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No. 34670-6-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Josephine Johnson,

Appellant.

Grant County Superior Court Cause No. 14-1-00826-3

The Honorable Judge John M. Antosz

Appellant's Reply Brief

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ARGUMENT

I. THE JUDGE SHOULD HAVE INSTRUCTED ON SELF-DEFENSE.

A. Ms. Johnson feared for her life when Bitterman came at her.

Donald Bitterman repeatedly assaulted Josephine Johnson.¹ RP (6/16/16) 182-183, 195, 200-202; RP (6/17/16) 40, 73, 81; Ex. 32; Ex. 2 (2/4/15), p. 18. He carried a gun and often threatened to shoot her and her sons. RP (6/15/16) 35; RP (6/16/16) 174, 177, 179, 197, 200-201; RP (6/17/16) 41, 74-75, 80; CP 58; Ex. 32; Ex. 2 (2/4/15), p. 3, 4; Ex. 24 p. 8.

She called the Sheriff's department many times. RP (6/16/16) 18, 182; RP (6/17/16) 17-18. She also told her doctor about the abuse. Ex. 24, p. 7. Twice, she petitioned for protection orders. RP (6/15/16) 12; RP (6/16/16) 169-170, 182; RP (6/17/16) 41; CP 67-92.

Just days before the shooting, Bitterman threatened to "blow [her] brains out." RP (6/17/16) 48. He also told her she couldn't leave him and couldn't call anyone. RP (6/17/16) 48-49; Ex. 32; Ex. 2 (2/4/15), p. 11-12. She armed herself and went to tell him she was leaving. CP 4; Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7.

Bitterman came toward her. Ex. 32; Ex. 2 (2/4/15), p. 6, 7. Believing the safety was on, she backed away from him and aimed at his chest. Ex. 32; Ex. 2 (2/4/15), p. 5, 6, 9, 23; RP (2/11/15) 27; RP (6/17/16)

¹ The evidence is summarized in a light most favorable to Ms. Johnson. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)); see also *State v. Callahan*, 87 Wn. App. 925, 931-934, 943 P.2d 676 (1997).

55. She feared he might grab her by the neck or take the gun and shoot her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10. She was afraid for her life. RP (2/11/15) 27. According to Bitterman, Ms. Johnson shot him intentionally. RP (6/16/16) 54. According to Ms. Johnson, Bitterman grabbed for the gun and it discharged accidentally. RP (6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6.

Taking this evidence in a light most favorable to Ms. Johnson, the trial court should have instructed on self-defense. *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004). She was entitled to self-defense instructions whether she shot Bitterman intentionally or was merely aiming at him when the gun discharged accidentally. *Id.*; see also *State v. Fernandez-Medina*, 141 Wn.2d 448, 460-61, 6 P.3d 1150 (2000).²

Respondent incorrectly claims “[t]here was no evidence of an imminent threat.” Brief of Respondent, p. 9. This is simply not true.

Respondent’s error apparently stems from a failure to “view [the evidence] in the light most favorable” to Ms. Johnson and to consider evidence “from ‘whatever source’” if it “tends to show that the defendant is entitled to the instruction.” *Fisher*, 185 Wn.2d at 849 (quoting *McCullum*, 98 Wn.2d at 488); see also *Callahan*, 87 Wn. App. at 931-934.

Ms. Johnson was “entitled to the benefit of all the evidence... [and] her defense may be based on facts inconsistent with her own testimony.” *Fisher*, 185 Wn.2d at 849. Applying these standards, the

² Review is *de novo*. See Appellant’s Opening Brief, pp. 20-24. However, reversal is required under any standard of review.

evidence supports Ms. Johnson's self-defense claim.

When Bitterman came toward her and grabbed at the gun, Ms. Johnson feared he might take it and shoot her. Her fear was reasonable, given the prior assaults and the many times he'd threatened to kill her. This provides at least "some evidence" supporting a self-defense instruction. *Fisher*, 185 Wn.2d at 851.

