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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA KIONI ELLIS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable James Orlando, Judge

No. 17-1-04397-6

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Defendant Ellis intentionally shot his ex-girlfriend Wendi Traynor with a high-powered semiautomatic pistol at close range in her apartment in the middle of the day killing her instantly. He testified that he acted intentionally with full knowledge of the likely result, but did so to avoid being shot himself. On this record, there is no evidence to support an inference that he acted negligently or recklessly so as to support a manslaughter instruction.

In jury selection, the prosecutors addressed concerns about institutional racism and implicit bias. The Defendant objected to an imagination exercise which assisted jurors to acknowledge their own biases and to recognize a remedy in letting go of opinions that are contrary to new information. The prosecutor's discussion was proper and not prejudicial. When defense counsel told the jury that he represented "the people," the prosecutor's correction of this misstatement was not improper or prejudicial.

The conviction should be affirmed.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court abuse its discretion in overruling an objection to the prosecutor's discussion which assisted the jurors to recognize and address their own implicit biases?
- B. Was it improper for the prosecutor to clarify to the jury that defense counsel did not represent "the people" as he had claimed?
- C. Is there any evidence to support an inference that the Defendant acted unintentionally where he testified that he intentionally shot the victim in self-defense with proportionate force, believing that "it was me or her" and knowing that the discharge could result in her death?
- D. May the court remand after review to strike one of the two merged murder counts?

III. STATEMENT OF THE CASE

The Defendant Joshua Ellis has been convicted of the second-degree murder of Wendi Traynor. CP 1-4, 13-14, 144.

In 2016-17, the Defendant and Wendi Traynor were dating and living together in Renton. RP6¹ 576-77; RP7 786-87; 8RP 1049; RP11 1595-97. Ms. Traynor graduated Central Washington University in 2016, completed TSA training, and had begun working as a TSA agent. RP5 446-47, 457. The Defendant was working at BMW Bellevue. RP8 1067.

¹ Following the Appellant's lead, trial transcripts 1 through 15 will be referenced by volume number, and the transcripts of other hearings will be referred to by date.

The Defendant is a firearms enthusiast, possessing five pistols, a shotgun, and an AR-15. RP8 1069; RP11 1578. He was always armed, wearing the pistols in holsters. RP11 1591-92, 1629. Sometimes, he would carry a gun in a chest pocket. RP11 1557, 1591, 1629; RP12 1768. The Defendant went to the shooting range twice a week with his 10mm pistol. RP11 1484, 1585-87. He also bought Ms. Traynor a small 9mm pistol which she kept in her purse, never in her pocket. RP5 452, 485; RP7 788; RP8 1037, 1042; RP11 1580, 1582-83.

In April of 2017, the Defendant moved to Kentucky after he had been terminated from his employment and was suspected of stealing from customers. CP 222; RP5 455; RP6 588. He told his friend that he “had a custody thing or something with his children” and wanted to catch up with family, but then he would be back. RP8 1071, 1073, 1086.

In June, the Defendant moved Ms. Traynor to Kentucky, but she was unhappy and wanted to return to Washington almost immediately. RP5 456-57, 460; RP6 578-79. At one point, she purchased a plane ticket for her cousin Jennifer Jones to help her move back. RP5 460; RP6 579-80; RP7 789. At another point, she began to drive herself back. RP6 580. In August, she made yet another failed attempt to drive back to Washington. RP5 461-62; RP6 580. The Defendant would bring her back to Kentucky. RP12 1788. Finally, on October 3rd, she succeeded in leaving the

Defendant. RP5 461; RP6 581; RP8 1052-53; RP11 1682-83. She packed up all her things while the Defendant was at work, leaving him only a text message – a pretense about an ill mother. RP6 584-85; RP11 1675-79; RP13 1889-90. While Ms. Traynor drove, she talked to an old college friend on the phone and told her the relationship with the Defendant was over. RP8 1015-17, 1024.

Ms. Traynor arrived in Washington on October 6th and appeared “excited,” “thrilled” to be back. RP6 598; RP7 791; RP8 1018; RP11 1683. She was in the process of moving into a new apartment and returning to her job at TSA. 5RP 465, 467-68. She was developing an exclusive, romantic relationship with Sean Bryant. RP7 799-803; RP8 1018-19, 1035-36 (“becoming official”), 1041, 1045. And she cut off communications with the Defendant. RP6 576, 582-84; RP11 1676, 1680.

Over a period of twelve hours on October 17 and 18, the Defendant called Ms. Traynor 60 times. RP11 1684, 1686. He then called Tammi Black late at night to ask why her daughter was not returning his messages. RP6 581-83, 585, 597-98. Ms. Black told the Defendant to leave her daughter alone. RP6 583, 585. Instead, he called Ms. Traynor 19 more times. RP11 1687. Ms. Traynor was in a “scared panic.” RP6 584. By the next week, the Defendant had returned to Washington state. RP6 585; RP7 791. He had driven for 30+ hours straight. RP11 1692.

When he arrived, Ms. Traynor's parents were out of town, and she was once again isolated from her friends. RP5 465-66; RP6 586-87; RP8 1017, 1020-21; RP11 1695. The Defendant was telling his friends that he had a couple jobs lined up with different automotive dealerships and that he and Ms. Traynor were getting an apartment together. RP8 1072-73; RP10 1391. He claimed that he was rescuing Ms. Traynor, who needed him to live with her to "guarantee the money" for her rent. RP11 1537, 1693.

