

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 Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Ms. Johnson's constitutional right to present a defense under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 3 and 22.
2. The court violated Ms. Johnson's right to present a defense by refusing to instruct on self-defense.
3. The court's instructions relieved the state of its burden to prove the absence of self-defense.

ISSUE 1: Self-defense instructions must be provided to the jury whenever there is "some" evidence supporting the defense from "whatever source." When considered in a light most favorable to Ms. Johnson, does the record contain "some" evidence of self-defense?

ISSUE 2: An accused person may present inconsistent defenses, relying on facts that contradict the defendant's own testimony. Did the trial judge violate Ms. Johnson's constitutional right to present a defense by refusing to instruct the jury on self-defense because the evidence of self-defense contradicted her testimony?

4. The court violated Ms. Johnson's right to present a defense by excluding critical evidence that was relevant and admissible.
5. The court misinterpreted ER 702 and ER 703.
6. The court violated Ms. Johnson's right to present a defense by excluding Dr. Gerlock's expert testimony on battered spouse syndrome.
7. The court violated Ms. Johnson's right to present a defense by excluding Dr. O'Donnell's expert testimony on diminished capacity.
8. The court violated Ms. Johnson's right to present a defense by excluding expert testimony explaining how battered spouse syndrome, dementia, and other cognitive impairments created memory problems and confusion and contributed to significant discrepancies between her statements to police and her testimony on the witness stand.

ISSUE 3: An accused person has a constitutional right to present relevant, admissible evidence necessary to the defense. Did the court violate Ms. Johnson's right to present a defense

by excluding relevant, admissible evidence critical to her theory of the case?

9. The trial judge violated Ms. Johnson's constitutional right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
10. The trial court improperly coerced the jury into returning special verdicts on the firearm enhancement, domestic violence finding, and the mandatory minimum aggravator for first-degree assault.
11. The trial court erred by telling jurors that "the special verdict forms need to be addressed."
12. The trial court erred by telling jurors that the special verdict forms "have to be filled out."
13. The trial court erred by telling jurors to "go back to the jury room and deliberate on [the special verdicts], to what extent, and do that."
14. The trial judge violated CrR 6.15(f)(2) by instructing the deliberating jury in a manner suggesting the need for agreement.

ISSUE 4: After the start of deliberations, a trial judge may not instruct jurors in such a way as to suggest the need for agreement. Did the trial court infringe Ms. Johnson's state and federal constitutional right to jury verdicts free of judicial coercion?

15. The jury's special findings violated Ms. Johnson's right to a unanimous verdict under Wash. Const. art. I, §21.
16. The trial court erred by failing to instruct jurors they were required to be unanimous to answer "yes" on each special verdict form.

ISSUE 5: The state constitution requires juror unanimity for any fact that increases the punishment for an offense. Did the court's failure to instruct jurors that unanimity was required for each special verdict violate Ms. Johnson's constitutional right to a unanimous verdict?

17. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 6: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Josephine Johnson is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

SUMMARY OF FACTS: Josephine Johnson suffers from dementia, memory problems, and vertigo stemming from traumatic brain injuries received in a series of motor vehicle accidents. Her husband Donald Bitterman physically abused her, repeatedly threatened to kill her and her sons, and belittled and humiliated her. In late 2014, Ms. Johnson armed herself with one of his handguns and told him she was leaving him. He told her she couldn't and advanced toward her. Afraid for her life, she raised the gun, and it discharged accidentally when he tried to grab it. At her trial for first-degree assault, the court refused to instruct on self-defense and excluded expert testimony on battered spouse syndrome, diminished capacity, and her memory problems.

1. Donald Bitterman physically abused his seventy-seven year old disabled wife and repeatedly threatened to kill her and her children.

Seventy-nine-year-old Grant County resident Josephine Johnson has dementia.¹ Ex. 25, p. 1, 3. Medical records since 2003 reveal problems with “[f]orgetfulness, vertigo, getting lost, talking ‘gibberish,’ and falling.”² Ex. 24, p. 7. Her condition stems from several accidents sustained during her career as a commercial truck driver. CP 25, 31; Ex. 24, p. 5, 15; Ex. 25, p. 5, 6, 10; RP (6/17/16)³ 24.

Two evaluators noted her memory difficulties, especially with dates and details. Ex. 24, p. 15; Ex. 25, p. 3, 4. In fact, during an interview with a state forensic psychologist, she stated her age as 88 rather than 78,

¹ After her 2003 accident, she also had hallucinations, anxiety, and nightmares. Ex. 24, p. 5. Dementia is now referred to as “neurocognitive disorder.” Ex. 25, pp. 1, 3.

² After her 2003 accident, she also had hallucinations, anxiety, and nightmares. Ex. 24, p. 5.

³ Two transcripts were filed for the date of June 17, 2016. The transcript filed by court reporter Sosa is cited as RP (6/17/16); the volume filed by transcriber Brittingham will be cited as RP (6/17/16 Brittingham).

and was completely unable to provide a coherent or consistent history. Ex. 25, p. 3, 4. She also has physical difficulties, including balance problems and incontinence. CP 26; Ex. 24, p. 13; Ex. 25, p. 10.⁴

In early summer 2012, she met Donald Bitterman; they married a year later. RP (6/16/16) 33-36. The couple lived on his property. Ms. Johnson has four adult children; one of her sons moved his trailer onto the property and lived there too. RP (6/16/16) 26, 32, 37-38; RP (6/17/16) 36.

They had a troubled marriage, unfortunately not Ms. Johnson's first experience in an abusive relationship. RP (6/15/16) 35. Bitterman frequently assaulted Ms. Johnson. 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 regularly threatened to shoot Ms. Johnson and her sons. He also walked around in the house armed with a gun at night, and told Ms. Johnson he would never let her leave him. RP (6/15/16) 35; RP (6/16/16) 179, 197, 200-201; RP (6/17/16) 41, 75, 80; Ex. 32⁵; Ex. 2 (2/4/15), p. 3, 4; Ex. 24 p. 8.

Bitterman had five handguns and nine rifles. Ex. 32; Ex. 2 (2/4/15), p. 16. He was often armed with a loaded handgun. RP (6/17/16)

⁴ According to her son, Ms. Johnson has Alzheimer's. RP (6/17/16) 30; CP 25-26. She also used an oxygen tank most of the time. RP (6/13/16) 72. In fact, at some point after the incident and before trial, an issue with her oxygen tank led to confusion and loss of mental acuity. RP (6/13/16) 72-73, 75. Ms. Johnson was likely on oxygen the day of the incident at issue here. RP (6/13/16) 75.

⁵ Ms. Johnson's recorded statement was played for the jury, but the court reporter did not include it in the Verbatim Report of Proceedings. A transcript was created but not offered at trial. That transcript is cited here; it was offered at a suppression hearing. It is the only exhibit from a hearing other than the trial exhibits that will be referenced in this brief; its citation therefore includes the date. Exhibit 32 is the video of Ms. Johnson's statement itself, Exhibit 2 (2/4/15) is the transcript.

78-79; Ex. 32; Ex. 2 (2/4/15), p. 23. At night, he sometimes sat with his gun in an armchair; when the chair creaked Ms. Johnson woke up, afraid her husband was coming into her bedroom to shoot her. RP (6/17/16) 48, 79; Ex. 32; CP. Ex. 2 (2/4/15), p. 16, 23.

Bitterman told her she was losing her mind and mocked her for having Alzheimer's. Ex. 24, p. 7. On one occasion, while Ms. Johnson was relying on Bitterman to help her across uneven ground, he let her fall and she hit her head. CP 26, Ex. 24, pp. 12, 14. Bitterman refused to allow his wife money to buy adult diapers, and made fun of her when she urinated on herself. Ex. 14, p. 13.

2. Ms. Johnson reported Bitterman's abuse to her doctor and the police, and twice sought protection orders; none of her efforts produced results.

During the six months leading up to the alleged offense, Bitterman threatened to shoot Ms. Johnson and her sons almost daily. RP (6/16/16) 174, 177; RP (6/17/16) 41, 74. He also abused her physically, slapping her on the head every week, and pushing her on occasion. RP (6/17/16) 40, 81; Ex. 32; Ex. 2 (2/4/15), p. 18. He poked her in the chest while swearing and calling her names. RP (6/16/16) 182-183, 195, 200-202; RP (6/17/16) 40, 73, 81. Her son (Arthur Osborn) observed at least three incidents of "hostile physical contact" while he lived on the property. RP (6/17/16) 81.

In September of 2014, Ms. Johnson repeatedly contacted the Grant County Sheriff's Department to report that Bitterman had assaulted her and threatened to kill her and her sons. RP (6/16/16) 18, 182; RP (6/17/16)

17-18. On September 4, after belittling her and poking her in the chest while drunk, Bitterman said “I should just go out to my truck and get my gun and blow your f*cking brains out, then go back out to the truck and blow my own brains out.” CP 58. She told the deputy that Bitterman made similar threats every week. CP 58. The deputy gave her “a New Hope victim’s right[s] packet,” but took no other action. CP 58.⁶

On September 24th, after sitting in his truck outside the house and watching her through the kitchen window, Bitterman came inside and told her “You don’t know how lucky you are, I almost shot you.” CP 61. When she called the sheriff’s department the next day, a deputy “explained to [her] about getting restraining orders or the possibility of leaving the residence.” CP 61. He also “explained ...the program New Hope which she was already familiar with,” and “asked [her] if she thought I needed to talk with her husband.” CP 61. When Ms. Johnson said “it would not do any good,” she was told to call “if she needed anything.” CP 61.

