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Division III
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No. 346706

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOSEPHINE ELLEN JOHNSON,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR AND ISSUES

1. The trial court erred in refusing to instruct on self-defense.

- A. What is the proper standard of review?
- B. Was there any evidence of an imminent threat to Ms.

Johnson?

- C. If there was error, was it harmless?

2. The trial court erred by excluding evidence of battered spouse syndrome and dementia.

- A. What is the proper standard of review for evidentiary rulings affecting the defendant's evidence?
- B. Did the trial court properly exclude the evidence as irrelevant?
- C. Was there sufficient expert opinions to present the defense of diminished capacity to the jury?

3. The trial court erred in the unanimity instructions and sending the jury back to complete the special verdict forms.

- A. Did the trial court error in following long established law to ensure the jury completed its task?
- B. Did the trial court error in telling the jury the verdict must be unanimous?
- C. If these were errors, were they harmless?

II. STATEMENT OF THE CASE

Josephine Johnson shot her husband, Donald Bitterman. Mr. Bitterman had made a will with Ms. Johnson as the beneficiary and an advanced health care directive with Ms. Johnson as the decision maker. Beck RP 48-9. He also allowed her son to place his trailer on his property, using hook ups that were there. Beck RP 47. However, things were not going well. Mr. Bitterman had spoken to an Attorney about getting the son removed, or possibly a divorce. Beck RP 50-51.

On December 23, 2014 Mr. Bitterman was on the phone, talking to his sister. Beck RP 51. Ms. Johnson was there listening to the conversation. Ms. Johnson was upset listening to the conversation. Beck RP 52. The day went on and Mr. Bitterman went about his routine. He went outside to feed the chickens. When he came back in Ms. Johnson approached Mr. Bitterman and said "I don't want to do this, but I have to." Mr. Bitterman replied "what are you talking about." Ms. Johnson pulled out a gun and shot Mr. Bitterman. Beck RP 54. Ms. Bitterman ran out of her house to her son's trailer holding the gun. Beck RP 27. Her son took the gun from her and went in to render aid and put the gun on the counter. Beck RP 27 stop reading at 99.

Ms. Johnson gave a statement to the police. In her initial statement she claimed that she was going to move out, but that her husband was not

going to let her take her things. Ex 2, pg. 3. She claimed Mr. Bitterman was talking to his sister on the phone about her. *Id.* Ms. Johnson decided she could not take it anymore and went and got a gun out of a drawer in the bedroom. *Id.* at 4. She then claimed that Mr. Bitterman tried to grab the gun and it went off, shooting him in the abdomen. She had pointed the gun at his chest, where it would “do the most good.” *Id.* at 5. She claimed that Mr. Bitterman said she could not leave because she could not carry all of her stuff. *Id.* at 7. She came out of the kitchen with the gun and let Mr. Bitterman know that she was serious and she was not going to take it anymore. *Id.* at 10. She claimed that Mr. Bitterman would not let her have any of her property. Mr. Bitterman said “if you really want to do it you can do it” referring to leaving. *Id.* at 25. Ms. Johnson acknowledged she should not have shot Mr. Bitterman. *Id.*

Ms. Johnson was evaluated by Dr. April Gerlock, an expert in battered spouse syndrome. CP 9-24. Dr. Gerlock’s conclusion was that Ms. Johnson was a battered woman, and it was understandable why she did what she did. She did not say anything about inability to form intent. CP 23-24. Dr. Gerlock did not do any testing or evaluate Ms. Johnson in regards to her dementia, or did she modify her conclusions to take into account Ms. Johnson’s lack of accurate reporting in her report.

Brittingham RP 124-26. In response Ms. Johnson was evaluated by Dr. O'Donnell of Eastern State Hospital.