In fact, the Defendant was about to have his Yukon Denali repossessed. RP9 1150-56; RP10 1413; RP11 1565-66. Ms. Traynor was the one with a job and references. CP 211 (she would be returning to TSA); 5RP 465. Her father had co-signed her lease, and her parents readily assisted with finances whenever there was an opportunity. RP5 461-63, 467-68, 470-71; RP9 1120. She did not need the Defendant's help. RP5 468-69.

Nor did it appear she had any intention of taking on a roommate. The one-year lease of the Milton apartment prohibited anyone but Ms. Traynor and her father from living there. RP5 468; RP6 586; RP9 1120, 1122-23. Under the terms of the lease, Ms. Traynor would be able to bring her lab/golden mix retriever Nulla from her dad's house. RP5 479-80. But it prohibited pit bulls, and the Defendant had a pit bull puppy Jay Rock. RP9 1123; RP10 1386; RP11 1576; Exh. 16. Her items alone filled the

closets and bathroom, leaving no room for the Defendant's property. RP11 1704-05.

Ms. Traynor moved into her Milton apartment on November 1st. RP5 468; RP9 1121-23. The last anyone ever heard from Ms. Traynor was the afternoon of Friday, November 3. RP8 1021-22, 1054; RP11 1719 (last text sent at 4:13).

At about 4:45 or 5 p.m. that day, Otis Bernard Stevenson found the Defendant at Salty's, tearful and very upset. RP10 1387-88, 392. He repeatedly said, "I fucked my life up." RP10 1397-98. The Defendant said he had messed up, was in trouble, and was leaving town. RP10 1390, 1392-93. When Mr. Stevenson asked after Ms. Traynor, the Defendant broke down, but never answered the question. RP10 1401. He said he did not want Mr. Stevenson to know what happened, because he did not want to disappoint him. RP10 1417.

Also that evening, a tenant Troy Braxton complained about a dog barking and about trash outside Ms. Traynor's apartment. RP5 477, 479; RP7 863; RP9 1126. A few days later, the Defendant told Mr. Stevenson that he had gone back to the apartment to take care of Jay Rock. RP10 1416-17, 1439. Neighbor Larissa Wilbur saw the Defendant walking the puppy on November 8 or 9. 7RP 951-55. She wanted to ask if she could pet it, but the Defendant seemed "busy, unapproachable." RP7 954. In the

early hours of November 8, neighbor Mark Harrison saw a man let Jay Rock out for a bit and noticed that a second bag of garbage had been left outside the apartment. 7RP 845-48, 855-56. That same day, the leasing agent posted a notice on Ms. Traynor's door about the complaints. RP7 863; RP9 1127. She also tried to reach her by phone. RP9 1127.

Ms. Traynor's father had returned from his trip and was also trying to reach her. RP5 471-73. On the tenth, he asked if the leasing agent could do a welfare check. RP5 473; RP9 1128. She let him into the apartment, unlocking both the door handle and deadlock. RP5 481. The Defendant's dog was confined to a kennel inside, barking loudly. RP5 479-82. Gerald Traynor found his daughter, long dead on the entry floor. RP5 482-84, 504-05, 539 (smelling of decomposition); RP6 690 and RP7 913 (infested with maggots); RP9 1128-29. She had been shot on the right side of her head, more likely than not from a barrel held against her skull. RP6 643-44; RP7 911, 914-18; Exh. 65. The bullet passed through her head and came to rest near the dog's cage. RP6 715; RP7 911. She had fallen forward and to her left, i.e. away from the impact. RP5 505; RP6 680; Exh. 14-15, 61-63. She would have been rendered unconscious immediately, and no medical intervention could have saved her. RP6 675, 679-80; RP7 928-29.

Ms. Traynor was wearing her fleece jacket and boots and had her purse strap over her left shoulder, the purse tucked under her left arm,

suggesting she had just arrived or was on her way out. RP5 507; RP6 679-80; RP11 1718; Exh. 14-15, 61-67, 69-70. Her left hand was in the left pocket, clutching a wallet and keys. RP6 680, 687; 7RP 908; Exh. 69-70, 121. “Everything was strewn out of [the purse].” RP5 508-09.

Curiously, her gun was tucked in her right jacket pocket. RP5 506; RP6 648-49, 654, 679-80; Exh. 61-64. A person trained in firearms would know that it is not safe to carry a Glock in a loose, open pocket, because the weapon has no safety and the trigger can catch, discharging the weapon. RP5 552-53. With the butt hanging out of the pocket and most of the weight on the back end, it would have fallen right out of the pocket. RP5 555. There were four smudge marks on the back of Ms. Traynor’s fleece jacket by her left shoulder blade, like finger marks from someone lifting the body to reach into her purse. RP 9 1167-68; RP13 1913; Exh. 67.

After consulting with half a dozen attorneys and getting the same advice, the Defendant finally turned himself in. RP11 1567. He was charged with two counts: Murder in the First Degree and Felony Murder in the Second Degree. CP 13-14.

The self-defense claim:

The Defendant testified that he had been in love with Ms. Traynor. RP11 1596, 1606, 1611, 1616. He claimed that he had moved to Kentucky in April to spend more time with his mother and children. RP11 1646. But

once in Kentucky, he admitted he chose to spend his time with Ms. Traynor and missed her when she was away even at short stretches. RP11 1646-49.

He claimed that he had abruptly decided to end the relationship on November 3rd. RP11 1553, 1702-03, 1707. He said his decision was based purely on a desire to live in Kentucky to spend more time with his mother and children. RP11 1676, 1680, 1702, 1707. It was not because he had moved on from Ms. Traynor. RP11 1680. It was not because they had had a fight. RP11 1703, ll. 9-13. And he denied it was because he grasped that Ms. Traynor was done with him or because he had learned about the new boyfriend she was texting. RP11 1676-81, 1719-20.

