quoting *United States v. Delval*, 600 F.2d 1098, 1102-1103 (5th Cir. 1979)).

“What is required ... for an effective voir dire on racial prejudice is ‘[o]pen-ended, non-leading questions [that] encourage respondents to explain their opinions and attitudes in their own words, thus penetrating stereotyped and socially desirable responses.’” *United States v. Love*, 219 F.3d 721, 731 (8th Cir. 2000) (Bennett, J. dissenting) (quoting 1 JURYWORK SYSTEMATIC TECHNIQUES § 2.11[2] at 2-72.32; *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir.1981)).

That is not what the prosecutor did here. Instead, he lectured and asked close-ended questions that would “encourage

² Overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 132-33, 761 P.2d 588 (1988).

jurors to deny their true feelings and opinions about race, effectively ending the voir dire before it has begun.” *Love*, 219 F.3d at 730-31 (Bennett, J. dissenting) (citing 2 JURYWORK § 17.03[4] at 17-54).

But worse than that, the prosecutor used voir dire as an opportunity to remind the jurors of inflammatory stereotypes and a historically controversial murder trial. Even though Ellis is not associated with any gang and there was no basis to connect this case to gang activity, the prosecutor asked the jurors to think about the history of gang violence in Tacoma and to imagine sitting next to potentially armed, rival, and historically black gang members. He reminded the jurors of the O.J. Simpson trial, a case steeped in racial controversy where an African American man was (most citizens believe)³ unjustly acquitted of killing his white ex-wife and her white male friend.

The prosecutor essentially asked the jurors to conjure images of violent African American men who get away with murdering white people, while claiming to actually be asking these

³ A Washington Post-ABC News poll taken in 2106, showed that 57 percent of black respondents and 83 percent of white respondents thought Simpson was guilty. The Washington Post. (March 4, 2016). Ross, J., *Two decades later, black and white Americans finally agree on O.J. Simpson's guilt*. [online] Available at: <https://www.washingtonpost.com/news/the-fix/wp/2015/09/25/black-and-white-americans-can-now-agree-o-j-was-guilty/> [Accessed 14 Feb. 2020].

jurors to be fair to the African American man (Ellis) accused of killing his white girlfriend (Traynor). He then admonished the jurors not to do what the O.J. Simpson jury had done by letting a guilty African American man go free. The prosecutor's attempt to cloak his appeal to the passion and prejudice of the jury pool under the guise of seeking racial neutrality was both obvious and improper.

There is a substantial likelihood that the improper comments affected the outcome of the case. The jury's verdicts depended on their perception of Ellis and on whether they believed his testimony and version of events. But by planting the unfair idea in the minds of the prospective jurors that African American men are violent, and that the mistake of letting a guilty man walk free should not be repeated, the prosecutor poisoned the jury's ability to fairly decide these issues. The prosecutor's appeal to the jury's passion and prejudice through wholly irrelevant questions and hypotheticals was a bell that could not be unring. The trial court abused its discretion when it failed to curtail this improper questioning during voir dire, and Ellis' case should be remanded for a new trial.⁴

⁴ If a defendant shows both misconduct and prejudice, the reviewing court should reverse the defendant's conviction. *State v. Emery*, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012).

B. THE TRIAL COURT ERRED IN REFUSING TO INCLUDE A FIRST DEGREE MANSLAUGHTER AND A SECOND DEGREE MANSLAUGHTER INSTRUCTION.

Ellis requested an instruction on both first degree manslaughter and second degree manslaughter on both counts, which the trial court denied. (RP12 1838-46) Because the evidence, when viewed in the light most favorable to Ellis, supported a manslaughter theory, the trial court erred in refusing to give the instructions.

RCW 10.61.006 states a defendant “may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.” A defendant is entitled to a jury instruction on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000); *State v. Henderson*, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015).

There was no dispute below that the legal prong of the

Workman test was met.⁵ (12RP 1838-39, 1840) But the trial court found that the factual prong was not met. (12RP 1846) Because the evidence would have permitted the jury to rationally find that Ellis was guilty of first or second degree manslaughter to the exclusion of first or second degree murder, the trial court erred in denying the manslaughter instructions.⁶

A person is guilty of manslaughter in the first degree when he “recklessly causes the death of another person.” RCW 9A.32.060(1)(a). A person acts “recklessly” when he “knows of and disregards a substantial risk” that a homicide may occur and his “disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c).