Dr. O'Donnell's report concluded:

Ms. Johnson has a documented history of deficits in memory, judgment and reasoning. However, it is important to note that even severe symptoms of a psychiatric illness rarely prevent an individual from having the capacity from knowing and intentional behavior. The individual whose knowledge, motivations and behavior are driven by the active symptoms of a mental disease typically maintains the capacity for knowing and intention action (e.g. a psychotic person may intentionally harm another individual because they believe their life is in danger when this in fact is not the case). Information from police reports and Ms. Johnson at the time of the alleged events that are consistent with the *capacity* for intent. However, actual intent is a matter for the court to decide.

Ex. 25 pg. 16.

Ms. Johnson testified at trial. She claimed the gun was just sitting on the bed. Sosa RP 52. She claimed she was going to hide the gun. *Id* at 53. In this version she picked up the gun by the trigger guard and went out of the bedroom to hide it. *Id*. She then ran into Mr. Bitterman. Mr. Bitterman then swiped at the gun and it went off. *Id*. at 54. Mr. Johnson was still the holding the gun by the trigger guard in her left hand. She said she never intended to shoot Mr. Bitterman. *Id*. at 55. She claimed that she never pulled the hammer back on the gun. *Id*. at 56. She claimed that she was not afraid of Mr. Bitterman. *Id*. at 61.

At the conclusion of the case the trial court gave instructions on assault in the first degree, as well as lesser included charges of assault in the second and third degrees. The jury returned a verdict of assault in first degree. They originally did not fill out the special verdict forms. The trial court sent them back to fill out the forms with whichever verdict they reached.

III. ARGUMENT

A. General overview of standard of review

Ms. Johnson devotes a considerable portion of her brief to the appropriate standard of review, citing many cases that apparently give conflicting standards for the same issue. The State agrees that standard of review case law in Washington has become confusing, with cases often giving sound bite treatment to the standard of review, without analysis or references to first principles. As some examples Ms. Johnson cites cases that state “we review constitutional issues de novo.” *E.g. State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). However, *Samalia* also notes that undisputed facts are verities on appeal and the application of the law to those facts is what is reviewed de novo. Confrontation clause issues, which are inherently constitutional, are subject to the discretion of the trial court and reviewed for abuse of discretion. *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017). Courtroom closures, which implicate constitutional

open court issues, are reviewed for abuse of discretion as long as proper procedures are followed. *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012).

A court reviews a magistrate's decision to issue a warrant for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In general, this decision should be given great deference. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A trial court's legal conclusion as to whether an affidavit establishes probable cause is reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). How a court gives great deference in general but reviews the conclusion de novo is confusing and unclear.

Recently the U.S. Supreme Court has provided an opinion that goes into great detail about the difference between de novo review and the abuse of discretion standard, including their reasons for being. *U. S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, ___ U.S. ___, ___ S. Ct. ___, No. 15-1509, 2018 U.S. LEXIS 1520 (2018). As the Supreme Court laid out most issues involve three basic questions. (1) What is the correct legal test to apply? This is a legal issue, subject to de novo review. (2) What are the historical facts of the case, addressing the who, what, why, where and how of a case? This is reviewed for abuse of discretion (sometimes phrased as clear error). (3) The third question is, do the historical facts

meet the legal test? This mixed question of law and fact is where confusion can arise.

The question the Supreme Court asked was what is the nature of the mixed question in the particular case, and which kind of court is better suited to resolve it? “When an issue falls somewhere between a pristine legal standard and a simple historical fact, the standard of review often reflects which judicial actor is better positioned to resolve it. Mixed questions are not all alike.” *Id.*, Slip op at 15. Some decisions require the court to expound upon the law by amplifying or elaborating on a broad legal standard. Clearly these are subject to de novo review. In other scenarios mixed questions involve immersing the “courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called multifarious, fleeting, special, narrow facts that utterly resist generalization.” *Id.* These type of cases are generally reviewed by an abuse of discretion standard. “In short, the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.” *Id.*

This kind of dichotomy is also reflected in Washington case law, although perhaps not spelled out quite as clearly as the Supreme Court did it in *U. S. Bank Nat'l Ass'n*. For example, the standard of review as to

whether to give a self-defense instruction is abuse of discretion if it is based on a factual dispute, but de novo if based on a ruling of law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The legal standard is that the defendant must point to “some evidence” from which a “reasonable person” could conclude they faced bodily harm. *Id.* Whether there is *some* evidence a *reasonable* person would conclude they faced bodily harm is a classic example of multifarious, fleeting, special, narrow facts that utterly resist generalization.