Respondent apparently believes that Ms. Johnson should have left the house without talking to Bitterman. Brief of Respondent, pp. 11-13. This might have been wise; however, it was not required.³

Ms. Johnson was entitled to be in the house, to carry a gun, and to tell Bitterman she was leaving. It is "well settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be." *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Ms. Johnson had "no duty to retreat" when Bitterman came toward her. *Id.*

Respondent argues that "Ms. Johnson chose to provoke a confrontation." Brief of Respondent, p. 12. This is incorrect for two reasons. First, when taken in a light most favorable to Ms. Johnson, the evidence shows that she went to talk to Bitterman, and that she armed herself because she was afraid to tell him she was leaving him. She armed herself and went to tell him she was leaving. CP 4; Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7.

³ Her failure to do so undoubtedly stemmed from the dynamics of the couple's domestic violence relationship. See Ex. 24. She apparently thought she needed Bitterman's agreement before she could end the relationship. RP (6/17/16) 48-49; CP 4; Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7, 11-12.

Second, provocation is a jury question. Jurors should have had the opportunity to decide if Ms. Johnson's actions were "reasonably likely to provoke a belligerent response." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.04 (4th Ed); *See also State v. Richmond*, --- Wn.App. ---, ___, 415 P.3d 1208, 1213 (Wash. Ct. App. 2018) (citing WPIC 16.04).

Nor can this case be compared to *State v. Walker*, 40 Wn. App. 658, 700 P.2d 1168 (1985). *See* Brief of Respondent, pp. 11-12 (citing *Walker*). In *Walker*, the defendant grabbed a butcher knife and stabbed her unarmed husband in the back. He had made no threatening or aggressive comments or gestures. *Id.*, at 664.

Here, by contrast, Bitterman came at Ms. Johnson and tried to grab the gun. She feared he might kill her, as he'd threatened many times in the past.

The court should have instructed on self-defense, whether the shooting was accidental or intentional. *See Rodriguez*, 121 Wn. App. at 183; *Fernandez-Medina*, 141 Wn.2d 460-461. Ms. Johnson's conviction must be reversed. *State v. Walden*, 131 Wn.2d 469, 473, 478, 932 P.2d 1237 (1997).

B. The error denied Ms. Johnson her right to claim self-defense.

If the trial court had instructed on self-defense, jurors may have voted to acquit. Because of this, the State cannot show the error was harmless.⁴

The State's harmless error argument presumes that Ms. Johnson was limited to arguing that the shooting was accidental. Brief of Respondent, pp. 13-16. According to Respondent, this limitation makes the error harmless, because the jury did not believe the shooting was accidental. Brief of Respondent, pp. 13-18.

Respondent's premise is flawed. Ms. Johnson was entitled to present inconsistent defenses.⁵ *Fernandez-Medina*, 141 Wn.2d 460-461. When taken in a light most favorable to Ms. Johnson, the evidence supported multiple theories, including that the shooting was intentional and justified.⁶

Jurors may have concluded that Bitterman came at Ms. Johnson and grabbed for the gun (as Ms. Johnson told police), and that she shot

⁴ The error is presumed prejudicial. *See Walden*, 131 Wn.2d at 473. To overcome this presumption of prejudice, the State must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Id.*, at 478.

⁵ Her lawyer's choice not to argue an intentional shooting in self-defense is not surprising. The court did not give instructions on self-defense; thus, under the instructions, Ms. Johnson's only choice was to argue that the shooting was accidental.

⁶ She had two possible versions of the accident theory. She could have argued that she was afraid when Bitterman came at her, so she aimed the gun at him and it discharged accidentally when he grabbed for it. Ex. 32; Ex. 2 (2/4/15), p. 6. This would have been consistent with her statement to the police. Ex. 32. Alternatively, she could have argued that she didn't fear him, and didn't aim at him, but that the gun discharged accidentally while she was looking for a place to hide it. This would have been consistent with her trial testimony. *See* RP (6/15/16) 19; RP (6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6.

him intentionally (as Bitterman claimed). RP (6/16/16) 54; RP (6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6. It would not be unusual for jurors to believe Ms. Johnson's version of the events immediately prior to the shooting, but to discount her claim of accident as a (dishonest) attempt to minimize her culpability.

As Respondent notes, jurors "found that she pulled the trigger with the intent to inflict great bodily harm." Brief of Respondent, p. 15. This is consistent with her self-defense claim, even if inconsistent with her testimony and her statement to police.