A person is guilty of manslaughter in the second degree when “with criminal negligence” he “causes the death of another

⁵ First and second degree manslaughter are lesser included offenses of premeditated first degree murder and second degree intentional murder. *State v. Berlin*, 133 Wn.2d 541, 550-51, 947 P.2d 700, 705 (1997); *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708, (1997). And manslaughter is also a lesser included offense of second degree felony murder where, as here (CP 120-21, 123, 127) the predicate felony is intentional assault that recklessly inflicts serious bodily injury in violation of RCW 9A.36.021(1)(a). *State v. De Rosia*, 124 Wn. App. 138, 153, 100 P.3d 331 (2004) (citing *State v. Gamble*, 118 Wn. App. 332, 335, 72 P.3d 1139 (2003)).

⁶ The trial court’s finding under the factual prong of the *Workman* rule that there was no evidence to support giving an instruction on manslaughter is reviewed for abuse of discretion. *Henderson*, 182 Wn.2d at 743.

person.” RCW 9A.32.070(1). A person acts with “criminal negligence” when he “fails to be aware of a substantial risk” that a homicide may occur and his “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)(d).

“When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” *Fernandez-Medina*, 141 Wn.2d at 455-56. The trial court must give a lesser included offense instruction “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

Self-defense cases present special circumstances. Under a self-defense theory, “a defendant who reasonably believes he is in imminent danger and needs to act in self-defense, ‘but recklessly or negligently used more force than was necessary to repel the attack,’ is entitled to an instruction on manslaughter.” *State v. Schaffer*, 135 Wn.2d 355, 358, 957 P.2d 214 (1998) (quoting *State*

v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)). In *Schaffer*, when the victim “moved his arm toward his back, Schaffer thought he was reaching for a gun.” 135 Wn.2d at 357. Schaffer then shot the victim five times in quick succession, which the court relied on to conclude that Schaffer either recklessly or negligently used excessive force to repel the danger he perceived. 135 Wn.2d at 358.

Division 1 recently applied *Schaffer* in *State v. Chambers*, 197 Wn. App. 96, 121-22, 387 P.3d 1108 (2016), concluding “a jury could reasonably find Chambers recklessly or negligently used more force than necessary” to repel an attack. Chambers was six to eight feet from Michael Hood when Hood grabbed a shovel from the back of a truck and held it in a “batter’s stance” toward Chambers. 197 Wn. App. at 122. Chambers believed Hood was going to kill him. 197 Wn. App. at 122.

Chambers pulled out a gun and fired three times. 197 Wn. App. at 122. The first bullet passed through Hood’s chest, exited on his left side, and then passed through his upper left arm. 197 Wn. App. at 122. According to the medical examiner, “[a]fter that shot, Hood ‘wouldn’t have any power to that arm’ and it would have been ‘difficult’ for Hood to hold anything.” 197 Wn. App. at 122.

Yet Chambers continued to fire despite no further threat from the shovel, shooting Hood twice in the back; “[e]ach shot required a separate pull of the trigger.” 197 Wn. App. at 122. On these facts, Division 1 concluded, “A jury could reasonably find Chambers acted recklessly or negligently by firing the two fatal shots directly into Hood’s back after he turned away and could no longer hold the shovel.” 197 Wn. App. at 122.

Under *Chambers* and *Schaffer*, Ellis was entitled to first and second degree manslaughter instructions. Ellis experienced significant fear based on Traynor’s threatening behavior, which he had experienced before. (RP11 1508-09; 1517-18, 1555, 1557-58, 1783-84) He thought Traynor might shoot him when he saw her begin to pull her gun out of her jacket pocket, so he made a split-second decision to defend himself. (RP11 1558, 1570; RP12 1801) Ellis testified that he raised his gun and fired in her general direction without looking or aiming. (RP11 1558) He also testified that he did not intend or desire to kill Traynor. (RP11 1570, 1741)

Under the circumstances, jurors could certainly conclude that Ellis’ split-second reaction was reckless because he disregarded a substantial risk or failed to be aware of a substantial risk that Traynor would die, or that he used more force than

necessary, when he blindly shot in Traynor's direction. The question of Ellis' recklessness or negligence should have gone to the jury.