He said he wrote Ms. Traynor a note in Sharpie on a napkin. RP11 1548, 1710-11. But she came home earlier than expected, saw his note, tore it up, and threw it in the trash. RP11 1548, 1550, 1710-11. (Police found no such note in the garbage. RP11 1711).

The Defendant said he stepped out for cigarettes and returned to find her dressed to go out. RP11 1550-52, 1713. They talked, Ms. Traynor became upset, and she threatened him with a gun which he claimed he was able to “smack” out of her two-handed grip. RP11 1553-55, 1721-23. He claimed he was terrified and yet made no effort to take control of the weapon. RP12 1796-1800. The Defendant said he had started to leave but turned when she followed. RP11 1556-58, 1725-26. In one version, he

watch her pace before she pulled her gun from her pocket and pointed it at him. RP11 1556-58, 1635 line 3. In a second version under cross-examination, the weapon remained in the pocket, although visible. RP11 1728-29, 1774-75. In this version, the Defendant “reached, drew, pointed” and shot Ms. Traynor “before she could even clear the pocket.” RP11 1730. He claimed he shot her with his 10mm pistol, “because I believed it was me or her.” RP11 1556-58, 1570, 1575. He testified he might have shot her even if she had not been holding a gun. RP12 1784 ll. 3-5. Shot above and behind the ear, she was not even facing him. RP11 1730, 1735 ll. 5-6, 1736 (“entrance wound behind the ear”).

The Defendant insisted that she had been two or three feet away from him. RP11 1727. To explain how Ms. Traynor’s body lay directly beside where he claimed he had been standing, the Defendant insisted that, after she was shot, she had taken a step or two to bridge the gap. RP11 1732-33. The medical examiner testified that Ms. Traynor would have been immediately incapacitated, unable to perform any deliberate, purposeful movement such as taking a step or returning a gun to a pocket. RP7 929. If she had been holding a gun, it would have dropped to the ground beside her. RP7 929.

In all the hours he spent commiserating with his best friend and mentor, the Defendant had never suggested that Ms. Traynor had attacked

him. RP10 1401,1408, 1412, 1422; RP11 1539, 1747-48. In fact, he told Mr. Stevenson, the less he knew, the better. RP10 1417, 1748.

In support of this self-defense narrative, the Defendant claimed that while in Kentucky, Ms. Traynor had pointed a gun at him and threatened a murder/suicide.² RP11 1507-08, 1630, 1634. This would have been out of character, so he claimed her entire personality changed within a few days of her arrival in Kentucky. RP11 1620-21, 1623-24. He depicted her as a depressed, unemployed drunk with large mood swings and murderous fits of jealousy. RP11 1490, 1494, 1496-97, 1502-08, 1513-14, 1517-20, 1528, 1593-95. He said she readily passed him the gun when asked. RP11 1509, 1630, 1633, 1637-39. And he subsequently permitted her to babysit his three- and five-year-old children. RP11 1644-45, 1647.

He claimed he had not driven west in October to pursue Ms. Traynor, but for a job in Montana. RP11 1534-35. But he had sped through Montana in six hours, stopping only for 25 minutes, continuing on purportedly because it was too cold and because the drivers he passed on the highway were not diverse enough. RP11 1535-36, 1689-90.

The Defendant claimed that he did not return to the apartment after killing Ms. Traynor, but left his dog to die. RP11 1560-61, 1743-45; RP12

² It was the Defendant who became suicidal after the murder. RP10 1402, 1426; RP11 1562, 1564, 1568.

1779. This did not track with his statement to Mr. Stevenson, the neighbors' testimony that he continued to care for the puppy days later, or the small puppy's good condition a week after the murder. RP7 845-48, 855-56, 951-54; RP9 1235-37; RP10 1416-17; Exh. 16, 18.

He claimed he could not have returned to the apartment, because he did not have a key. RP11 1745-46. But that did not track with the deadbolt being locked behind him. *Id.*

After he killed her, the Defendant called Ms. Traynor's cell phone twice. RP11 1757-58; RP12 1776. Then he turned off his own cell phone, so police could not track him, and supposedly misplaced it. RP9 1149; RP11 1757-58. He also disposed of the gun, which would have provided valuable evidence, but claimed he did not recall where. RP11 1568, 1756.

Jury Instructions:

The jury was instructed on intentional second-degree murder as a lesser included offense of premeditated first-degree murder (count 1). CP 118-19, 138; RP12 1834. However, defense counsel Bible also asked the court to instruct the jury on manslaughter as lesser included offenses of the first count. RP12 1838-46.

The discussion focused on the factual prong of the *Workman* test. RP12 1838-39. The prosecutor noted that the Defendant testified he had

intentionally shot Ms. Traynor knowing that it would kill her. RP12 1842.

The court denied the manslaughter instructions.

Quite honestly, the cases where there is Manslaughter 1, Manslaughter 2 often involve situations where somebody is handling a weapon in a manner where the weapon is discharged ... This seems to me to be a straight-up self-defense claim. I shot her because I perceived that I was in reasonable fear of substantial bodily injury or death. That's the testimony that Mr. Ellis gave. ... There is no facts in this record that would show recklessness on his part. He wasn't fumbling in his pocket to pull his gun out in the manner that would demonstrate a grave indifference to human life or substantial disregard of a risk. You pulled the gun out, you fired, and that was it. I just don't think factually on what's before me I can give either Manslaughter 1 or Manslaughter 2 to the charge of Murder in the First Degree.