Nor does the trope constitutional issues are reviewed de novo really answer the question in a specific case. Certainly issues of constitutional law are reviewed de novo. But stuffing an issue into the category of “constitutional” does not change the fact that a trial court may be more institutionally suited to answer the question posed because they are dependent on ‘multifarious, fleeting, special, narrow facts that utterly resist generalization.’ Without citation Ms. Johnson asserts that the rule that constitutional issues are reviewed de novo encompasses discretionary decisions that violate constitutional rights. While obviously a ruling that *violates* constitutional rights should be reversed regardless of the standard of review, it does not follow that a discretionary decision that *touches upon* constitutional rights should be reviewed de novo. “Criminal law is so largely constitutionalized that most claimed errors can be phrased in

constitutional terms.” *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Just about anything can arguably fall under the term ‘due process.’ There has been no case the State is aware of that holds that due process requires de novo review of every issue that can be said to touch a constitutional provision, and there are many cases that hold just the opposite, that findings of fact are reviewed for abuse of discretion even if they touch upon a constitutional issue or that constitutional issues such as the confrontation clause or courtroom closure are reviewed for abuse of discretion, depending on the circumstance.

B. Self Defense

1. There was no evidence of an imminent threat in this case.

There is no dispute on the law of self-defense in this case. The issue is whether the facts would support a self-defense instruction. Thus review is under the abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The Court properly refused to give a self-defense instruction. Self-defense requires a showing of (1) reasonable apprehension of a design to commit a felony or to do some great personal injury, and (2) imminent danger of that design being accomplished. RCW 9A.16.050(1); *State v. Negrin*, 37 Wn. App. 516, 521, 681 P.2d 1287, *review denied*, 102 Wn.2d 1002 (1984). The "imminent danger" prong

requires the jury to find that the victim honestly and reasonably believed that the aggressor intended to inflict serious bodily injury in the near future. *Negrin*, 37 Wn. App. at 521. Thus, Washington uses a subjective standard to evaluate the imminence of the danger a defendant faced at the time of the act. However, there is no requirement of evidence of an actual physical assault to demonstrate the immediacy of the danger. *State v. Walker*, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985). Fear alone does not entitle a defendant to a self-defense instruction. *State v. Kidd*, 57 Wn. App. 95, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990); *State v. Bell*, 60 Wn. App. 561, 566- 567, 805 P.2d 815, review denied, 116 Wash.2d 1030, 813 P.2d 582 (1991) (a good faith belief that deadly force is necessary is not in itself sufficient to support a self-defense instruction). Some evidence of aggressive or threatening behavior, gestures, or communication by the victim is normally required to show the reasonableness of the defendant's belief that she was in imminent danger of great bodily harm. *Walker*, 40 Wash. App. at 663, 700 P.2d 1168.

Washington's subjective standard to evaluate the immediacy of the danger a defendant faced at the time of the act requires the court and the jury to evaluate the reasonableness of the defendant's perception of the imminence of that danger in light of all the facts and circumstances known to the defendant at the time she acted, including the facts and circumstances as she

perceived them before the crime. *State v. Wanrow*, 88 Wn. 2d 221, 235-236, 559 P.2d 548 (1977).

Neither in her statement to the police nor in her testimony did Ms. Johnson claim she was afraid of physical harm if she left Mr. Bitterman. She claimed he might not allow her to take her things, but refusal to give up property does not permit the use of deadly force. When specifically asked Ms. Johnson claimed she was not afraid of Mr. Bitterman. *Sosa* RP 61. The trial court speculated that some combination of Ms. Johnson's testimony and statement, if one were to pick and choose various elements of them, might add up to self-defense, but an actual review of what was stated show that they do not. Appellant does not point to any statement that shows Ms. Johnson was actually afraid Mr. Bitterman would injure her if she tried to leave. While there are many statements that, if believed, would support Ms. Johnson being afraid, she must actually, subjectively be afraid to claim self-defense. She never claimed she was.