On September 30th, a deputy came to the house after Bitterman threatened to “get his gun and end this” during an argument. CP 63. This time, the deputy offered to “find her a safe place to stay through New Hope services,” and told her to call again if Bitterman “showed back up this night.” CP 63. The deputy also – apparently for the first time—asked the prosecutor to review the incident “and use their discretion in filing charges.” CP 63.

⁶ She later told police that Bitterman prevented her from calling New Hope. Ex. 32; Ex. 2 (2/4/15), p. 24.

Ms. Johnson told her primary care physician that Bitterman had been “abusive recently, hitting her in the face and over the ears several times.” Ex. 24, p. 7. She described a three-year period of abuse. Ex. 24, p. 7. Although the doctor’s office documented her statements, the doctor apparently took no action. Ex. 24, p. 7.

In the weeks leading up to the alleged offense, Ms. Johnson twice requested protection orders against Bitterman. RP (6/15/16) 12; RP (6/16/16) 169-170, 182; RP (6/17/16) 41; CP 67-92. She sought the first on October 22, 2014. CP 81; Ex. 28. In her petition, she wrote that Bitterman “said he was going to kill himself and then me and my son,” and told the court that he carries a .45 caliber pistol in his pickup. CP 85. She also described the September 24th incident, writing that Bitterman “sat in his pickup and watched me thru [sic] the windows and said I didn’t know [sic] how close I came to being shoot [sic].” CP 86.

The Grant County Superior Court denied her petition the day she filed it. CP 90. The court made a boilerplate finding that the petition did not “list a specific incident and approximate date of domestic violence.” CP 90 (emphasis in original). The order noted that “Respondent [sic] was given time to provide approximate dates... & she failed to do so.” CP 92.

Ms. Johnson filed another petition on December 2, 2014. CP 68; Ex. 30. In her request for emergency temporary protection, she wrote “I truly believe Respondent would shoot me.” CP 71. She went on:

I truly believe the respondent has plans to kill me. Respondent has 9 rifles and 5 pistols – 1 .45 caliber 1 3[illegible] pistols that he has

in the leather chair where he sits each night. I am frightened at night when I go to bed. I know the respondent will kill me. I would like to feel at ease when I try to sleep... The respondent has a drinking problem. The respondent has also threatened my adult children.
CP 72.⁷

She reiterated that he'd threatened to kill her children numerous times, and again described the September 24th incident she'd reported to the police:

One night 1 week ago^[8] the respondent sat in his pickup and watched me + my family thru [sic] the kitchen windows. The next day he told me you don't know how close you came to being shot.
CP 73.

She concluded by saying "I don't want to die, please help me." CP 74.

Again, the court denied her request and dismissed the case on the day she filed it. CP 80. The court based the dismissal on the same boiler-plate finding as before: that the petition did not "list a specific incident and approximate date of domestic violence." CP 78 (emphasis in original).

Ms. Johnson was afraid Bitterman would shoot her if he found out about the protection orders. Ex. 32; Ex. 2 (2/4/15), p. 17-18.

3. Ms. Johnson armed herself with a firearm and told Bitterman she was leaving him; the gun discharged accidentally when Bitterman tried to grab it.

⁷ She wrote that Bitterman had his guns "for his job and to shoot me and my family," that the guns were loaded, and that he kept his .45 in his pickup truck under a quilt in the front seat. CP 73. She also asked the court to issue an order lasting longer than a year, indicating that "Time will not help, his rage it will only get worse. I can't [stress] enough... The respondent will only get worse." CP 74.

⁸ Assuming the event occurred only once, the discrepancy in the date likely resulted from Ms. Johnson's neurocognitive disorder (dementia), which made it very difficult for her recall dates and timeframes. Ex. 24, p. 151; Ex. 25, p. 3, 4. This is also a feature of battered spouse syndrome. Ex. 24, p. 14. She later testified that the incident took place only a few days before the alleged offense. RP (6/16/16) 178.

Just before the day of the incident, Bitterman threatened to “blow [her] brains out.” RP (6/17/16) 48. This followed additional threats he’d made over the preceding days. Ex. 32; Ex. 2 (2/4/15), p. 24. Ms. Johnson told Bitterman she planned to leave him, but he told her she couldn’t. RP (6/17/16) 49; Ex. 32; Ex. 2 (2/4/15), pp. 11-12.

On December 23, 2014, Ms. Johnson armed herself with one of Bitterman’s handguns and told him she was leaving.⁹ CP 4; Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7. Again, he told her she couldn’t leave. Ex. 32; Ex. 2 (2/4/15), p. 7. He also told her she couldn’t call anyone. Ex. 32; Ex. 2 (2/4/15), p. 7.

When Ms. Johnson told her husband that he couldn’t stop her from leaving, he came at her. Ex. 32; Ex. 2 (2/4/15), p. 6, 7. She feared he might grab her around the neck, or take the gun and use it against her. Ex. 32; Ex. 2 (2/4/15), p. 6, 8, 10. She was afraid for her life. RP (2/11/15) 27.

She believed the gun was “on safe”¹⁰ as she backed away, but she aimed at his chest “where it would do the most good” if she shot him. Ex. 32; Ex. 2 (2/4/15), p. 5, 6, 9, 23; RP (2/11/15) 27; RP (6/17/16) 55.

Bitterman grabbed at the gun. RP (6/17/16) 54. Ex. 32; Ex. 2 (2/4/15), p. 8. It discharged accidentally, shooting him in the abdomen. RP

⁹ This is what she stated to police on the day of the incident; her description at trial was that she was planning to hide the gun. RP (6/17/16) 53-54.

¹⁰ Ms. Johnson had little experience with guns. Ex. 32; Ex. 2 (2/4/15), p. 3, 4. When he saw her with the gun, Bitterman told her she wouldn’t be able to shoot him because the safety was on. Ex. 32; Ex. 2 (2/4/15), p. 3, 7, 9. During her police interview, after explaining she didn’t know how to tell if the safety was on, she said she thought the gun would fire even with the safety on. Ex. 32; Ex. 2 (2/4/15), p. 7. She later said she thought it *wouldn’t* fire with the safety on. Ex. 32; Ex. 2 (2/4/15), p. 9, 10.

(6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6. Ms. Johnson told police (and later testified) that she didn't intentionally shoot Bitterman. Ex. 32; Ex. 2 (2/4/15), pp. 9, 26. She ran to her son's trailer and told him that Bitterman had been shot. RP (6/16/16) 27.

The state charged Ms. Johnson with assault one with a firearm enhancement and special allegations for domestic violence and for use of force likely to result in death. CP 4.

4. Ms. Johnson planned to assert self-defense and diminished capacity at trial, and retained an expert to testify about battered spouse syndrome.

At an omnibus hearing held in January of 2015, Ms. Johnson's attorney David Bustamante gave notice of the "general nature of the defense." Supp. CP. (Omnibus Order, Sub No. 16, Filed 1/21/15). Bustamante checked boxes marked self-defense and diminished capacity. Supp. CP. Under "other," he added "Battered spouse syndrome." Supp. CP.

Bustamante retained Dr. April Gerlock, PhD, to evaluate Ms. Johnson as a battered woman, and to opine on whether she acted in a manner that could be explained by the dynamics of an abusive relationship. Ex. 24, p. 1. In her report, Dr. Gerlock wrote that the months preceding the incident were especially important. Ex. 24, p. 1.

Dr. Gerlock explained that physical assaults, threats, and other coercive behaviors create "a system of intentional behaviors used by an

abuser to control a partner.” Ex. 24, p. 12.¹¹ She gathered information regarding Bitterman’s threats to kill Ms. Johnson and her family, and the physical violence he perpetrated against her. Ex. 24, pp. 1-10, 14.

Dr. Gerlock also outlined abusive and coercive behaviors that did not involve physical violence. Ex. 24, p. 12, 13. Bitterman frequently criticized Ms. Johnson, called her sexist and racially-charged names like “stupid bitch” and “squaw,” stood over her to monitor her activity, alienated her friends, controlled how she bathed, prohibited her from planting certain flowers or giving away extra vegetables from her garden, mowed over her rose bushes, glared at her, took money that she had saved, made decisions without her agreement, accused her of paying too much attention to other people or things, told her how to cook and became upset if she failed to meet his standards for cooking or cleaning, angrily questioned her about returning home late, criticized her parenting, and smashed things she valued. Ex. 24, p. 12-13.

Dr. Gerlock found evidence of Ms. Johnson’s distress and fear, and reviewed her multiple attempts to get help from law enforcement and the court system. Ex. 24, p. 10-11. She described how the system’s failure to respond left Ms. Johnson feeling desperate. Ex. 24, p. 14, 15.

She also pointed out that Ms. Johnson’s impaired cognitive abilities compounded the “frustration, fear and anger typical of a battered

¹¹ According to Dr. Gerlock, this systemic coercion can lead the abused person to behave in ways that seem irrational to outside observers. Ex. 24, pp. 12-13. Dr. Gerlock also noted that battered women sometimes lack clear recall of dates and time-frames because of the distress they experience. Ex. 24, p. 14.

woman,” and made it even harder for her “to safely navigate her circumstances.” Ex. 24, p. 16. In Dr. Gerlock’s opinion, Ms. Johnson’s age, physical disabilities, and cognitive limitations all contributed to her inability to escape the relationship. Ex. 24, p. 16.