RP12 1844-45.

Jury Selection:

Because the Defendant is black and Ms. Traynor was white, racial bias was of particular concern to the prosecutors in selecting a jury. RP4 256-57, 260. They prepared questionnaires for all potential jurors to complete, which included several questions about interracial relationships and implicit racial bias. CP 41, 282-89; RP2 37, 40.

Having reflected on these questions, the general voir dire was eager to discuss bias with DPA Swaim. RP3 199 (in the context of diverse beliefs, perspectives, and experiences); RP3 201 (whether people are capable of suppressing their biases); RP4 257-59 (the importance of being aware of the

possibility of unconscious biases in their deliberation as well the effects of systemic racism). RP3 201. The prosecutor concluded her portion by noting that bias is real and something we need to be conscious of in ourselves. RP3 202.

DPA Neeb used some of his time to address the topic in greater depth, inviting the jurors to explain how they “check” themselves and how the attorneys might identify potential jurors who were unable to do so. RP4 260.

JUROR NO. 29: I think you’ve already started in this process. You just have to ask folks to be open and honest. Some people may not know until they’re sitting in that chair listening and then they realize.

MR. NEEB: They might until it’s too late.

JUROR NO. 29: They may not, but throughout this process, I think you have a great opportunity to ask us directly, through the questionnaire.

RP4 260. After some discussion, the prosecutor then obtained a promise from the jurors to “promise to check themselves in that respect.” RP4 261.

The prosecutor then invited a discussion on institutional racism. RP4 274-75. After more discussion, he obtained a promise from the jury not to permit gender or race to improperly influence their deliberations. RP4 277.

The prosecutor advised the jury that although he was assigned to the gang and human trafficking unit and although DPA Swaim was assigned to

the special assault unit, this case did not involve any of those concerns. RP4 269. He invited the jury to close their eyes and imagine two people summoned for jury duty, one dressed entirely in blue and the other entirely in red, adorned with facial tattoos reading either Bloods and Crips. RP4 277-78. When the jurors opened their eyes, many admitted that they had imagined African-Americans. RP4 279. “And that’s implicit bias right there.” RP4 279. He then asked them to imagine the same two people shaking hands and discussing a theatrical production, because they were actually actors in costume. *Id.*

MR. NEEB: The issue in implicit bias is this. If you judge somebody by their appearance right up front, you get to. If you stick to that opinion no matter what the evidence is, you’re wrong. It’s that simple.

RP4 279-80. At this point, the court overruled a defense objection.

MR. BIBLE: I’m going to object, Your Honor. Again, this has a significant impact on essentially presumption of innocence and the like.

MR. NEEB: I didn’t say, Judge, it was him. I was talking about the witnesses.³

THE COURT: Go ahead.

RP4 280. The prosecutor then obtained the jurors’ promise to keep an open mind, “hold the state to its burden of proof and find the defendant not guilty if we fail.” RP4 280-81.

³ The State called 23 witnesses. The defense called the Defendant and his stepsister. RP12 1813.

In the last minute of his time with the jury, the prosecutor wanted to address a misleading defense comment in which Mr. Bible had called himself “the people.”

JUROR NO. 20: ... They’re giving us all this information. I would think that I would believe them over someone that’s just sitting there doing nothing and not stating their case.

THE COURT: Juror No. 22?

JUROR NO. 22: You’re the state, right?

MR. BIBLE: No, I’m not. I’m the people.

JUROR NO. 22: Fair enough.

MR. NEEB: That I would object to, Judge. He needs to rephrase that.

MR. BIBLE: I represent Mr. Ellis. I never say a thing. I never say a word. I never ask a question.

RP3 216. DPA Neeb explained that in Washington, prosecutors say they represent the State or the State of Washington. RP4 284. In California, prosecutors say they represent the People, something that might be familiar to jurors in the context of the most publicized case ever, People versus O.J. Simpson. *Id.*

Mr. Bible yesterday told you he represents the people. Anybody believe that? Who does he represent? Rhetorical question, right? He represents Mr. Ellis, and Mr. Ellis alone. No one’s confused about that, right? No one’s confused about our roles. Okay?

RP4 284. Defense counsel objected reflexively at the name O.J. Simpson, but did not renew his objection when the full question was fleshed out. RP4 283-84.

Defense counsel Bible also spent some of his time on a discussion of racial bias.

Now, one of my concerns is that, as we've noted earlier and somewhat obvious, my client is African-American. There's been a conversation about the person that was shot in this case being a white person. One of my concerns is that people will look at him and look at her, and have preconceived notions about either that will impact our ability to get a fair trial. And I think that's kind of natural in relation to domestic violence and other things. The reality is the state pointed out this hypothetical involving a red shirt, a blue shirt, Crips and Bloods, and talked about O.J. Simpson and the O.J. Simpson case.

Which, by the way, how many of you think race was involved in the O.J. Simpson case?

....

Would that be an issue in this case?

RP4 290. He polled each juror individually. RP4 290-94. And he encouraged a discussion on institutional racism and how that might affect an investigation. RP4 298.

Verdict and Sentence:

The jury convicted the Defendant of second-degree intentional murder (the lesser included offense of count one) and second-degree felony murder predicated on second-degree assault, each with a firearm enhancement. CP 127, 138-41. The two counts merged at sentencing. CP 144, 263-64; 15 RP 1992-93. The court imposed a high-end sentence of 220 months plus one 60 month firearm enhancement. CP 145, 147. The Defendant appeals. CP 270.

IV. ARGUMENT

A. The trial court did not abuse its discretion in overruling the defendant's objections to the prosecutor's comments during jury selection.