Ms. Johnson's case is analogous to *State v. Walker*, 40 Wn. App. 658, 700 P.2d 1168 (1985). According to Ms. Johnson's statement to the police Mr. Bitterman was in his computer room playing solitaire when she went to check that the gun was there. She claims that a little later Mr. Bitterman was on the phone to his sister and was saying bad things about her. Ms. Johnson went into the room and obtained the gun. She came out

of the room with the gun pointed at Mr. Bitterman. They had a conversation about Ms. Johnson leaving while she held him at gun point. According to Ms. Johnson Mr. Bitterman tried to grab the gun from her and it went off.

“Some evidence of aggressive or threatening behavior, gestures, or communication by the victim before defendant's use of force is required to show that the defendant had reasonable grounds to believe there was imminent danger of great bodily harm.” *Walker* 40 Wn. App. at 663. Like Walker, Ms. Johnson’s “ultimate defense rested solely on the bare assertion that she feared for her life because of abuse she allegedly sustained in the past.” *Id.* at 664. In rejecting Ms. Walker’s argument the court stated “Mrs. Walker attempts to establish the concept that one who is a victim of family abuse is justified in inflicting deadly force on the abuser even where a confrontation is brought about at the instigation of the abused.” *Id.* at 665 “It is the perceived imminence of danger, based on the appearance of some threatening behavior or communication, which supplies the justification to use deadly force under a claim of self-defense.” *Id.*

Here there was no imminent danger. By at least one of her own admissions Ms. Johnson chose to provoke a confrontation with a drawn and leveled gun. Just as the defendant in *Walker* was not entitled to an

instruction on self-defense, Ms. Johnson is not so entitled. Ms. Johnson testified to many horrible things that Mr. Bitterman had allegedly done in the past. She never claimed she had an imminent fear when she pointed the gun at him. Because there is no evidence of fear of imminent harm the information on battered woman syndrome is irrelevant in regards to self-defense in this case.

2. Any failure to give a self-defense instruction was harmless beyond a reasonable doubt.

A person is guilty of Assault in the First Degree when, with intent to inflict great bodily harm, he or she assaults another with a firearm or any deadly weapon. RCW 9A.36.011. A person is guilty of Assault in the Second Degree when he or she assaults another with a deadly weapon, including a firearm. RCW 9A.36.021. Thus the difference between the two is that a person who commits Assault 1 does so with the intent to inflict great bodily harm. The person who commits Assault 2 only does it to assault. As a practical matter when the assault is done with firearms the difference is that the person who commits Assault 1 tries to hit a vital spot; the person who commits Assault 2 shoots to scare or maybe lightly injure, or only points the gun at someone to scare them.

There are three cases generally cited for the proposition that accident and self-defense are not inconsistent defenses. *State v. Werner*,

170 Wn.2d 333, 337, 241 P.3d 410 (2010); *State v. Callahan*, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997); *State v. Fondren*, 41 Wn. App. 17, 701 P.2d 810 (1985). This headline proposition is not quite accurate. There is significant case law for the proposition that self-defense is not available to those who testify the fatal blow was accidental. *State v. Hendrickson*, 81 Wn. App. 397, 914 P.2d 1194 (1996) (Collecting cases). Self-defense and accident are inconsistent defenses for the same discrete act, but may be applicable to different stages of a course of conduct. It may be reasonable, in certain scenarios, to draw or point a gun at someone, but not intend to fire it. The gun may then go off by accident. This is the basic scenario in each of the cases that hold self-defense and accident are consistent defenses. Each defense, self-defense and accident, are applicable to different steps of the process. Self-defense is applicable to the drawing and pointing of the gun. Accident is applicable to discharge of the gun. In each of the above cases the verdict showed that the jury found the defendant did not intend to inflict great bodily harm. *Werner* (Assault in the Second Degree), *Callahan* (Assault in the Second Degree), *Fondren* (Manslaughter in the Second Degree). None of these convictions involve an intentional discharge with the intent to cause great bodily harm.