Dr. Gerlock opined that Ms. Johnson is a battered woman. Ex. 24, p. 10, 15. In her conclusion, she outlined how her testimony would help someone trying to understand Ms. Johnson’s mindset at the time of the alleged offense:

By understanding how all of these dynamics came into play on December 23, 2014, it is easier to understand why Ms. Johnson acted as she did. In an escalating situation with failed system response, sometimes a battered woman will take actions into her own hands. Sometimes she will use violent or aggressive force. Ex. 24, p. 15.

Bustamante’s defense theory evolved, apparently as Ms. Johnson’s dementia caused her recollection of the event to fluctuate. Prior to the start of trial, defense counsel planned to argue self-defense to the jury. CP 25-26, 28-32. The self-defense theory was consistent with Ms. Johnson’s statements to police and her interview with Dr. Gerlock. Ex. 32; Ex. 2 (2/4/15), pp. 2-8; Ex. 24, p. 7.

However, on the first day of trial, Bustamante told the court that the defense theory had changed. RP (6/15/16) 40. Instead of claiming self-defense, Bustamante planned to present a pure accident theory. RP (6/15/16) 40. Bustamante explained to the court that Ms. Johnson had seen

the gun on the bed and picked it up to hide it. RP (6/15/16) 19.¹² It discharged accidentally, injuring Bitterman. RP (6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6.

Bustamante still planned to introduce evidence of Bitterman's violence and threats to kill as well as expert testimony regarding battered spouse syndrome. The evidence was offered for the limited purpose of explaining why, despite her lack of experience with and dislike of firearms, Ms. Johnson would pick up the gun to hide it. RP (6/15/16) 19-20, 35-40; CP 51-53; Ex. 32; Ex. 2 (2/4/15), pp. 3, 4, 16, 23.

For the trial judge, the issue came down to whether Ms. Johnson would testify that fear motivated her to pick up the gun. RP (6/13/16) 63, 65. The judge interpreted part of her recorded statement to mean she was fed up with Bitterman, rather than afraid of him, making expert testimony on battered spouse syndrome inadmissible. RP (6/13/16) 63, 65-67.

5. The court excluded expert testimony establishing diminished capacity and explaining Ms. Johnson's dementia, confusion, and memory problems.

Defense counsel also sought to introduce evidence of Ms. Johnson's head injury in support of a diminished capacity defense. RP (6/17/16) 24. He planned to call Dr. O'Donnell to provide expert testimony linking Ms. Johnson's condition with her capacity to form the intent required for conviction. RP (6/15/16) 12; RP (6/17/16) 29-31, 87-

¹² She had made a similar statement during her interview with Dr. Cedar O'Donnell, a forensic psychologist who had evaluated Ms. Johnson at the state's behest. Ex. 25, pp. 14-15.

90.

Although Dr. O'Donnell's written report did not support diminished capacity, Bustamante clarified that she would testify that Ms. Johnson's "cognitive difficulties could have impaired [her] ability to form intent." RP (6/17/16) 92. According to defense counsel, Dr. O'Donnell would opine that "it's possible that [Ms. Johnson's] condition could have impaired her ability to form the intent, but not necessarily." RP (6/17/16) 95.

The trial court did not make a final ruling until after the state rested its case and the defense made a lengthy offer of proof which included testimony from Ms. Johnson herself.¹³ RP (6/16/16) 105-225.

The judge questioned whether the proffered evidence was sufficient. He explained that conviction required proof of two mental states, the first of which is "intentional pulling of the trigger and that's a real low threshold to meet and a high threshold to assert that there wasn't a mental state capable of knowing that here's how you pull a trigger." RP (6/13/16) 71. According to the court, this first mental state is "like pressing a button." RP (6/13/16) 71.

The judge went on to explain that:

the second mental state is inflicting substantial bodily harm and again, someone would have to show for the defendant that she

¹³ That offer of proof included Ms. Johnson and her son Arthur Osborn; the state rebutted the offer with the testimony of Bitterman. RP (6/16/16) 171-211. Ms. Johnson said she was worried when she saw the gun, as Bitterman was unhappy with her of late and she feared he would shoot her. RP (6/16/16) 172-173. She said the gun went off when Bitterman tried to take it from her. RP (6/16/16) 176.

didn't understand that pulling a trigger could result in a substantial bodily harm. So, I'm failing to see what pertinence to the question of diminished capacity in this case.

RP (6/13/16) 71.

Ultimately, he found the evidence irrelevant and inadmissible. He again explained that the mental elements are very simple: “[I]t would be quite a high threshold to show that someone didn't understand -- didn't intend to pull a trigger or didn't intend to inflict great bodily harm when they did so.” RP (6/17/16) 29. The judge later reiterated his understanding of the issue:

THE COURT: Is there any evidence that Ms. Johnson was not aware that when one fires a firearm at someone, that it will cause substantial bodily harm?

MR. BUSTAMANTE: No.

THE COURT: I think that's the issue....

RP (6/17/16) 98.

The defense also planned to introduce Dr. O'Donnell's expert testimony to explain how and why Ms. Johnson's dementia and other cognitive impairments created memory problems and confusion. RP (6/17/16) 89, 120.¹⁴ Ms. Johnson's cognitive difficulties, memory problems, and confusion contributed to the major discrepancies between her statements to police and her testimony on the witness stand—discrepancies that likely made her seem dishonest in the eyes of the jury. Ex. 25, p. 3, 4, 16.

According to Dr. O'Donnell, Ms. Johnson's neurocognitive disorder (commonly called dementia) caused her difficulties with memory.

¹⁴ Dr. Gerlock supported these conclusions. RP (8/19/16) 113-114, 119-120.

Ex. 25, p. 3, 4. These problems made her “unable to provide a coherent or consistent history” to Dr. O’Donnell. Ex. 25, p. 4.

Dr. O’Donnell indicated that Ms. Johnson “demonstrated difficulties in her episodic memory and seemed to confuse details from different events.” Ex. 25, p. 4. The problem affected her current, recent, and remote memory. Ex. 25, p. 3. Dr. O’Donnell believed it possible that paranoia, delusions, and confabulation may have contributed to the “significant changes in Ms. Johnson’s report of the incident.” Ex. 25, p. 16.

The court excluded this testimony.¹⁵ RP (6/17/16) 24; RP (6/17/16 Brittingham) 29-30.

6. After Ms. Johnson testified and the state introduced a recording of her police interview, the court again refused to instruct on self-defense or allow Bustamante to introduce expert testimony.

Ms. Johnson testified. Her testimony deviated from what she told the police. She recounted how she saw the gun lying on the bed, and decided to hide it. RP (6/17/16) 52.¹⁶ She explained her thinking to the jury:

It was a puzzle because I couldn't figure out why it was laying on the bed...I looked at it for a couple of seconds. And then I picked it up with the idea that I was going to hide it. I put it under the

¹⁵ Initially, Bustamante only planned to offer Dr. O’Donnell’s testimony on these subjects if the court also allowed her to testify regarding diminished capacity. RP (6/17/16) 87-90. He later asked to have the testimony relating to dementia and memory problems admitted even without the testimony on diminished capacity. RP (6/17/16) 120. The court refused. RP (6/17/16 Brittingham) 29-30.

¹⁶ She told police she’d taken it from a drawer. Ex. 32; Ex. 2 (2/4/15), p. 3. When they searched the house, police found an open drawer with an empty holster. RP (6/17/16) 112-113.

covers to begin with, but you could see the bump through the covers... [So] I picked it out of there...And I walked into the other room to see if I could find a spot to hide it out there. Maybe in my music records.

RP (6/17/16) 53.

As she walked into the other room, Bitterman surprised her. RP (6/17/16) 53-54. She testified that he asked her what she was doing with the gun, and she said: "I might have to shoot you." RP (6/17/16) 54. When he told her the safety was on, she replied "Well, I guess I'm not going to shoot you then if it's on safety." RP (6/17/16) 54.

Ms. Johnson testified that Bitterman grabbed for the gun and it discharged. RP (6/17/16) 54-55. She said she didn't intend to harm him; she loved him and "felt bad because I didn't think he loved me." RP (6/17/16) 55. She went on to say she "might have took a step backwards" but she "wasn't really afraid of [him]." RP (6/17/16) 61. She also testified that she wasn't angry with him, but she was disappointed that she'd have to move from the property.¹⁷ RP (6/17/16) 55-56, 62.

After Ms. Johnson testified and the defense rested, the state introduced the video recording of her statement to police. RP (6/17/16) 114-116; Ex. 32. The recording was introduced in its entirety without any limitation. RP (6/17/16) 114-116; Ex. 32.

With Ms. Johnson's statement in evidence, Bustamante asked the court to reconsider its earlier refusal to instruct on self-defense. He

¹⁷ Bitterman told the jury that he was walking between rooms in the house when Ms. Johnson came from the front room with the gun. RP (6/16/16) 53-54. He claimed she said she didn't want to do "this", but she had to, and shot him in the stomach. RP (6/16/16) 54.

submitted briefing, and proposed an instruction on self-defense. CP 138-158; RP (6/20/16) 6, 15-20, 26-29, 32. He also renewed his request to introduce Dr. Gerlock's expert testimony on battered spouse syndrome. CP 146; RP (6/20/16) 6.

The court again denied the requests, excluding the evidence and declining to instruct on self-defense. CP 159-192; RP (6/20/16) 7-8, 15, 19, 29-31, 32-35. The court based its refusal on the inconsistencies between Ms. Johnson's testimony and her statement to police:

She gives one version to law enforcement. She testifies to a completely different version here. And the differences go beyond just the first statement is that she's pointing the gun, the second statement is that she's trying to hide the gun and she's caught and she's not brandishing it. It also differs as to whether she was threatened in the past and how she was threatened in the past and what the threats were. Those are also different as well. But that if you cherry pick certain facts from her statement to law enforcement and then almost nonsensically just take certain facts from her testimony and put those together you might have arguably self-defense...