Considering all the evidence in the light most favorable to Ellis, a jury could rationally find Ellis acted recklessly or negligently by not looking where he was firing or by using more force than necessary against Traynor in self-defense. Ellis was therefore entitled to instructions on first and second degree manslaughter.

C. ELLIS WAS SUBJECTED TO DOUBLE JEOPARDY WHEN THE SENTENCING COURT FAILED TO VACATE A MERGED SECOND DEGREE MURDER CONVICTION AND FAILED TO STRIKE ALL REFERENCE TO IT IN THE JUDGMENT AND SENTENCE.

Although the sentencing court merged Ellis' two second degree murder convictions, the court's failure to vacate the merged conviction, as well as to strike the statutory references to the merged conviction on his Judgment and Sentence, subjected him to double jeopardy.

The jury found Ellis guilty of second degree intentional murder for count 1 (RCW 9A.32.050(1)(a)) and second degree felony murder for count 2 (RCW 9A.32.050(1)(b)). (CP 138, 140, 144; RP14 1982) The trial court found that the second degree murder counts were the "same criminal conduct" and merged the

crimes on that basis. (CP 263-64; RP15 1993) The court then sentenced Ellis for one count of second degree murder. (RP15 2021-22; CP 144, 147, 264)

However, the court failed to vacate the merged murder conviction. Instead, in its written order merging count 1 and count 2, the court states, “because the jury was unanimous as to each alternative means of committing second degree murder, the Judgment and Sentence shall include citation to both subsections of the second degree murder statute, RCW 9A.32.050(1)(a) and (b).” (CP 264) The court included a reference to both second degree murder provisions under the “RCW” box in the Judgment and Sentence. (CP 144) This improperly subjected Ellis to double jeopardy.

Whether a defendant’s convictions violate double jeopardy is a question of law that is reviewed de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Both our federal and state constitutions prohibit multiple punishments for the same offense. See *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)); U.S. Const. amend. V; Wash. Const. art. I, § 9. The term “punishment” encompasses more than just a defendant’s sentence

for purposes of double jeopardy. *Turner*, 169 Wn.2d at 454. Even a conviction alone, without an accompanying sentence, can constitute “punishment” sufficient to trigger double jeopardy protections. *Turner*, 169 Wn.2d at 454-55.

Accordingly, our Supreme Court has held that a court may subject a defendant to double jeopardy when it fails to vacate a conviction that merges, when it fails to strike any references to vacated convictions in the judgment and sentence, or when it otherwise improperly discusses the vacated conviction during the defendant’s sentencing hearing. *In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 818-19, 256 P.3d 1159 (2011); *Turner*, 169 Wn.2d at 464-65.

In a similar case, *Strandy*, the Washington Supreme Court granted a PRP and ordered the sentencing court to vacate the merged felony convictions. 171 Wn.2d at 818-19. There, the jury convicted Strandy of two counts of first degree felony murder and two counts of aggravated first degree murder for each of two victims. For sentencing purposes, the trial court found that each felony murder constituted the “same criminal conduct” as each aggravated murder in regards to each victim. The court merged the crimes on that basis, but it did not vacate the lesser of the merged

convictions. 171 Wn.2d at 819. This failure to vacate Strandy's two felony murder convictions violated the prohibition against double jeopardy. 171 Wn.2d at 818-19.

Likewise, although the trial court merged Ellis' two second degree murder convictions, the court's failure to vacate one of the merged convictions, as well as to strike the statutory reference to one of the merged convictions on his Judgment and Sentence, violated the prohibition against double jeopardy. Ellis' case should be remanded to the trial court with instructions to vacate one of the merged second degree murder convictions and to strike all reference to it in the Judgment and Sentence.

V. CONCLUSION

The prosecutor's statements asking jurors to remember violent crimes committed by African American men constituted an improper appeal to the passion and prejudice of the jury, and prejudiced Ellis' right to a fair trial. The evidence presented at trial supported an inference that Ellis acted with criminal recklessness or negligence in firing blindly towards Traynor. The trial court should have instructed the jury on first or second degree manslaughter. Both of these errors require reversal of Ellis' convictions and remand for a new trial. And finally, Ellis' right to be

free from double jeopardy was violated when the trial court failed to vacate one of the two second degree murder convictions.

DATED: February 19, 2020



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Joshua Kioni Ellis

CERTIFICATE OF MAILING

I certify that on 02/19/2020, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Joshua K. Ellis, DOC# 416599, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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