In this scenario, where a reasonable person might point and threaten with a gun, but the actual shooting was accidental, accident is the defense to Assault 1, self-defense is the defense to Assault 2. (Or where a death actually occurs, accident would be the defense to intentional murder, and self-defense to manslaughter.) Here Ms. Johnson argued her theory of accident as a defense to Assault 1. The jury rejected it. They found that she pulled the trigger with the intent to inflict great bodily harm. Ms. Johnson only argued there was sufficient evidence for self-defense as to pointing the gun. She argued accident for the actual shooting.

This case is very similar to *State v. Hanson*, 58 Wn. App. 504, 793 P.2d 1001 (1990). There the defendant testified she obtained a gun to scare her alleged abuser. According to the defendant the abuser grabbed her arms and the gun went off, killing him. The trial court properly rejected evidence of battered woman syndrome.

Assume, for the sake of argument, Ms. Johnson was fully justified in pointing the gun at Mr. Bitterman. She never asserted, and never produced evidence, that she was justified in pulling the trigger with the intent to cause great bodily harm. She always asserted the gun went off by accident; the jury just did not believe her. The accident defense was for Assault in the First Degree. That is what the jury found she did. The self-defense argument was a defense to Assault 2, not Assault 1. Because the

jury was instructed to consider Assault 1 before Assault 2, and to consider Assault 2 only if it did not find her guilty of Assault 1, the jury would have never reached the issue of self-defense had the court given it, and any error in the failure to give a self-defense instruction was harmless beyond a reasonable doubt. Had the jury acquitted or been unable to agree on Assault 1, and convicted on Assault 2 this might be a different analysis, but they did not.

3. State v. Werner

In the preceding section of this brief the State addressed *State v. Werner* as an assault in the second degree case. In the text of that opinion the per curium Court states it is an Assault in the First Degree case. The Commissioners of both Division III and the Supreme Court took judicial notice that the *Werner* Court misstated the crime charged. *See* Commissioner's Ruling and Ruling Denying Review in this case. The facts of *Werner* only would support an Assault in the Second Degree charge, as the defendant fired into the ground, rather than at a person. The unpublished Court of Appeals Opinion in the case noted the crime of conviction was assault in the second degree. *State v. Werner*, noted at 154 Wn. App. 160, 2010 Wn. App. LEXIS 477 (2010) (Unpublished).¹

¹ The State does not cite the unpublished case as any sort of legal authority, but to only show what was considered. *See State v. Chacon Arreola*, 176 Wn.2d 284, 297, Fn 1, 290 P.3d 983 (2012).

"In cases where a legal theory is not discussed in the opinion that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)). "Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014).

This principle, that cases are not precedential for what they do not consider, is especially true in the *Warner* case. The difference between Assault in the First Degree and Assault in the Second Degree as it relates to the accident/self-defense claim was not discussed by the Supreme Court in *Werner*. This is understandable, since it was an assault in the second

degree conviction and the facts did not show an intentional shooting.

Werner specifically held that “under the facts of this case” *Werner* was entitled to a self-defense instruction. *Id.* at 335. It is not precedential in the case where someone is intentionally shot, as the jury found here.

Because the self-defense argument as framed in this case is only relevant to an Assault Two charge, and the jury never reached that charge, any error in failing to give a self-defense instruction was harmless.

C. The trial court properly declined a diminished capacity instruction.

“To support a diminished capacity instruction, there must not only be substantial evidence of the mental disorder, but the evidence must also explain the connection between the disorder and the diminution of capacity.” *State v. Stumpf*, 64 Wn. App. 522, 528, 827 P.2d 294 (1992).

“To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, 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). “It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime.

The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.” *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001).

There is no such showing here. Dr. O’Donnell’s report states exactly the opposite, that there is no connection between Ms. Johnson’s mental impairment and her ability to form intent. The fact that, in some hypothetical scenario, dementia could theoretically affect the ability to form intent is insufficient to show that it did.