RP (6/20/17) 18-19.

The judge concluded that there was no "evidence to support an imminent threat." RP (6/20/17) 35. The jury was not instructed on self-defense. CP 159-192.

Faced with the major discrepancies between Ms. Johnson's recorded statement and her testimony, Bustamante again asked the court to permit Dr. O'Donnell to testify regarding Ms. Johnson's neurocognitive disorder and how dementia impacted her memory. RP (6/17/16) 120; RP (6/17/16 Brittingham).

Bustamante also wanted to introduce Dr. Gerlock's expert testimony for a similar purpose. CP 142; RP (6/20/16) 36-43. Dr. Gerlock would explain to the jury why battered women sometimes minimize the abuse they've suffered, or recant prior allegations. CP 142; RP (6/20/16) 36-43; RP (8/19/16) 107.

The court refused to allow either expert to testify, even for this limited purpose. RP (6/17/16) 120; RP (6/17/16 Brittingham) 29-30; RP (6/20/16) 36-43.

7. After the jury found Ms. Johnson guilty, the court told jurors that the special verdict forms "have to be filled out," and returned the jury to the jury room to "do that."

After deliberating for some time, the jury notified the bailiff that they had reached a verdict. RP (6/21/16) 45-46. When the court reviewed the forms, he noted that the special verdict forms were not completed. RP (6/21/16) 46. The court brought the jury into the courtroom, and had a colloquy with the presiding juror:

The Court: I have a verdict form, but the special verdict forms have not been handed, were those filled out?

[Presiding Juror]: No.

The Court: Okay. The special verdict forms need to be addressed, as well.

[Presiding Juror]: Okay.

The Court: So what I'll do is hand back the – well, I'll keep the Verdict Form A here and then the other ones have to be filled out.

[Presiding Juror]: Okay.

The Court: So you can go back to the jury room and deliberate on that, to what extent, and do that.

[Presiding Juror]: Okay.

RP (6/21/16) 47.

Fourteen minutes later, jurors returned to the courtroom. They had completed the special verdict forms by answering “yes” on each of them. RP (6/21/16) 47-48.

Ms. Johnson, who had no criminal history, received a sentence of 153 months. CP 255, 257. She timely appealed. CP 274.

ARGUMENT

I. THE TRIAL COURT VIOLATED Ms. JOHNSON’S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY REFUSING TO INSTRUCT ON HER THEORY OF THE CASE.

When all the evidence is taken in a light most favorable to Ms. Johnson, it shows that Bitterman physically abused her and repeatedly threatened to kill her. Afraid for her life, she armed herself and went to tell him she was leaving him. He told her she couldn’t leave or call anyone, and came at her. Fearing he’d grab her by the neck or take the gun and shoot her, she pointed it at his chest. It accidentally discharged when he tried to bat it away. Given this evidence, the trial judge should have instructed the jury on self-defense. His refusal to do so violated Ms. Johnson’s Sixth and Fourteenth Amendment right to present a defense.

- A. This court should review *de novo* the trial court’s refusal to instruct on Ms. Johnson’s self-defense claim.
 - 1. The claimed error raises a constitutional issue and a question of law, both of which are reviewed *de novo*.

Constitutional issues are reviewed *de novo*. *State v. Armstrong*, --- Wn.2d---, ___, 394 P.3d 373 (Wash. 2017) The same is true for issues of

law, mixed questions of law and fact, and cases involving the application of law to facts. *Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, --- Wn.2d---, ___, 393 P.3d 748 (2017) (questions of law); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016) (mixed questions of law and fact; application of law to facts).

Consistent with these general rules, the sufficiency of evidence to support self-defense instructions presents an issue of law.¹⁸ *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). Review is thus *de novo* where “the basis for the trial court's refusal to give [a] requested jury instruction appears to be lack of evidence” supporting the defense. *Id.*

Here, the trial court decided that insufficient evidence supported Ms. Johnson’s self-defense claim. RP (6/20/16) 7-8, 15, 19, 29-31, 32-35. The court’s refusal to instruct on self-defense is thus an issue of law, reviewed *de novo*. *Fisher*, 185 Wn.2d at 849.

Furthermore, review is *de novo* because the trial court’s decision rested on a misunderstanding of the law. The court apparently believed that an accused person could not rely on inconsistent defenses, and failed to consider all the evidence “in a light most favorable” to Ms. Johnson.¹⁹ RP (6/20/16) 7-8, 15, 19, 29-31, 32-35. The court’s ruling thus presents additional issues of law, reviewed *de novo*. *Xia* ---Wn.2d at ___.

Ms. Johnson also raises a constitutional issue—the denial of her

¹⁸ Arguably, it also presents a mixed question of law and fact or an issue involving the application of law to facts.

¹⁹ Cf. *Fisher*, 185 Wn.2d at 849.

right to present a defense. Such issues are also reviewed *de novo*. *Armstrong*, ---Wn.2d, at _____. The issues can also be characterized as mixed questions of law and fact or questions involving the application of law to facts. For all these reasons, Ms. Johnson’s arguments should be reviewed *de novo*. *Samalia*, 186 Wn.2d at 269.

2. Cases purporting to address “factual disputes” affecting a request for jury instructions (a) rest on questionable precedent and (b) conflict with the rule that evidence be taken in a light most favorable to the instruction’s proponent.

The *de novo* standard applied by the *Fisher* court supersedes precedent erroneously suggesting that “[a] trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion.” *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). This oft-cited language from *Walker* rests on a shaky foundation and contradicts the well-established prohibition against judicial factfinding.

First, there can be no “factual dispute” in these circumstances. The evidence must be taken in a light most favorable to the instruction’s proponent. *Fisher*, 185 Wn.2d at 849. By law, any “factual dispute” is resolved in favor of the party proposing the instruction. *Id.*; see also *State v. O'Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015); *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

Thus, when deciding if an instruction is supported by the record, a judge may not weigh or evaluate evidence. *State v. Fernandez-Medina*,

141 Wn.2d 448, 460-61, 6 P.3d 1150 (2000). Weighing evidence is the exclusive province of the jury. *Id.* *Walker's* abuse-of-discretion standard implies that the trial judge has discretion, when evaluating the facts; this “violates the proposition that ‘[i]n evaluating the adequacy of the evidence [to support a proposed instruction], the court cannot weigh the evidence.’” *Id.* (quoting *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1034 (1999), abrogated on other grounds by *State v. Kurtz*, 178 Wn.2d 466, 309 P.3d 472 (2013)).

Second, the *Walker* court’s error stemmed from its reliance on *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). *Walker*, 136 Wn.2d at 772. The *Lucky* court made a similar pronouncement, suggesting review was for abuse of discretion when “[a] trial court's refusal to give a requested instruction [was] based on the facts of the case.” *Lucky*, 128 Wn.2d at 731.

In support of the abuse-of-discretion standard, *Lucky* cites two cases that had nothing to do with jury instructions, much less the appropriate standard of review. *Lucky*, 128 Wn.2d at 731 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) and *Grant v. Huschke*, 70 Wash. 174, 177, 126 P. 416 (1912), overruled on other grounds by *Larson v. City of Seattle*, 25 Wn.2d 291, 171 P.2d 212 (1946)). The *Carroll* case involved judicial discretion to open sealed mental illness files. *Carroll*, 79 Wn.2d at 23. The *Grant* case involved review of a

decision granting a new trial. *Grant*, 70 Wash. at 178.²⁰

The *Walker* language relies on questionable authority. In addition, the standard espoused by the *Walker* court conflicts with the requirement that trial courts take the evidence in a light most favorable to an instruction's proponent, instead of weighing or otherwise evaluating it. *Fernandez-Medina*, 141 Wn.2d at 460-61.

The *Fisher* court's application of a *de novo* standard is in harmony with these bedrock rules. This court should review the decision *de novo*.

B. Ms. Johnson had a constitutional right to jury instructions on self-defense because the record contains "some evidence" supporting self-defense.

Ms. Johnson had a constitutional right to present her defense to the jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§3, 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). The court's refusal to instruct on self-defense violated this constitutional right. *Jones*, 168 Wn.2d at 720.

Her right to present a defense entitled her to instructions on her theory of the case. *Fisher*, 185 Wn.2d at 848.²¹ Because there was evidence to support self-defense, Ms. Johnson's conviction must be reversed. *Id.*

²⁰ The *Grant* court also addressed a party's failure to request an instruction: "If the respondent desired the instruction, he should have specifically requested it, and, having failed to do so, no error resulted." *Grant*, 70 Wash. at 177.

²¹ Furthermore, every litigant is entitled to jury instructions that accurately state the law and permit her to argue her theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

Like all criminal defendants, she had the right to present inconsistent defenses at trial. *Fernandez-Medina*, 141 Wn.2d at 460. She asked the court to instruct on self-defense even though she also claimed accident. CP 138-155; RP (6/20/16) 6, 15-20, 26-29, 32. The two defenses “are not mutually exclusive.” *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). Even if they were, her right to present inconsistent defenses would have entitled her to instructions on self-defense. *Fernandez-Medina*, 141 Wn.2d at 460.