It makes no difference if evidence supporting the jury's conclusion came from Bitterman, the police interview, or some other source. *Fisher*, 185 Wn.2d at 849; *see also Callahan*, 87 Wn. App. at 931-934. As in *Callahan*, the pieces of evidence showing an intentional shooting done in self-defense can be drawn from multiple inconsistent sources. *Callahan*, 87 Wn. App. at 931-934.

As the verdict suggests, there was "some evidence"⁷ of an intentional shooting. There was also "some evidence" showing that her use of force was justified. During the police interview, Ms. Johnson said she feared Bitterman might grab her by the neck, or that he might take the gun and shoot her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10.⁸

This is evidence "that she was justified in pulling the trigger with intent to cause great bodily harm." Brief of Respondent, p. 15. Indeed,

⁷ *Fisher*, 185 Wn.2d at 851.

⁸ She also told police she was afraid for her life. RP (2/11/15) 27.

considering Bitterman’s repeated threats to kill her, Ms. Johnson may well have been justified in shooting with intent to kill. *See State v. Painter*, 27 Wn. App. 708, 711, 620 P.2d 1001 (1980); *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

Both *Painter* and *Wanrow* involved women accused of murdering unarmed men. Both claimed self-defense and were convicted at trial. Both convictions were reversed because the women were entitled to proper instructions on the law of self-defense.⁹ *Painter*, 27 Wn. App. at 711-715; *Wanrow*, 88 Wn.2d at 233-241. As the Supreme Court put it in *Wanrow*, “it is obviously crucial that the jury be precisely instructed as to the defense of justification.” *Wanrow*, 88 Wn.2d at 234.

As in *Painter* and *Wanrow*, Ms. Johnson was entitled to proper instructions on self-defense. *See also Walden*, 131 Wn.2d at 478-479. When taken in a light most favorable to the defense, there was at least “some evidence” that her use of force was justified. *Fisher*, 185 Wn.2d at 851. This is so whether the shooting was accidental or intentional. *Id.*; *Rodriguez*, 121 Wn. App. at 185.

Furthermore, even if Ms. Johnson were somehow limited to claiming accident, this would not make the error harmless. *Id.* In *Rodriguez*, for example, the defendant stabbed an unarmed man. He told the jury that the stabbing was accidental: “it happened as he was trying to catch his balance and [the victim] leaned in to get at him.” *Id.*, at 183.

⁹ Each jury was instructed on self-defense; however, the instructions contained errors.

The *Rodriguez* jury necessarily found that the defendant acted with intent to inflict great bodily harm. *Id.*, at 187-188. Under Respondent's theory, this finding should have made any error in the self-defense instructions harmless, because the jury rejected the defendant's claim of accident. *See* Brief of Respondent, pp. 13-18. The Court of Appeals did not consider the error harmless; instead, it found prejudice and reversed.¹⁰ *Id.*

Respondent spends a great deal of time discussing the underlying facts and applicability of *Werner*. Brief of Respondent, pp. 16-18 (citing *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010)). Respondent appears to think that a self-defense/accident claim cannot apply to first-degree assault. Brief of Respondent, pp. 13-18.

This is incorrect, as evidenced by *Rodriguez*.

Respondent's argument is also logically flawed. Assuming the evidence is sufficient to convict—that is, sufficient to prove an intentional shooting—a jury can always reject the defendant's claim of accident while still considering the facts supporting self-defense. If the circumstances justify the use of deadly force, jurors are free to acquit. They can acquit even if they believe the accused acted with intent to kill or inflict great bodily harm.

¹⁰ In fact, the Court of Appeals found prejudice under the standard for ineffective assistance claims. *Id.* The *Rodriguez* defendant prevailed even though he was not entitled to the presumption of prejudice that applies here.

Whether Ms. Johnson fired intentionally or not, the jury should have been allowed to consider her self-defense claim. *Fisher*, 185 Wn.2d at 851; *Rodriguez*, 121 Wn. App. at 185. The error was not harmless beyond a reasonable doubt. *Walden*, 131 Wn.2d at 473, 478. The conviction must be reversed, and the case remanded for a new trial with proper instructions. *Id.*

II. THE JUDGE SHOULD HAVE ADMITTED EXPERT TESTIMONY FROM DR. GERLOCK AND DR. O'DONNELL.

A. Testimony on battering relationships was relevant and admissible.

Dr. April Gerlock reviewed the facts and concluded that Ms. Johnson was stuck in a battering relationship. Ex. 24. Age, disability, and cognitive limitations left Ms. Johnson unable to leave the relationship. Ex. 24, pp. 10, 15-16.