State v. Mitchell, 102 Wn. App. 21, 997 P.2d 373 (2000), relied upon by Ms. Johnson, does not state otherwise. There the defendant punched a child for no apparent reason, then fought with officers who tried to arrest him. Dr. Muscatel, the expert in that case, said that the defendant suffered from a psychotic disorder that had the potential to interfere with his knowledge.

Unlike in *Mitchell* all the evidence here points to an intentional act where Ms. Johnson knew what she was doing. If Mr. Bitterman was believed, she intentionally shot him. If Ms. Johnson’s first story was believed she intentionally pointed the gun at him, and accidentally shot him. If the third story is believed she intentionally tried to hide the gun and accidentally shot him. Each of these scenarios show that she was acting

with intent to do something, thus capable of forming intent. While it is hypothetically possible that Ms. Johnson's dementia could lead her to be incapable of forming intent, Dr. O'Donnell was unable to forensically connect that hypothetical possibility to Ms. Johnson's actions. Simply having a mental condition that could, under some circumstances interfere with the ability to form intent, is not sufficient to establish diminished capacity. *State v. Atsbeha*, 142 Wn.2d at 918. There must be some evidence that the mental condition did interfere with that ability. There is none in this case. The trial court properly rejected the diminished capacity jury instruction.

D. The trial court properly excluded evidence of dementia to explain why Ms. Johnson's statements changed over time.

1. Legal Standards

An appellate court reviews a trial court's evidentiary rulings under an abuse of discretion standard. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). Non-constitutional evidentiary errors are reversible only if, within reasonable probability, they affected the trial's outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." Similarly, court's limitation of the scope of cross-

examination will not be disturbed unless it is the result of manifest abuse of discretion. However, the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002)

Determination of evidentiary relevance is within the broad discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Similarly, a determination of whether probative value outweighs substantial prejudice is within the broad discretion of the trial court and will only be reversed in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990). "Relevancy means a logical relation between evidence and the fact to be established. Any evidence which tends to identify the accused as the person guilty is relevant." *State v. Whalon*, 1 Wn. App. 785, 791, 464 P.2d 730 (1970) (citation omitted). Material evidence is also admissible. *Id.* Material evidence is evidence that logically tends to prove a defendant's connection with a crime either alone or from whatever inferences may be drawn when it is considered with other evidence. *Id.*

Even relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

Unfair prejudice is that which is more likely to arouse an emotional response rather than a rational decision by the jury. *Gould*, 58 Wn. App. at 183. Crucial consideration is given to the word “unfair” when applying ER 403 to prejudicial evidence. *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758 (1985).

2. Issues in this case

The primary issues in this case were (1) did Ms. Johnson intentionally shoot her husband and (2) did Ms. Johnson intentionally point the gun at her husband? Ms. Johnson gave conflicting stories regarding this issue. Ms. Johnson does not explain how telling the jury she was suffering from a form of dementia insufficient to cause a lack of ability to form intent would help the jury determine these issues. Credibility means “The quality that makes something (as a witness or some evidence) worthy of belief.” Black’s Law Dictionary, 9th ed. P. 423 (2009). Telling the jury that Ms. Johnson had dementia does not make her more worthy of belief. It may provide something of an explanation of why her story kept changing, but it does not assist the jury in determining whether the State has proved an issue in the case beyond a reasonable doubt. In other words, the State asserted, and the jury found, Mr. Bitterman’s description of events were true. Knowing that Ms. Johnson had dementia does not make it any more likely that the jury would have

believed one of her stories was an actual relation of events that occurred, or tell them which one to believe. If anything it would make the jury less likely to believe her.