Where there is “some evidence” of self-defense, a trial judge must instruct jurors on the defense. *Werner*, 170 Wn.2d at 337. Here, Ms. Johnson was entitled to self-defense instructions because there was “some evidence” supporting the defense. *Id.* Because there was “some evidence,” the court’s refusal to instruct on self-defense requires reversal. *Fisher*, 185 Wn.2d at 848-49.

The evidence must be viewed in the light most favorable to Ms. Johnson. *Id.* The evidence supporting her defense “may come from ‘whatever source.’” *Id.* (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)).

In assessing Ms. Johnson’s request for an instruction on self-defense, this court “must consider all of the evidence that [was] presented at trial.” *Fernandez-Medina*, 141 Wn.2d at 456; *see also State v. Thysell*, 194 Wn. App. 422, 426, 374 P.3d 1214 (2016) (“[A] defendant is entitled to a self-defense instruction when, considering *all* of the evidence, the jury could have a reasonable doubt as to whether the defendant acted in self-

defense”) (emphasis in original).

Consistent with these principles, the court instructed jurors that “[e]ach party is entitled to the benefit of all of the evidence, whether or not that party introduced it.” CP 161. Since Ms. Johnson was “entitled to the benefit of all of the evidence,” she was permitted to rely on “facts inconsistent with her own testimony.” *Fisher*, 185 Wn.2d at 849.

As the *Fisher* court noted, an accused person is not limited to her own testimony or the testimony of defense witnesses. *Id.* Instead, Ms. Johnson could “point to other evidence presented at trial, including the State's evidence.” *Id.*, at 850. As in *Fisher*, this “other evidence” included “portions of her statement to investigators.” *Id.*, at 851 (emphasis added).²²

Self-defense “requires only a subjective, reasonable belief of imminent harm from the victim.” *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).²³ The evidence need not show “an actual physical assault.” *State v. Janes*, 121 Wn.2d 220, 241, 850 P.2d 495 (1993). Nor need there be proof of “actual imminent harm.” *State v. Woods*, 138 Wn. App. 191, 199, 156 P.3d 309 (2007) (emphasis in original).

Instead, the court must consider the “contextual circumstances.”

²² Thus, “a defendant may exercise her right to refrain from testifying and rely on the evidence elicited from the State and cross-examination of the State's witnesses” to support her theory of the case. *Fisher*, 185 Wn.2d at 850.

²³ The use of force toward another person is justified “[w]hen used by a party about to be injured...in preventing or attempting to prevent an offense against his or her person, in case the force is not more than is necessary.” RCW 9A.16.020(3).

State v. George, 161 Wn. App. 86, 99, 249 P.3d 202 (2011).²⁴ An imminent threat “is not necessarily an immediate threat but instead acknowledges the circumstance of ‘hanging threateningly over one’s head; menacingly near.’” *Id.*, quoting *Janes*, 121 Wash.2d at 241 (citation omitted).

Furthermore, “[a] threat, or its equivalent, can support self-defense.” *Janes*, 121 Wn.2d at 241 (emphasis added). In abusive relationships, “patterns of behavior become apparent which can signal the next abusive episode.” *Id.*

As in all cases involving assault by an abused person against her abuser, the jury’s role would have been “to inquire whether [Ms. Johnson] acted reasonably, given [her] experience of abuse.” *Janes*, 121 Wn.2d at 239. This standard required jurors to

put themselves in the place of the appellant, get the point of view which [she] had at the time of the tragedy, and view the conduct of [Bitterman] with all its pertinent sidelights as the appellant was warranted in viewing it.

Id., at 238 (quoting *State v. Wanrow*, 88 Wn.2d 221, 236, 559 P.2d 548 (1977) (Utter, J., plurality)) (citation omitted).

In abuse cases, the jury must “consider the conditions as they appeared to the [defendant], taking into consideration all the facts and circumstances known to the [defendant] at the time and prior to the

²⁴ In other words, self-defense requires jurors to “put themselves in the defendant’s shoes.” *State v. Rodriguez*, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004).

incident.” *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). The fact that “the triggering behavior and the abusive episode are divided by time does not necessarily negate the reasonableness of the defendant’s perception of imminent harm.” *Janes*, 121 Wn.2d at 241. In fact, “[e]ven an otherwise innocuous comment which occurred days before [an assault] could be highly relevant when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode.” *Id.*, at 241-242.

In *Allery*, the defendant shot and killed her husband as he lay on the couch. *Allery*, 101 Wn.2d at 593. The Supreme Court reversed her conviction, in part because of the trial court’s failure to provide complete instructions on self-defense. *Id.*, at 594-595, 598.²⁵

The problem here was even more egregious: the trial court in this case failed to provide *any* instructions on self-defense. Like the defendant in *Allery*, Ms. Johnson was prevented from arguing her theory to the jury.

When all the facts—including those introduced by the state—are considered in a light most favorable to Ms. Johnson, the evidence shows that she subjectively feared that she was in imminent danger, that her belief was objectively reasonable, and that she used no greater force than was reasonably necessary. *Fernandez-Medina*, 141 Wn.2d at 456; *Thysell*, 194 Wn. App. at 426. The trial judge violated her constitutional rights by refusing to instruct on self-defense. *Fisher*, 185 Wn.2d at 848-49; *Jones*,

²⁵ The reversal was also based on the exclusion of expert testimony regarding what was then called “battered woman syndrome.” *Allery*, 101 Wn.2d at 597. Similar testimony was erroneously excluded in this case, as argued elsewhere in this brief.

168 Wn.2d at 720.

Some evidence showed that Bitterman repeatedly threatened to shoot Ms. Johnson and her sons.²⁶ RP (6/17/16) 41, 75, 80; Ex. 32; Ex. 25, p. 3, 4. He had five handguns and nine rifles. Ex. 32; Ex. 2 (2/4/15), p. 16. He was often armed with a loaded handgun, and had once considered shooting her while she worked in the kitchen. RP (6/17/16) 78-79; Ex. 32; Ex. 2 (2/4/15), p. 4, 23. Bitterman sometimes sat with his gun in an armchair; Ms. Johnson awoke in fear when when the chair creaked, fearing that he would come into her bedroom to shoot her. RP (6/17/16) 48; Ex. 32; Ex. 2 (2/4/15), p. 16, 23.²⁷

He also abused her physically, slapping her on the head every week, and pushing her on occasion. RP (6/17/16) 40, 81; Ex. 32; Ex. 2 (2/4/15), p. 18. He poked her in the chest while swearing and calling her names. RP (6/17/16) 40, 73, 81. Her son observed at least three incidents of “hostile physical contact.” RP (6/17/16) 81.

Ms. Johnson described herself as “a victim of domestic violence committed by [Bitterman].” Ex. 28; Ex. 30. She couldn’t sleep because she was afraid he’d shoot her in the night. RP (6/17/16) 47. She had called the police multiple times and sought more than one protection order, to no avail. Ex. 32; Ex. 2 (2/4/15), p. 2, 4, 17. Ms. Johnson was afraid her

²⁶ At one point, he even threatened her pets. Ex. 32; Ex. 2 (2/4/15), p. 24.

²⁷ At times, Bitterman prowled the house at night with his gun. RP (6/16/16) 179, 197; Ex. 24 p. 8.

husband would shoot her if he found out about the protection order requests. Ex. 32; Ex. 2 (2/4/15), p. 17-18. Police referred her to a domestic violence agency, but Bitterman stopped her from calling. Ex. 32; Ex. 2 (2/4/15), p. 24.

These are the “contextual circumstances” the trial judge should have considered. *George*, 161 Wn. App. at 99. They establish a danger that was ““hanging threateningly over [her] head; menacingly near”” in the months leading up to the alleged offense. *Id.* (quoting *Janes*, 121 Wash.2d at 241) (citation omitted).

Bitterman threatened her on the day before the incident, and the day before that, and the prior weekend. Ex. 32; Ex. 2 (2/4/15), p. 24. Immediately prior to December 23rd, he threatened to “blow [her] brains out.” RP (6/17/16) 48. Hoping to leave him, she found an apartment. RP (6/17/16) 47. The day before the alleged offense, she told him she intended to leave him. RP (6/17/16) 49; Ex. 32; Ex. 2 (2/4/15), pp. 11-12. He told her she couldn’t. RP (6/17/16) 49.

The following day, Ms. Johnson armed herself before going to tell Bitterman she was going to leave.²⁸ Ex. 32; Ex. 2 (2/4/15), pp. 3-4, 7. He told her she couldn’t leave or call anyone. Ex. 32; Ex. 2 (2/4/15), p. 7. She told him she was going to leave, and that he couldn’t stop her. Ex. 32; Ex.

²⁸ In contrast to her statement to the police, she testified that she saw the gun lying on the bed. RP (6/17/16) 52. She picked it up to hide it. RP (6/17/16) 53. Initially, she tried to hide it under the covers, but it made a visible bump. RP (6/17/16) 53. She walked into another room to find a hiding place, but Bitterman surprised her. RP (6/17/16) 53-54. Even under this version of the incident, the events that followed support her self-defense claim.

2 (2/4/15), p. 7.

Then he “was coming at me,” and she was afraid he might “[g]rab me around the neck.” Ex. 32; Ex. 2 (2/4/15), p. 6, 8. She also feared he might take the gun and use it against her. Ex. 32; Ex. 2 (2/4/15), p. 6, 10. She told the police that she was afraid for her life. RP (2/11/15) 27. Although she didn’t intend to shoot him and didn’t want to hurt him, she pointed the gun at his chest “where it would do the most good.” Ex. 32; Ex. 2 (2/4/15), p. 5, 6, 9, 23; RP (6/17/16) 55.