Without Dr. Gerlock's testimony, jurors had no explanation for why Ms. Johnson stayed despite Bitterman's abuse and threats to kill her. Dr. Gerlock would also have helped jurors understand how Bitterman prevented Ms. Johnson's departure by telling her she couldn't leave. *See* RP (6/17/16) 49; Ex. 32; Ex. 2 (2/4/15), pp. 11-12. She also could have explained why Ms. Johnson armed herself when she went to tell him a second time that she planned to leave. CP 4; Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7.

Without Dr. Gerlock's testimony, jurors likely thought that Ms. Johnson "chose to provoke a confrontation," as Respondent apparently

believes. Brief of Respondent, p. 12. This conclusion is reasonable; Dr. Gerlock would have explained why it is wrong. Ex. 24.

Respondent devotes a single sentence to this issue. The State argues that Dr. Gerlocks' testimony was irrelevant "[b]ecause there is no evidence of fear of imminent harm." Brief of Respondent, p. 12.

This is incorrect. As outlined above, Ms. Johnson reasonably feared imminent harm when Bitterman came at her and tried to grab the gun. RP (6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6-8, 10.¹¹ She thought he might grab her by the neck or take the gun and shoot her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10.

Given the battering relationship and Bitterman's threats to kill her, the evidence supports Ms. Johnson's self-defense theory. Expert testimony explaining the battering relationship would have been helpful to the jury.

Furthermore, the evidence was relevant to explain Ms. Johnson's conduct even if she did not claim self-defense. Jurors likely wondered what kept Ms. Johnson in the relationship if Bitterman was so abusive. They also may have questioned why she would pick up the gun to hide it (as she testified).

Dr. Gerlock's testimony would have helped jurors understand the evidence. Without the testimony, jurors may have believed Ms. Johnson was lying about the abuse.

¹¹ See also RP (2/11/15) 27.

Whether the shooting was intentional, a combination of self-defense and accident, or purely accidental, Dr. Gerlock’s testimony had at least “minimal relevance.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). It met the “very low” threshold for admission. *Darden*, 145 Wn.2d at 621; *see also State v. Janes*, 121 Wn.2d 220, 241, 850 P.2d 495 (1993); *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

The trial court’s exclusion of the evidence violated Ms. Johnson’s right to present a defense. *Jones*, 168 Wn.2d at 720. Her conviction must be reversed, and the case remanded for a new trial. *Id.*

B. Testimony explaining Ms. Johnson’s dementia was relevant and admissible.

Ms. Johnson suffers from dementia. Ex. 25, pp. 1, 3. She has memory problems and is easily confused. Ex. 24, p. 15; Ex. 25, p. 3, 4, 16. Her neurocognitive disorder affects her current, recent, and remote memory. Ex. 25, p. 3. Sometimes, it causes her to talk gibberish. Ex. 24, p. 7.

Dementia made her “unable to provide a coherent or consistent history” when Dr. O’Donnell interviewed her. Ex. 25, p. 4. She even misstated her age by a decade, claiming she was 88 rather than 78. Ex. 25, p. 3, 4.

Ms. Johnson’s dementia explains the major discrepancies between her statement to police and her testimony at trial. Ex. 25, p. 3, 4, 16. She

told police that she armed herself and aimed the gun at Bitterman's chest as he came toward her. Ex. 32; Ex. 2 (2/4/15), p. 5, 6, 9, 23. However, in her testimony she told jurors she found the gun and was planning to hide it when Bitterman grabbed for it, causing it to discharge accidentally. RP (6/17/16) 52.

Dr. O'Donnell's testimony about Ms. Johnson's dementia would have explained the discrepancy between her statement to police and her testimony. RP (6/17/16) 89, 120; RP (6/17/16 Brittingham) 29-30; Ex. 25, p. 3, 4, 16. Without Dr. O'Donnell's testimony, jurors could not help but conclude that Ms. Johnson lied.