The Defendant alleges that it was error for the prosecutor to engage the jury pool in a discussion on implicit racial bias. Opening Brief of Appellant (OBA) at 17.

1. Legal Standards

Some of the Defendant's challenges were raised to the trial court through timely objections, which the court overruled. OBA at 15 (citing RP4 278, 283). Where the matter was raised to the trial court, the lower court's ruling is reviewed only for abuse of discretion. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977, 994 (2000) { TA \l "State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977, 994 (2000)" \s "State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977, 994 (2000)" \c 1 } ("It is well settled that trial courts have discretion in determining how best to conduct *voir dire*"); *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999) { TA \l "State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999)" \s "State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999)" \c 1 }; *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960, 967 (1995) { TA \l "State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960, 967 (1995)" \s "State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960, 967 (1995)" \c 1 } (a trial court's ruling on prosecutorial misconduct is given deference

on appeal). The trial court's ruling as to the scope and content of voir dire will not be disturbed, absent a showing that the rights of the accused have been substantially prejudiced as a result. *Davis*, 141 Wn.2d at 826. *See also Rosales-Lopez v. United States*, 451 U.S. 182, 188-89, 101 S. Ct. 1629, 1634-35, 68 L. Ed. 2d 22 (1981){ TA \l "*Rosales-Lopez v. United States*, 451 U.S. 182, 188-89, 101 S. Ct. 1629, 1634-35, 68 L. Ed. 2d 22 (1981)" \s "*Rosales-Lopez v. United States*, 451 U.S. 182, 188-89, 101 S. Ct. 1629, 1634-35, 68 L. Ed. 2d 22 (1981)" \c 2 }.

Insofar as the Defendant frames this challenge as prosecutorial error, he bears the burden of showing (1) the prosecutor's discussion was improper in the context of the record and all of the circumstances of the trial and (2) that there is a substantial likelihood the discussion resulted in his conviction. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012){ TA \l "*In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012)" \s "*In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012)" \c 1 }.

2. Discovering racial bias in the jury pool is an important purpose of voir dire.

The Defendant appears to argue that acknowledging race through a discussion of implicit racial bias "focus[es] attention on Ellis' and Traynor's ethnicity" and exacerbates bias. OBA at 16. Of course, the purpose of jury selection is to discover and remove biased jurors. *Davis*,{ TA \s "*State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977, 994 (2000)" } 141 Wn.2d 798,

824-26. The judge and lawyers asks questions touching on the jurors’ “qualifications to serve” and “as appropriate to the facts of the case.” CrR 6.4(b){ TA \l "CrR 6.4(b)" \s "CrR 6.4(b)" \c 4 }. This requires *focus* on salient concerns.

In fact, the constitution may require that jurors be “interrogated on the issue of racial bias.” *Ham v. South Carolina*, 409 U.S. 524, 527, 93 S. Ct. 848, 850, 35 L. Ed. 2d 46 (1973){ TA \l "*Ham v. South Carolina*, 409 U.S. 524, 527, 93 S. Ct. 848, 850, 35 L. Ed. 2d 46 (1973)" \s "*Ham v. South Carolina*, 409 U.S. 524, 527, 93 S. Ct. 848, 850, 35 L. Ed. 2d 46 (1973)" \c 2 }. *See also Ristaino v. Ross*, 424 U.S. 589, 598 n.9, 96 S. Ct. 1017, 1022, 47 L. Ed. 2d 258 (1976){ TA \l "*Ristaino v. Ross*, 424 U.S. 589, 598 n.9, 96 S. Ct. 1017, 1022, 47 L. Ed. 2d 258 (1976)" \s "*Ristaino v. Ross*, 424 U.S. 589, 598 n.9, 96 S. Ct. 1017, 1022, 47 L. Ed. 2d 258 (1976)" \c 2 } (“wiser course generally is to propound appropriate questions designed to identify racial prejudice”). “[W]hen explicit or implicit racial bias is a factor in a jury’s verdict, the defendant is deprived of the constitutional right to a fair trial by an impartial jury.” *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172, 1178 (2019){ TA \l "*State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172, 1178 (2019)" \s "*State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172, 1178 (2019)" \c 1 }. Therefore, the parties have a duty to discover and root out biased jurors. “[I]mplicit racial bias exists at the unconscious level,

where it can influence our decisions without our awareness.” *Id.* It must be brought to the surface.

So while people might be sensitive to the very mention of race, the attorneys’ failure to address this issue with potential jurors could have given rise to accusations of ineffective assistance and misconduct.

3. The prosecutor did not appeal to the jurors’ passions and prejudices by helping them acknowledge their own implicit biases and providing a tool to address prejudice in deliberations.

The Defendant takes umbrage with DPA Neeb’s imagination exercise. OBA at 15 (citing RP4 277-79). He argues the discussion “appeared designed to appeal to the passion or prejudice of the jury and to focus attention [on race],” exacerbating bias. The opposite is true. It dispelled prejudices in the deliberative process.

Jurors cannot “check” biases they do not acknowledge. The effect of this exercise was a significant acknowledgement by jurors of their own implicit biases and their promise to remain open-minded.

The prosecutor explained that he chose the particular exercise for two reasons. First, because it involved a stereotype that the venire would be familiar with. RP4 277-78 (“Tacoma, Washington, Pierce County has a history of some gang violence.”) And second, because it was off-topic. The trial did not touch on gang issues. RP4 269 (“Did anyone here think this case must involve gangs or human trafficking? It doesn’t. It does not.”)