As she backed away from him, Bitterman tried to get the gun from his wife. RP (6/17/16) 54. Ex. 32; Ex. 2 (2/4/15), p. 8. The gun went off as he tried grab it. RP (6/17/16) 54; Ex. 32; Ex. 2 (2/4/15), p. 6.

This reading of the evidence provides at least “some evidence” of self-defense. *Werner*, 170 Wn.2d at 337. Ms. Johnson reasonably feared for her safety, armed herself before telling Bitterman of her plan to leave him, and aimed the gun at his chest when she thought he might grab her by the neck or take the gun and shoot her. Ex. 32; Ex. 2 (2/4/15), pp. 5, 6, 8, 9, 10, 23; RP (6/17/16) 54-55.

The court should have instructed the jury on her defense. *Id.* This is so even if the judge was required to “cherry pick certain facts from her statement to law enforcement and then almost nonsensically just take certain facts from her testimony and put those together.” RP (6/20/16)

19.²⁹ See *State v. Callahan*, 87 Wn. App. 925, 931-934, 943 P.2d 676 (1997). The law doesn't require a single coherent narrative. *Id.*

Callahan illustrates this principle. In *Callahan*, the defendant displayed a handgun in an “attempt[] to de-escalate [a] situation” where he was outnumbered and fearing for his safety. *Id.*, at 933. He denied aiming or intentionally firing the gun; however, the victim (Manning) “specifically testified that Callahan did aim the gun at his head.” *Id.* The *Callahan* court found this combination of testimony sufficient to raise self-defense: “Manning's testimony, coupled with Callahan's admission that he displayed the weapon, supports the inference that Callahan intentionally exercised force in self-defense.” *Id.*, at 933-934.

In fact, instructions on self-defense are required even where the defendant cannot remember the act causing another person's death. *State v. Hendrickson*, 81 Wn. App. 397, 914 P.2d 1194 (1996). In *Hendrickson*, the defendant grabbed a knife to scare her boyfriend after he hit her. The two struggled, and the boyfriend died of a knife wound. *Id.*, at 398-399. The defendant “did not know, did not realize, or did not remember, how [her boyfriend] received the fatal wound.” *Id.*, at 401. The *Hendrickson* court nonetheless found the evidence allowed “the inference that she intended to strike that particular blow.” *Id.*

The trial court should have instructed the jury on self-defense.

²⁹ As the court noted, her statements were “all over the board with regards to what happened.” RP (6/20/16) 15. This was likely a result of her dementia and the abuse she had suffered.

Werner, 170 Wn.2d at 337. Its failure to do so violated her constitutional right to present a defense. *Fisher*, 185 Wn.2d at 848-49; *Jones*, 168 Wn.2d at 720. Her conviction must be reversed and the case remanded for a new trial with proper instructions. *Jones*, 168 Wn.2d at 720.

II. THE TRIAL COURT VIOLATED MS. JOHNSON’S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE CRITICAL TO HER THEORY OF THE CASE.

Ms. Johnson sought to introduce expert testimony relating to (1) battered spouse syndrome, (2) diminished capacity, and (3) her history of traumatic brain injury and symptoms of dementia. The evidence was relevant and admissible, and should have been admitted. Its exclusion violated her constitutional right to present a defense.

A. The court must review the issue of Ms. Johnson’s right to present a defense *de novo* because it infringed a constitutional right.

The Supreme Court has issued conflicting opinions on the proper standard of review of discretionary decisions violating an accused person’s constitutional rights. The better approach is to review *de novo* a trial court’s evidentiary rulings (and other discretionary decisions) where they infringe constitutional rights.

Appellate courts review constitutional issues *de novo*. *Lenander v. Washington State Dep’t of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

The Supreme Court has applied the *de novo* standard to discretionary decisions that would otherwise be reviewed for abuse of

discretion. *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). In *Jones*, for example, the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.³⁰ Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id.*

However, the court has not applied this rule consistently. For example, one month prior to its decision in *Jones*, the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*—the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* and *Iniguez*. This is so because cases applying the more deferential abuse-of-discretion standard to errors that violate constitutional rights have not grappled with the reasoning outlined by the *Jones* and *Iniguez* courts. *See, e.g., State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). In *Dye*, the court

³⁰ Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

indicated that “[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review.” *Id.*, at 548.

The *Dye* court did not cite *Iniguez* or *Jones*. *Id.*, at 548. Nor did it address the reasoning outlined in those decisions. Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. See Petition for Review³¹ and Supplemental Brief.³² As the *Dye* court noted, the petitioner “present[ed] no reason for us to depart from [an abuse-of-discretion standard].” *Id.*³³ There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones*. *Id.*

In a more recent case, the court applied an abuse of discretion standard despite the petitioner’s claim of a constitutional violation. *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017). In *Clark*, the court announced it would “review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court.” *Id.* (internal quotation marks and citations omitted). Upon finding that the lower court had excluded “relevant defense evidence,” the reviewing court would then “determine as a matter of law whether the exclusion violated the constitutional right to

³¹ Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf> (last accessed 11/7/16).

³² Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 11/7/16).

³³ By contrast, the Respondent did argue for application of an abuse-of-discretion standard. See *Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20Obrief.pdf> (last accessed 11/7/16).

present a defense.” *Id.*

Although the *Clark* court cited *Jones*, it did not suggest that *Jones* was incorrect, harmful, or problematic, and did not overrule it. *See, e.g., Armstrong*, ---Wn.2d at ___ (“For this court to reject our previous holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it.”)

The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* court. *Id.* Nor does the *Clark* opinion mention *Iniguez*. Furthermore, as in *Dye*, the Respondent in *Clark* argued for the abuse-of-discretion standard, and Petitioner did not ask the court to apply a different standard. *See* Respondent’s Supplemental Brief, p. 16;³⁴ Petitioner’s Supplemental Brief.³⁵

This court should follow the reasoning in *Iniguez* and *Jones*. This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye* and *Clark*.

Constitutional errors should be reviewed *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This rule encompasses discretionary decisions that violate constitutional rights. A rule that would permit review for abuse of discretion would put the constitutional rights of an accused person in the hands of the individual judge presiding over that

³⁴ Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (last accessed 2/10/17).

³⁵ Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (last accessed 2/10/17).

person's trial.

Furthermore, the standard set forth in *Clark* makes the *de novo* standard meaningless: an abuse of discretion resulting in the exclusion of relevant and admissible defense evidence will always violate the right to present a defense. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. Such cases will turn on harmless error analysis, not on *de novo* review of the error's constitutional import.

Jones and *Iniguez* set forth the proper standard. Given the Supreme Court's inconsistency on this issue, review here should be *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.

B. Ms. Johnson had a constitutional right to introduce relevant admissible evidence.

The right to present a defense includes the right to introduce relevant and admissible evidence. *Jones*, 168 Wn.2d at 720. Evidence is relevant "if it has any tendency to make the existence of any consequential fact more probable or less probable." *Washington v. Farnsworth*, 185 Wn.2d 768, 782–83, 374 P.3d 1152 (2016) (citing ER 401). The threshold to admit relevant evidence is low; "even minimally relevant evidence is admissible." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010) (internal quotation marks and citation omitted).

Evidence that meets the "minimally relevant" standard can only be excluded if the state proves that it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720. No

state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

Here, Ms. Johnson sought to introduce expert testimony supporting her self-defense claim, establishing her diminished capacity defense, and explaining the reasons for her own inconsistent statements. The evidence was at least “minimally relevant,” and should not have been excluded. *Id.*; *Salas*, 168 Wn.2d at 669.

C. The court erroneously excluded expert testimony supporting Ms. Johnson’s self-defense claim, establishing her diminished capacity defense, and explaining how dementia contributed to the inconsistency between her statement and her testimony.

1. Expert testimony is admissible if it would be helpful to the jury.

A qualified expert may provide opinion testimony based on scientific, technical, or other specialized knowledge if it would “assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact, with “helpfulness” construed “broadly.” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)). The rule favors admissibility in doubtful cases. *Miller I*, 109 Wn. App. at 148.

In addition, the underlying facts supporting an expert opinion are “admissible for the limited purpose of explaining the basis for [that] opinion.” *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 579, 157 P.3d 406 (2007). This is so even if the underlying facts would otherwise be

inadmissible. *Id.*; ER 703.

Here, Ms. Johnson sought to introduce Dr. Gerlock's expert testimony on battered spouse syndrome, to support her self-defense claim.³⁶ CP 25-32, 138-155; RP (5/31/16) 57-58. She also offered the expert testimony of Dr. O'Donnell, to establish her diminished capacity defense and to explain the major discrepancies between her statements to the police and her testimony on the witness stand.³⁷ RP (6/17/16) 24-31, 87-98, 120. CP 28, 31. The court violated her right to present her defense by prohibiting both experts from testifying. *Jones*, 168 Wn.2d at 720.

2. The trial court should have admitted Dr. Gerlock's expert testimony regarding battered spouse syndrome.

The trial court excluded relevant and admissible expert testimony regarding battered spouse syndrome. RP (6/20/16) 29-43. This violated Ms. Johnson's right to present a defense. *Jones*, 168 Wn.2d at 720.

Ms. Johnson survived an abusive relationship prior to her marriage to Bitterman. Ex. 24, p. 4. She also suffered near constant abuse at Bitterman's hands, including death threats and physical assaults. RP (6/15/16) 35; RP (6/16/16) 174, 177, 179, 182-183, 195, 197, 200-202; RP (6/17/16) 40-41, 73-75, 80-81; Ex. 32; Ex. 2 (2/4/15), p. 3, 4, 18; Ex. 24 pp. 7-8. Despite this, Ms. Johnson stayed with her husband.