Ms. Johnson's dementia clearly impacted her credibility. It is difficult to make sense of Respondent's contention that "[t]elling the jury that Ms. Johnson had dementia does not make her more worthy of belief." Brief of Respondent, p. 22. The expert testimony would have transformed Ms. Johnson (in the jury's eyes) from a liar into a sincere but confused woman doing her best to give an honest account.

Respondent admits that her dementia "may provide something of an explanation of why her story kept changing." Brief of Respondent, p. 22. This concession alone establishes the testimony's admissibility.

Properly informed of her dementia and its effects, jurors may have decided that Ms. Johnson's statement to police was true, and that her trial testimony was the product of her confusion and memory problems. Alternatively, they might have decided that portions of her testimony were

true, that she never felt afraid or aimed at Bitterman, and that the shooting was wholly accidental.

Dr. O'Donnell's role was not to help jurors "decide which version could be true." Brief of Respondent, p. 23. Her expert testimony would have explained "why [Ms. Johnson's] story kept changing." Brief of Respondent, p. 22.

This would have been "helpful to her." Brief of Respondent, p. 23. Even if jurors could not figure out the sequence of events, they might have discounted all contradictory statements but believed her consistent assertion that the shooting itself was accidental. This would have led to a conviction of the lesser offense, or even an outright acquittal.

Dr. O'Donnell's evidence had at least "minimal relevance." *Darden*, 145 Wn.2d at 622. It had some "bearing on the credibility or probative value of" Ms. Johnson's testimony. *State v. Mollet*, 181 Wn. App. 701, 713, 326 P.3d 851 (2014), *review denied*, 339 P.3d 635 (Wash. 2014).

The exclusion of Dr. O'Donnell's testimony violated Ms. Johnson's right to present a defense. *Jones*, 168 Wn.2d at 720. Her conviction must be reversed, and the case remanded for a new trial. *Id.*

C. Testimony on diminished capacity was relevant and admissible.

Ms. Johnson's mental condition "could have impaired her ability to form the intent" to commit first-degree assault. RP (6/17/16) 95. The court should have admitted Dr. O'Donnell's testimony on this point.

To support diminished capacity, an expert must testify that a mental disorder “could have” impaired the defendant’s ability to form the necessary mental state. *State v. Mitchell*, 102 Wn. App. 21, 27, 997 P.2d 373 (2000), *as amended on reconsideration* (Apr. 17, 2000). Dr. O’Donnell was able to provide this opinion. RP (6/17/16) 92, 95.

The mental state required for first-degree assault is the intent to inflict great bodily harm. RCW 9A.36.011(1). Respondent fails to recognize this, focusing instead on evidence that Ms. Johnson acted purposefully. Brief of Respondent, pp. 19-20. Purposeful conduct may prove an intentional assault; it does not prove the intent to inflict great bodily harm.

Respondent erroneously argues that the evidence was inadmissible because Dr. O’Donnell’s testimony was “insufficient to show that it [dementia] *did*” affect Ms. Johnson’s “ability to form intent.” Brief of Respondent, p. 19 (emphasis added). This is not the proper standard.

An expert discussing a mental condition need not show that “it did” cause impairment. Brief of Respondent, p. 19. The testimony need only establish that it “could have” done so. *Id.*

Dr. O’Donnell believed that Ms. Johnson’s mental condition “could have” impaired her ability to form the intent required for conviction. RP (6/17/16) 92, 95. Her testimony thus had at least “minimal relevance.” *Darden*, 145 Wn.2d at 622. It met the standard outlined in *Mitchell* and should have been admitted. *Mitchell*, 102 Wn. App. at 27.

The exclusion of Dr. O'Donnell's testimony on diminished capacity violated Ms. Johnson's right to present a defense. *Jones*, 168 Wn.2d at 720. Her conviction must be reversed, and the case remanded for a new trial. *Id.*

III. THE SPECIAL VERDICTS WERE COERCED AND BASED ON INCOMPLETE INSTRUCTIONS.

A. The judge's comments suggested a need for agreement.

Although jurors convicted Ms. Johnson of first-degree assault, they returned to the courtroom without announcing any verdict on the aggravating factors. RP (6/21/16) 45-46. The trial judge told the jury that "[t]he special verdict forms need to be addressed" and that they "have to be filled out." RP (6/21/16) 47. He told jurors to "go back to the jury room and deliberate on that, to what extent, and do that." RP (6/21/16) 47.