This exercise was proper. In a non-confrontational way, it helped jurors become more conscious of their biases and gave them a tool to combat prejudice in their deliberations, i.e. being open to new information and letting go of opinions in the face of new, contrary information. The court did not abuse its discretion in overruling an objection to the helpful exercise.

4. The prosecutor did not appeal to the jurors' passions and prejudices by curing defense counsel's misconduct and clarifying the attorneys' roles.

The Defendant claims that the mere utterance of the name O.J. Simpson prejudices him, regardless of context. He objected as soon as the name passed the prosecutor's lips. RP4 483. The judge allowed the prosecution to finish the question, after which the defense did not renew objection. Therefore, the standard must be "so flagrant and ill intentioned" that "no curative instruction would have obviated any prejudicial effect on the jury." *State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018){ TA \l "*State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018)" \s "*State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018)" \c 1 } (standard of review in the absence of an objection).

The American public understands that the attorney who represents "the people" is the prosecutor. They grasp this, if only because a very famous case was known in popular culture by its title "People versus O.J.

Simpson.” RP4 483-84. But defense counsel had told the jury that he represented “the people.” RP3 216. This was highly irresponsible, reckless, and confusing. The prosecutor wanted to clarify the roles of the attorneys.

This clarification of the attorneys’ role was not misconduct of any kind. It was a curative instruction for the defense counsel’s own misconduct.

5. The jury discussion did not prejudice the Defendant.

The prosecutors’ attention to concerns of implicit racial bias resulted in healthy discussions acknowledging institutional and implicit racism and produced repeated resolutions by the jurors to be conscious of these concerns during their deliberations. The attorneys exacted multiple promises from jurors to check themselves for unconscious bias (RP4 261), to not permit gender or race to improperly influence deliberations (RP4 277), to acquit if the state did not meet its high burden of proof (RP4 280-81), and to not let race be an issue in this case (RP4 290-94).

There is value to a promise, resolution, or oath. They heighten awareness and harden our purpose and determination. Thus we swear in witnesses and obtain no-suicide contracts from the severely depressed. They work.

It is not possible that heightening jurors' awareness of their own implicit biases prejudiced the Defendant. It is not possible that clarifying the roles of the attorneys prejudiced the verdict.

For the jury to have believed the defense, they would have had to disregard so much of the State's evidence and to accept so many of the Defendant's irrational explanations.

The Defendant's story was lazy, a simple trading of parts. Someone wanted to leave the relationship and did so without saying goodbye. The other person would rather they were both dead than apart. Someone carried a gun in a pocket. He exchanged his name for hers.

None of the details of his story worked. The Defendant did not travel from Kentucky for a job in Montana, only to change his mind after catching a chill while stretching his legs. Ms. Traynor did not want to reconcile with the Defendant after trying so long and hard to break with him and after finding a new boyfriend. The Defendant did not stalk her by phone and drive across the county only to end the relationship. There was no sharpie note in the trash. The Defendant had not left his dog to starve. The deadbolt did not lock itself.

It would not have been reasonable to believe that the Defendant was afraid of Ms. Traynor and yet left her gun behind. It is not reasonable to

believe that he shot her in self-defense. It was the evidence and not racial prejudice which rendered the verdict.

B. The trial court correctly refused to instruct the jury on manslaughter.

The Defendant claims the trial court should have instructed the jury on the crimes of first-degree and second-degree manslaughter. OBA at 21. The court made no error.

1. Where the evidence did not support an inference that the Defendant committed manslaughter, the crime is not a lesser included offense of intentional murder.

A defendant may be found guilty of an offense “which is necessarily included within” an offense charged in the information. RCW 10.61.006{ TA \l "RCW 10.61.006" \s "RCW 10.61.006" \c 3 }. There is a two-part test for determining whether an offense is a “lesser included” of the charged offense.

First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *Workman*, 90 Wash.2d at 447–48, 584 P.2d 382. We refer to the first prong of the test as the “legal prong” and the second prong as the “factual prong.” This has been the test for lesser included offenses and will continue to be the test for lesser included offenses.

State v. Berlin, 133 Wn.2d 541, 545–46, 947 P.2d 700, 702 (1997){ TA \l "State v. Berlin, 133 Wn.2d 541, 545–46, 947 P.2d 700, 702 (1997)" \s "State v. Berlin, 133 Wn.2d 541, 545–46, 947 P.2d 700, 702 (1997)" \c 1 }.

A first-degree murder, as charged in the information, is a premeditated, intentional killing. CP 13 (RCW 9A.32.030(1)(a){ TA \l "RCW 9A.32.030(1)(a)" \s "RCW 9A.32.030(1)(a)" \c 3 }). A manslaughter is either a reckless or negligent killing. RCW 9A.32.060{ TA \l "RCW 9A.32.060" \s "RCW 9A.32.060" \c 3 }; RCW 9A.32.070{ TA \l "RCW 9A.32.070" \s "RCW 9A.32.070" \c 3 }.

Under the legal prong, each of the elements of manslaughter are necessary elements of intentional murder as charged in count one of the information. *Berlin*{ TA \s "State v. Berlin, 133 Wn.2d 541, 545–46, 947 P.2d 700, 702 (1997)" }, 133 Wn.2d at 551; *State v. Warden*, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997){ TA \l "State v. Warden, 133 Wn.2d 559, 562-63, 947 P.2d 708, (1997)" \s "State v. Warden, 133 Wn.2d 559, 562-63, 947 P.2d 708, (1997)" \c 1 }. However, the trial court found the factual prong was not met, i.e the evidence did not support an inference that the killing had been reckless or negligent. RP12 1844-45.