³⁶ Alternatively, Bustamante hoped to use the evidence to explain why his client felt it necessary to pick up and hide the gun despite her aversion to and lack of experience with firearms. CP 51-55; RP (6/15/16) 19-20.

³⁷ Bustamante also offered Dr. Gerlock's testimony for this latter purpose. RP (6/20/16) 36-43.

In such circumstances, “[e]xpert testimony on the battered person syndromes is critical because it informs the jury of matters outside common experience.” *Janes*, 121 Wn.2d at 239. Expert testimony allows the jury to “place[] itself in the defendant's position” so it can “properly assess the reasonableness of the defendant's perceptions of imminence and danger.” *Id.*; see also *Allery*, *supra*.

In *Allery*, the court approved the use of expert testimony offered to “(1) explain the mentality and behavior of battered women generally, (2) to provide a basis from which the jury could understand why defendant perceived herself in imminent danger at the time of the shooting, and (3) to explain why a battered woman remains in a relationship that is both psychologically and physically dangerous.” *Id.* at 596. Ms. Johnson sought to admit the testimony for the same reasons. CP 142-144.

The *Allery* court found “that expert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate... and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person.” *Id.*, at 597. Such evidence “may have a substantial bearing on the woman's perceptions and behavior at the time of the [offense] and is central to her claim of self-defense.” *Id.* The court found it “appropriate that the jury be given a professional explanation of the battering syndrome and its effects on the woman through the use of expert testimony.” *Id.*

Here, Dr. Gerlock should have been allowed to testify regarding

the dynamics of Ms. Johnson’s relationship with Bitterman. Like other batterers, Bitterman used “a system of intentional behaviors... to control [his] partner.” Ex. 24, p. 12. These included physical abuse, threats to kill Ms. Johnson, and other abusive and coercive behaviors such as name-calling, humiliation, isolation, and property destruction. Ex. 24, p. 1-10, 12-14.

Dr. Gerlock could have explained why it was especially important to focus on the months preceding the alleged offense, how the legal system’s failure to respond affects battered women, and why a battered woman might perceive threats and respond with violence or aggression, even though an outside observer would see no need for force. Ex. 24, p. 1, 10-11, 14, 15.

Dr. Gerlock would have testified that Ms. Johnson is a battered woman. Ex. 24, p. 10, 15. She would have explained that Ms. Johnson’s age, cognitive impairments, and physical difficulties made it even harder for her to escape this abusive relationship or otherwise “safely navigate her circumstances.” Ex. 24, p. 16.³⁸

The court excluded Dr. Gerlock’s testimony, apparently because of the inconsistencies between Ms. Johnson’s testimony and her statements to police. RP (6/16/16) 224; RP (6/20/16) 7-8, 15, 19, 29-35. The court also refused to allow Dr. Gerlock to testify for the limited purpose of

³⁸ Even without such impairments, the legal system’s failure to adequately respond to domestic violence can contribute to learned helplessness, “a condition in which the woman is psychologically locked into her situation.” *Allery*, 101 Wn.2d at 596–97.

explaining why Ms. Johnson might minimize or recant her prior allegations of domestic violence. RP (6/20/16) 36-37. The court apparently believed that Bustamante could not impeach his own client's testimony. RP (6/20/16) 38-39.

The court's rulings violated Ms. Johnson's right to present a defense. The evidence was relevant and admissible; it should not have been excluded.

Dr. Gerlock's testimony would have helped jurors understand why Ms. Johnson stayed in an abusive relationship instead of leaving, and why she felt she needed to arm herself when she went to tell him she was leaving. Ex. 24, pp. 15-16. It also would have helped jurors understand why she would recant or minimize her prior allegations of abuse. RP (8/19/16) 107. These are recognized purposes of expert testimony regarding battered spouse syndrome.³⁹ *Allery*, 101 Wn.2d 596–97.

The trial judge should have allowed Ms. Johnson to introduce the testimony in support of her self-defense claim. The jury should have received “a professional explanation of the battering syndrome and its effects.” *Allery*, 101 Wn.2d at 597. This would have allowed her “[t]o effectively present the situation as perceived by the defendant, and the reasonableness of her fear.” *Id.*

The error infringed Ms. Johnson's right to present a defense. *Jones*, 168 Wn.2d at 720. Her conviction must be reversed and the case

³⁹ In addition, Dr. Gerlock could have put into context Ms. Johnson's difficulties with dates and timeframes. Ex. 24, p. 15.

remanded for a new trial. *Id.*

3. The trial court should have admitted Dr. O'Donnell's expert opinion that Ms. Johnson's capacity to form intent was impaired.

A defense of diminished capacity negates the culpable mental state required for conviction. *State v. Marchi*, 158 Wn. App. 823, 835, 243 P.3d 556 (2010). It requires expert testimony that a mental disorder “*impaired* the defendant's ability to form the specific intent to commit the crime charged.” *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998) (emphasis added).⁴⁰

The expert need not opine “that the mental disorder actually did produce the asserted impairment at the time in question-*only that it could have.*” *State v. Mitchell*, 102 Wn. App. 21, 27, 997 P.2d 373 (2000), *as amended on reconsideration* (Apr. 17, 2000) (emphasis added).

The proffered testimony from Dr. O'Donnell met this standard. In his offer of proof, Bustamante indicated that the expert would say “that the cognitive difficulties *could have* impaired [Ms. Johnson's] ability to form intent.” RP (6/17/16) 92 (emphasis added). Dr. O'Donnell would have testified that “it's possible that” Ms. Johnson's condition “could have impaired her ability to form the intent, but not necessarily.” RP (6/17/16) 95.

This is all that was necessary under *Mitchell*. Because Ms. Johnson's condition “could have impaired” her ability to form intent, she

⁴⁰ In addition, “character evidence may be relevant and admissible to support an inference that the defendant lacks the necessary mental state.” *State v. Eakins*, 127 Wn.2d 490, 495, 902 P.2d 1236 (1995).

was entitled to present Dr. O'Donnell's testimony and to have the jury instructed on diminished capacity. *Id.* The trial court's refusal to permit Dr. O'Donnell to testify (and thus to allow the jury to consider the issue) violated Ms. Johnson's right to present a defense. *Id.*, at 29; *Jones*, 168 Wn.2d at 720.

4. The trial court erred by excluding expert testimony explaining how Ms. Johnson's dementia contributed to discrepancies in her statements.

Evidence is relevant if it has "any tendency to make the existence of any [material] fact...more probable or less probable." ER 401. Even "minimally relevant" testimony meets this standard. *Salas*, 168 Wn.2d at 669.

Any fact "bearing on the credibility or probative value of other evidence is relevant." *State v. Mollet*, 181 Wn. App. 701, 713, 326 P.3d 851 (2014), *review denied*, 339 P.3d 635 (Wash. 2014). Here, the trial court erroneously excluded evidence bearing on Ms. Johnson's credibility.

The defense sought to introduce expert testimony explaining how and why Ms. Johnson's dementia and other cognitive impairments created memory problems and confusion. RP (6/17/16) 89, 120, RP (8/19/16) 113-114, 119-120. These difficulties likely contributed to the major discrepancies between her statements to police and her testimony on the witness stand—discrepancies that likely made her seem dishonest in the eyes of the jury. Ex. 25, pp. 3, 4, 16.

According to Dr. O'Donnell, Ms. Johnson's neurocognitive

disorder (commonly called dementia) caused her difficulties with memory. Ex. 25, pp. 3, 4. These problems made her “unable to provide a coherent or consistent history” to Dr. O’Donnell. Ex. 25, p. 4.

Ms. Johnson “demonstrated difficulties in her episodic memory and seemed to confuse details from different events.” Ex. 25, p. 4. The problem affected her current, recent, and remote memory. Ex. 25, p. 3. Dr. O’Donnell believed it possible that paranoia, delusions, and confabulation may have contributed to the “significant changes in Ms. Johnson’s report of the incident.” Ex. 25, p. 16.

This testimony was critical to explain the significant differences between Ms. Johnson’s account to the police—which the state introduced in its entirety—and her testimony on the witness stand. Ex. 32; Ex. 2 (2/4/15); RP (6/17/16) 120; RP (6/17/16 Brittingham) 29-30. For example, she told the police that she intentionally armed herself by getting the gun from the drawer where it was kept, and that she brought it with her when she went to tell Bitterman she planned to leave him. Ex. 32; Ex. 2 (2/4/15). In her testimony, she told the jury she found the gun sitting on the bed and picked it up intending to hide it, but that Bitterman surprised her while she was looking for a hiding place. RP (6/17/16) 52-54.

Absent Dr. O’Donnell’s testimony on Ms. Johnson’s cognitive impairments, the jury was left with no explanation for the discrepancies between her testimony and her other accounts of the incident. The testimony was relevant and admissible to explain these discrepancies. ER 401; *Mollet*, 181 Wn. App. at 713. It would have been “helpful” to the jury

and should have been admitted. ER 401; ER 702; *Philippides*, 151 Wn.2d at 393. Its exclusion violated Ms. Johnson's constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

D. The errors are not harmless beyond a reasonable doubt.

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. The prosecution must show that any reasonable jury would reach the same result absent the error. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).⁴¹

Here, the state cannot make this showing. *Id.*; *Jones* 168 Wn.2d at 724. Ms. Johnson's primary theory was self-defense. She could not explain her actions without the context provided by Dr. Gerlock's expert testimony. She could not clarify why she gave such varying statements without testimony explaining her condition and its effects on her memory. She could not argue her case to the jury without proper instructions.