These comments suggested a "need for agreement" on the aggravating factors. CrR 6.15 (f)(2). They interfered in the deliberative process and invaded Ms. Johnson's right to a jury trial. *State v. Boogaard*, 90 Wn.2d 733, 736-737, 585 P.2d 789, 791 (1978).

Jury deliberations were not complete. *See State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011). Jurors had not made the required announcement that they'd reached a unanimous verdict on the aggravators. RP (6/21/16) 45-46; *Id.*

Respondent's argument that the court "did not suggest what the answer should be" misses the point. Brief of Respondent, p. 24. Coercion

occurs when comments suggest the need for agreement. *Boogaard*, 90 Wn.2d at 737. Some jurors could have interpreted the judge’s comments to suggest they needed to reach a verdict. RP (6/21/16) 47.

Respondent also misstates the test required for reversal. Brief of Respondent, p. 24. A litigant need not show “a reasonable probability”¹² of improper influence; the correct standard is “a reasonably substantial possibility that the verdict was improperly influenced.” *Ford*, 171 Wn.2d at 188–189 (emphasis added) (quoting *State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983)). The correct standard—a “possibility”—is something less than a probability.

Furthermore, it is the possibility of influence that requires reversal. *Id.* Respondent appears to argue that the sufficiency of the evidence plays a role. Brief of Respondent, pp. 24-25. This is incorrect.

In *Boogaard*, for example, the evidence was sufficient for conviction. *Boogaard*, 90 Wn.2d at 734-735. Despite this, the judge’s coercive comments required reversal. *Id.*, at 735-740. The *Boogaard* court did not attempt to decide how jurors might have evaluated the evidence during deliberations. *Id.*

The court’s directive violated Ms. Johnson’s constitutional right to a jury trial. *Boogaard*, 90 Wn.2d at 737. The special verdicts must be vacated. *Id.* The case must be remanded for resentencing without the enhancements, or for a new trial on the aggravators. *Id.*

¹² Brief of Respondent, p. 24.

B. The instructions did not require unanimity on the special verdicts.

The court did not instruct jurors on the need for unanimity on the firearm, domestic violence, and likelihood of death aggravators. CP 159-192. The court should have used instructions based on WPIC 160.00 and WPIC 300.07. *See* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 160.00 and 300.07 (4th Ed).

The court's general concluding instruction does not correct the error. *See* Brief of Respondent, pp. 25-26; CP 191. Although that instruction told jurors they would receive special verdict forms, it did not discuss the requirement of unanimity regarding the aggravating factors. CP 191.

Instead, it gave jurors specific unanimity directions regarding the substantive crime and each lesser included offense. The concluding instruction directed jurors to "first consider the crime of assault in the first degree." CP 191. The instruction told jurors to fill in Verdict Form A "[i]f you unanimously agree on a verdict." CP 191. Absent a verdict, jurors were to consider the lesser crime of second-degree assault. CP 191. Again, the instruction directed them to fill in Verdict Form B "[i]f you unanimously agree on a verdict." CP 191. The same language was used regarding third-degree assault and Verdict Form C. CP 191.

The instruction did not contain similar language regarding the special verdict forms. Instead, it reiterated generally that "each of you must agree for you to return a verdict." CP 191.

In context, this was insufficient. A reasonable juror “could have interpreted the instruction[s]” to require unanimity on the substantive crime, but not on the aggravators. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

The instructions did not make the unanimity requirement “manifestly apparent,” except as to the substantive charge. CP 191; *see State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The firearm enhancement, domestic violence finding, and special aggravator for the mandatory minimum must be vacated. *State v. Irby*, 187 Wn. App. 183, 199, 347 P.3d 1103, 1111 (2015), *review denied*, 184 Wn.2d 1036, 379 P.3d 953 (2016). The case must be remanded for a new sentencing hearing or a new trial on the aggravating factors. *Id.*

CONCLUSION

Ms. Johnson’s conviction must be reversed. Alternatively, the special verdicts must be vacated. The case must be remanded for a new trial or a new sentencing hearing.

Respectfully submitted on June 4, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Grant County Prosecuting Attorney
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

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

Signed at Olympia, Washington on June 4, 2018.



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