Ms. Johnson's dementia was simply not relevant to show that she was accurately relating the facts of what happened in any way that was helpful to her. Perhaps if Dr. O'Donnell could say that Ms. Johnson was more affected by dementia when she provided her testimony than when she provided her statement and been able to quantify that, that information might have helped the jury decide which version could be true. However, there is no indication Dr. O'Donnell could or did make such an assessment. The jury ultimately had to decide which story was proven, Mr. Bitterman's, one of Ms. Johnson's or, potentially, none of the above. Knowing a potential reason for Ms. Johnson's multiple accounts does not help them do that. Whether she was intentionally lying or confabulating does not help the jury. The real reason to introduce evidence of Ms. Johnson's dementia was to invoke sympathy, an emotional response. The trial court properly exercised its discretion and declined to introduce this irrelevant information.

E. The trial court properly instructed the jury to fill out the special verdict forms.

RCW 10.61.060 provides “When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict...” “The rule is well settled that the court may, with proper instructions, recommit a verdict to the jury for their reconsideration, where the verdict which they have rendered is not in the proper form, where it is insufficient in substance, not responsive to or covering the issues or instructions, or is otherwise defective.” *State v. Dereiko*, 107 Wash. 468, 470, 182 P. 597 (1919). The trial court was simply following these well-established principles when it required the jury to complete the verdict forms.

The court did not coerce the jury; it did not suggest what the answer should be. It did not place a time limit on their deliberations or require them to come to a conclusion. If the jury had left the verdict forms blank, but signed them, signaling an inability to reach a verdict, the court would have accepted them.

As Ms. Johnson states, to prevail on a claim of judicial interference with a verdict, the defendant must show a reasonable probability that the verdict was improperly influenced. Brief of Appellant at 49, citing *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). This she cannot do. The special verdicts in this case followed as a matter of logic and

undisputed facts from the jury's verdict. There was no dispute that Mr. Bitterman and Ms. Johnson were married, they both acknowledged and testified to that fact. The fact that Mr. Bitterman was shot by Ms. Johnson was also undisputed, the question was her intent. Because the jury found she shot her husband intentionally, it also necessarily found that she was armed with a firearm that was readily available for offense or defensive use. He was shot in the stomach. There is no question this was force likely to cause death. It almost did. The special verdicts followed as a matter of inexorable logic the jury's unanimous verdict on the Assault in the First Degree charge and the undisputed evidence in the case.

F. The jury instructions properly informed the jury they must be unanimous to render a verdict.

Jury instructions are evaluated in the context of the instructions as a whole. *State v. Sublett*, 176 Wn.2d 58, 78, 292 P.3d 715 (2012). Jurors are presumed to follow instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Here the closing jury instruction informed the jury "Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff." There is absolutely nothing to indicate this would not apply to the special verdict forms, which are part of the verdict.

Even if the jury instructions were not clear, such error was harmless. *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990), held that harmless error applies in jury unanimity issues. A misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence. *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011). As discussed above, in this case the fact that Ms. Johnson was armed with a firearm and used force or means likely to cause death were uncontroverted. The fact that Mr. Bitterman and Ms. Johnson were married was also uncontroverted. The issue in this case was what was Ms. Johnson's intent when she shot her husband? The special verdicts flow as a matter of inexorable logic from the verdict of guilty on the Assault in the First Degree charge. Any error in the jury unanimity instruction regarding the special verdicts was harmless beyond a reasonable doubt.

IV. CONCLUSION

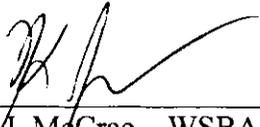
The trial court properly excluded the self-defense argument. Ms. Johnson never claimed she was in imminent fear. The battered spouse evidence was properly rejected as irrelevant. Even if the court should have given a self-defense instruction, such an instruction would have only been relevant for an Assault 2 charge, a charge the jury never reached. Ms. Johnson never offered an expert who could connect her dementia to the inability to form intent, a requirement for a diminished capacity

instruction. The court properly sent the jury back to complete the special verdict forms. The jury instructions also told the jury they needed to be unanimous. In any event those errors would be harmless if they were errors. The trial court should be affirmed in all respects.

Dated this 5th day of April 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: April 10, 2018.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

April 06, 2018 - 8:13 AM

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