Like the defendant in *Allery*, who shot her husband as he lay on a couch, Ms. Johnson's behavior was likely inexplicable to the jury. The problem was further compounded by the dementia-induced discrepancies in her account of the alleged offense and by the court's refusal to allow her to rebut the state's impeachment evidence.

⁴¹ Even a nonconstitutional error requires reversal unless the state can show 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. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

The trial court should not have excluded admissible evidence relevant to Ms. Johnson's defense. The court's rulings violated her right to present a defense, requiring reversal of her conviction and remand for a new trial. *Jones*, 168 Wn.2d at 720.

III. THE FIREARM ENHANCEMENT AND OTHER AGGRAVATORS WERE ENTERED IN VIOLATION OF DUE PROCESS AND MS. JOHNSON'S RIGHT TO A JURY TRIAL.

A. The trial judge improperly coerced the jury into returning special verdicts.

The state and federal constitutions protect an accused person's right to a jury trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§21 and 22. Among other protections, these provisions secure "the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789, 791 (1978). A judge presiding over a criminal trial may not interfere in the jury's deliberative process. *Id.*, at 737.

Once deliberations begin, the court may not instruct the jury "in such a way as to suggest the need for agreement." CrR 6.15(f)(2). Any suggestion that a juror "should abandon his conscientiously held opinion for the sake of reaching a verdict invades [the jury] right." *Boogaard*, 90 Wn.2d at 736.

This is true "however subtly the suggestion may be expressed." *Id.* The rule is intended "to prevent judicial interference in the deliberative

process... [T]he jury should not be pressured by the judge into making a decision.” *Id.*, at 736.

A claim that judicial coercion affected a verdict may be raised for the first time on review. *State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011) (citing RAP 2.5(a)(3)). To prevail, the appellant must show a reasonably substantial possibility that the verdict was improperly influenced. *Id.*

In *Boogard*, for example, the trial judge asked jurors who had deliberated into the night if they thought they could reach a verdict within half-an-hour. When eleven of the jurors thought it possible, the court instructed the jury to continue deliberating for 30 minutes. *Boogard*, 90 Wn.2d at 735. The Supreme Court reversed the defendant’s conviction because the court’s questions “unavoidably tended to suggest to minority jurors that they should ‘give in’ for the sake of that goal which the judge obviously deemed desirable namely, a verdict within a half hour.” *Id.*, at 736.

Jury deliberations are not complete until the jury announces that it has reached a unanimous verdict. *Ford*, 171 Wn.2d at 190.⁴² In this case, the judge told jurors that “the special verdict forms need to be addressed,” that the forms “have to be filled out,” and that they should “go back to the jury room and deliberate on that, to what extent, and do that.” RP

⁴² *Ford* marked a departure: prior cases had suggested that deliberation continues until the verdict is filed and the jury discharged. *Ford*, 171 Wn.2d at 196-198 (Stephens, J., dissenting) (collecting cases).

(6/21/16) 47.

The court should not have ordered jurors to complete the blank verdict forms. The court's directive violated Ms. Johnson's constitutional right to a jury trial. *Boogaard*, 90 Wn.2d at 737.

The court also violated the Superior Court Criminal Rules, which provide as follows:

After jury deliberations have begun, the court *shall not instruct the jury in such a way as to suggest the need for agreement*, the consequences of no agreement, or the length of time a jury will be required to deliberate.

CrR 6.15(f)(2) (emphasis added). Jury deliberations had "begun" in this case; thus, the court should not have "instruct[ed] the jury in such a way as to suggest the need for agreement..." CrR 6.15(f)(2). By telling jurors that "the special verdict forms need to be addressed" or "filled out," the court ordered them to come to agreement. RP (6/21/16) 47. The error was compounded by the court's statement that they should "go back to the jury room and deliberate on that, to what extent, and do that." RP (6/21/16) 47. This implied that jurors need not engage in further deliberations.

To prevail on a claim of judicial interference with a verdict, the defendant must show a reasonably substantial possibility that judge improperly influenced the verdict. *Id.*, at 188-189. Here, there is a reasonably substantial possibility that the verdict was improperly influenced.

Because the jury had not yet announced it was unanimous as to the special verdicts, the court's directive improperly influenced the jury's

deliberations. *Id.* The special verdicts must be vacated and the case remanded for resentencing or for a new trial on the firearm enhancement, domestic violence allegation, and special allegation for the mandatory minimum. *Boogaard*, 90 Wn.2d at 737.

B. The firearm, domestic violence, and “force or means likely to result in death or intended to kill” special verdicts were entered in violation of Ms. Johnson’s right to juror unanimity.

1. The error may be raised for the first time on review.

A violation of the right to a unanimous verdict may be raised for the first time on appeal as a manifest error affecting a constitutional right. *See, e.g., State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).⁴³ An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

2. The court’s instructions permitted jurors to return non-unanimous special verdict forms.

An accused person has a state constitutional right to a unanimous jury verdict. Wash. Const. Art. I, § 21; *State v. Irby*, 187 Wn. App. 183,

⁴³ The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

199, 347 P.3d 1103, 1111 (2015), *review denied*, 184 Wn.2d 1036, 379 P.3d 953 (2016).⁴⁴ The rule applies to aggravating factors and sentence enhancements: the jury “must unanimously find beyond a reasonable doubt any aggravating circumstances that increase a defendant's sentence.” *State v. Nunez*, 174 Wn.2d 707, 709, 285 P.3d 21 (2012).

Here, the court did not explicitly instruct jurors on the need for unanimity as to the firearm enhancement, the domestic violence special finding, or the special allegation regarding use of force likely to result in death. CP 159-192. The court could have used instructions patterned on WPIC 160.00 and WPIC 300.07. *See* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 160.00 and 300.07 (4th Ed).

WPIC 300.07 makes the unanimity requirement clear: “In order for you to find the existence of an aggravating circumstance in this case, *you must unanimously agree* that the aggravating circumstance has been proved beyond a reasonable doubt.” WPIC 300.07 (emphasis added). Similarly, WPIC 160.00 instructs as follows: “In order to answer the special verdict form[s] ‘yes,’ *you must unanimously be satisfied* beyond a reasonable doubt that ‘yes’ is the correct answer.” WPIC 160.00 (emphasis added).

In the absence of an explicit instruction, jurors may have agreed to return each special verdict even if they were not unanimous. This is

⁴⁴ The federal constitutional right to jury unanimity does not apply to state criminal prosecutions. *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005) (citing *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)).

especially true because court's concluding instruction did explicitly require unanimity as to the substantive charge:

[Y]ou will first consider the crime of assault in the first degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.
CP 191.

The concluding instruction did not even mention the special verdict forms.
CP 191-192.

Jury instructions must make the relevant legal standard "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864 (internal quotation marks and citations omitted). To determine whether an instruction is misleading, courts look at "the way a reasonable juror *could have* interpreted the instruction." *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (*Miller II*) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

The instructions here did not make the unanimity requirement "manifestly apparent," because they did not explicitly direct jurors to reach unanimity before completing the special verdict forms. *Kyllo*, 166 Wn.2d at 864. A reasonable juror "could have interpreted" the court's instructions to require unanimity for conviction of first-degree assault but not for each special verdict. *Miller II*, 131 Wn.2d at 90.

Here, "given what the trial court knew," it could have corrected the

error by providing a unanimity instruction. *O'Hara*, 167 Wn.2d at 100.

The error may be raised for the first time on appeal as a manifest error affecting Ms. Johnson's right to a unanimous verdict. *Id.*; RAP 2.5(a)(3).

The firearm enhancement, domestic violence finding, and special aggravator for the mandatory minimum must be vacated. *Irby*, 187 Wn. App. at 199. The case must be remanded for a new sentencing hearing or a new trial on the aggravating factors. *Id.*

IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

The Court of Appeals should decline to award appellate costs because Ms. Johnson "does not have the current or likely future ability to pay such costs." RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Ms. Johnson is approaching eighty years old. CP 2. She has dementia as well as other disabilities. CP 26; Ex. 24, p. 13; Ex. 25, pp. 1, 3, 10. The trial court found her indigent at the beginning and end of the proceedings in superior court. CP 3, 295. That status is unlikely to change, especially with the addition of a felony conviction and the imposition of a lengthy prison term. CP 257 The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should

deny any appellate costs requested. RAP 14.2.

CONCLUSION

For the foregoing reasons, Ms. Johnson's conviction must be reversed and the case remanded for a new trial. In the alternative, the jury's findings on the firearm, domestic violence, and mandatory minimum special verdicts must be vacated and the case remanded for a new sentencing hearing.

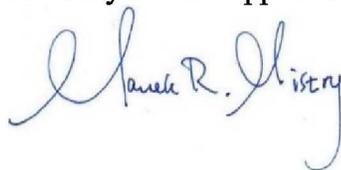
If the state substantially prevails, the Court of Appeals should decline to award costs.

Respectfully submitted on June 9, 2017,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Josephine Johnson
1347 Road M S.E., Space #28
Moses Lake, WA 98837

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 at gdano@grantcountywa.gov

I filed the Appellant's Opening 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 9, 2017.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

June 09, 2017 - 3:16 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Josephine Ellen Johnson
Superior Court Case Number: 14-1-00826-3

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