The State's evidence and theory was that the Defendant was a possessive, controlling boyfriend who refused to let Ms. Traynor leave him. She finally got away. She set up an apartment just for herself with no room for him. She was returning to work at TSA. And she had begun a new romance that was becoming exclusive. She had gained her independence, physically, financially, and socially. When he realized she was not coming

back, the Defendant executed her with a barrel held to her head. He then removed her weapon from her purse and put it in her pocket.

The Defendant did not suggest that the killing had been reckless or negligent. He testified that the killing had been intentional, but justified in defense of self. The Defendant's testimony and theory was that Ms. Traynor was an unstable, dependent woman who threatened to shoot him. Believing "it was me or her," he intentionally shot her in self-defense. RP11 1570, RP12 1841. He "always" had a bullet in the chamber and "I know my gun is ready to fire when I draw it." RP11 1588. It was a high-powered semi-automatic pistol fired from a distance of two or three feet. RP11 1727; RP12 1841. The Defendant testified that he "absolutely" knew that a gun fired at a person could kill. RP12 1783.

Q. Mr. Ellis, what's the first rule of firearm safety?

A. Don't put your finger on the trigger unless you are prepared to pull.

Q. Don't point a gun at something you don't intend to shoot?

A. Right.

Q. You pointed it at Wendi?

A. Yes.

Q. You shot at Wendi?

A. That's correct.

Q. You shot to stop a threat?

A. Yes.

Q. You shot her in the head?

A. That's correct.

...

Q. (By Mr. Neeb) You told us that you hit what you shoot at, right?

A. Yeah.

Q. You shot Wendi, right?

A. Yes, she's shot.

Q. You hit Wendi?

A. Yes.

Q. In the head?

A. Yes.

RP11 1736-38.

Q. (By Mr. Neeb) You shot to stop the threat against you?

A. Yes.

Q. The threat against you was to kill you?

A. Yes.

Q. And you stopped that from happening?

A. Yes.

Q. By equal force?

A. Yes.

RP11 1742. As the court concluded, this was a "straight-up self-defense claim." RP12 1844. "I shot her because I perceived that I was in reasonable fear of substantial bodily injury or death. That's the testimony that Mr. Ellis gave." *Id.*

A negligent killing is one where the person is unaware of the substantial risk his action creates and this failure to be aware is a gross deviation from the standard of care a reasonable person would exercise. RCW 9A.08.010(1)(d){ TA \l "RCW 9A.08.010(1)(d)" \s "RCW 9A.08.010(1)(d)" \c 3 }. The Defendant was fully aware that discharging his weapon could result in Ms. Traynor's death. There was no evidence to infer this was a negligent act.

A reckless killing is one where the person knows of a substantial risk and, in a gross deviation from reasonable conduct, disregards the risk. RCW 9A.08.010(1)(c){ TA \l "RCW 9A.08.010(1)(c)" \s "RCW 9A.08.010(1)(c)" \c 3 }. But the Defendant did not disregard the risk. He testified he was preserving his life. If that was reasonable to believe, it was not a gross deviation from reasonable conduct to preserve one's own life at the cost of another's. There was no evidence to infer this was a reckless act. The question was only – was it justified?

The Defendant cites distinguishable cases.

The first case is an abbreviated, per curiam decision with no analysis from which to draw a precedent. *State v. Schaffer*, 135 Wn.2d 355, 359, 957 P.2d 214 (1998){ TA \l "*State v. Schaffer*, 135 Wn.2d 355, 359, 957 P.2d 214 (1998)" \s "*State v. Schaffer*, 135 Wn.2d 355, 359, 957 P.2d 214 (1998)" \c 1 }. That shooting took place in a drunken fight that began in a nightclub and continued outside. *Schaffer*, 135 Wn.2d at 357. The opinion summarily concludes “manslaughter is an included offense, and he was entitled to have the jury consider that alternative.” *Id.* at 358. However, the court reached its conclusion, it does not appear that there was evidence comparable to Mr. Ellis’ testimony that he shot at the victim in an enclosed space from only two or three feet away intentionally and with full knowledge that the result was likely to be death.

In *State v. Chambers*, 197 Wn. App. 96, 106, 117, 387 P.3d 1108 (2016){ TA \l "*State v. Chambers*, 197 Wn. App. 96, 106, 117, 387 P.3d 1108 (2016)" \s "*State v. Chambers*, 197 Wn. App. 96, 106, 117, 387 P.3d 1108 (2016)" \c 1 }, the defendant had no memory of pulling the gun or shooting. He only recalled that he had been under attack from all sides in the alley. *Chambers*, 197 Wn. App. at 106, 115-17. When he shot, he was at a distance of approximately ten feet. *Id.* at 103-04, 111, 113. But he could not keep track of his much younger assailants. *Id.* at 103-04, 106, 111, 115-17. It was also dark, late, in the middle of a snowstorm, and Chambers was heavily intoxicated. *Id.* at 102-03, 105. Under these circumstances, a jury could find that Chambers had not acted intentionally, but in a drunken, confused haze to scare off fast-moving assailants. *See also State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981){ TA \l "*State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)" \s "*State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)" \c 1 } (defendant's intoxication was evidence from which a jury could infer lack of intent).

Jones references two other cases to show evidence of lack of intent. *Jones*, 95 Wn.2d at 623. Both regard the discharge of a weapon while the parties struggled to control it. In *State v. Sill*, 47 Wn.2d 647, 650-51, 289 P.2d 720 (1955){ TA \l "*State v. Sill*, 47 Wn.2d 647, 650-51, 289 P.2d 720 (1955)" \s "*State v. Sill*, 47 Wn.2d 647, 650-51, 289 P.2d 720 (1955)" \c 1 }

}, a grease smear on the defendant's jacket evidenced that the barrel of a gun had been pressed against her at one point. *Sill*, 47 Wn.2d at 650. According to the forensic evidence, at the moment of the shooting, "the butt of the gun must have been on the floor; the deceased must have been leaning over; [and] the person shooting must have been on the floor." *Id.* From this, a jury could have inferred that Mrs. Sill, while intending to defend herself, had not intended to do more than get her husband off of her. *Id.* at 650-51. *See also State v. Crudup*, 11 Wn. App. 583, 590, 524 P.2d 479 (1974) { TA \l "State v. Crudup, 11 Wn. App. 583, 590, 524 P.2d 479 (1974)" \s "State v. Crudup, 11 Wn. App. 583, 590, 524 P.2d 479 (1974)" \c 1 } (a jury could find lack of intent to support a manslaughter instruction when the parties struggled over a gun).

These cases are all plainly distinguishable on their facts.

Because there was no inference from the evidence that the Defendant acted negligently or recklessly, the factual prong was not met. Manslaughter was not a lesser included offense under this record. The court made no error in denying instructions on manslaughter.

2. Manslaughter is not a lesser included offense of count two, felony murder predicated on second-degree assault.

The Defendant notes that the parties did not dispute whether the legal prong of the *Workman* test was met. OBA at 21-22. But this agreement was as to the first count only. RP12 1838. It is established that

manslaughter is not a lesser included offense of felony murder which was the second count.

We have previously held that neither first nor second degree manslaughter are lesser included offenses of second degree felony murder. *Davis*, 121 Wash.2d at 6, 846 P.2d 527. We note that our result in *Davis* rested, in part, on *State v. Dennison*, 115 Wash.2d 609, 801 P.2d 193 (1990) (holding first and second degree manslaughter are not lesser included offenses to first degree felony murder) and *State v. Frazier*, 99 Wash.2d 180, 661 P.2d 126 (1983) (holding manslaughter is not a lesser included offense to first degree felony murder). We affirm the result we reached in *Davis*.

Berlin{ TA \s "State v. Berlin, 133 Wn.2d 541, 545–46, 947 P.2d 700, 702 (1997)" }, 133 Wn.2d at 550. See also *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005){ TA \l "State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005)" \s "State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005)" \c 1 } (under the legal prong, manslaughter is not a lesser included offense of second-degree felony murder predicated on second-degree assault); *State v. Tamalini*, 134 Wn.2d 725, 953 P.2d 450 (1998){ TA \l "State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998)" \s "State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998)" \c 1 }.

Below, the Defendant provided no argument challenging *Gamble*, *Tamalini*, or *Berlin*. RP12 1838-39. On appeal, he drops a footnote referencing two court of appeals cases which represent bad law. OBA 22, n. 5. As he notes, *State v. De Rosia*, 124 Wn. App. 138, 153 n.23, 100 P.3d

331 (2004) TA \ "State v. De Rosia, 124 Wn. App. 138, 153 n.23, 100 P.3d 331 (2004)" \s "State v. De Rosia, 124 Wn. App. 138, 153 n.23, 100 P.3d 331 (2004)" \c 1 } relied entirely upon the analysis made in *State v. Gamble*, 118 Wn. App. 332, 335, 72 P.3d 1139 (2003), *aff'd in part, rev'd in part*, 154 Wn.2d 457, 114 P.3d 646 (2005) TA \ "State v. Gamble, 118 Wn. App. 332, 335, 72 P.3d 1139 (2003), *aff'd in part, rev'd in part*, 154 Wn.2d 457, 114 P.3d 646 (2005)" \s "State v. Gamble, 118 Wn. App. 332, 335, 72 P.3d 1139 (2003), *aff'd in part, rev'd in part*, 154 Wn.2d 457, 114 P.3d 646 (2005)" \c 1 }. In the *Gamble* case, the court of appeals directed the entry of judgment on manslaughter, notwithstanding the fact that the jury had not been instructed on the offense. *Gamble*, 118 Wn. App. at 336. The following year, in June 23, 2005, the Washington supreme court addressed this theory and held again that manslaughter did not meet the legal prong to be a lesser included of felony murder predicated on second-degree assault. *Gamble*, 154 Wn.2d at 465-69 (the mens rea elements are different). It reversed the court of appeals' order to remand for entry of a manslaughter conviction. *Gamble*, 154 Wn.2d at 469-70.

Therefore, the Defendant's request for manslaughter instructions does not touch on the conviction on count two. Regardless of the discussion of the factual prong, the Defendant will remain convicted of second-degree murder on the second count and the sentence will be the same.

C. After review of this appeal, the Court should affirm and remand to strike one of the two merged counts.

The Defendant complains that the merged counts violate double jeopardy. OBA at 27-28. Lower courts will leave the verdicts intact pending a higher court's review of the record. After this Court considers the appeal, it would be proper to affirm the convictions and then remand to vacate one of the two counts. *In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 818-19, 256 P.3d 1159 (2011){ TA \l "*In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 818-19, 256 P.3d 1159 (2011)" \s "*In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 818-19, 256 P.3d 1159 (2011)" \c 1 }; *State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010){ TA \l "*State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010)" \s "*State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010)" \c 1 }). The Defendant does not indicate which of the two counts should be vacated. Because neither is the lesser conviction, the superior court may strike either, leaving a conviction on the other and the sentence the same.

V. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's sentence.

RESPECTFULLY SUBMITTED this 28th day of July, 2020.

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7/27/20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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