NO. 45276-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DENISE LARKINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry Costello, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Under the rules of statutory construction, the rule of lenity and In re the Personal Restraint of Andress,[1] RCW 9A.32.050(1)(b) must be interpreted to apply only to assault predicates which are separate from the act causing the death.

2. Appellant's conviction of second degree felony murder violates his State and Federal constitutional rights to equal protection and fundamental fairness.

3. The court's refusal to instruct the jury on self defense violated appellant's right to present a defense.

4. The trial court's reasonable doubt instruction undercut the burden of proof and confused the jury's role in the judicial process.

5. The court's failure to vacate the second degree manslaughter conviction violated appellant's right to be free from double jeopardy.

Issues pertaining to assignments of error

1. The only way to avoid an absurd and nonsensical result and comply with the rule of lenity is to interpret the current second degree felony murder statute so as to permit conviction based upon the predicate crime of assault only if the assault is not the conduct which results in the

[1] 147 Wn.2d 602, 56 P.3d 981 (2002).

death. Should this Court so interpret the statute, and should the conviction be reversed where the predicate assault in this case was the conduct which caused the death?

2. Does the current second degree felony murder statute violate equal protection where there is no limit to the prosecutor's discretion to charge a higher crime for the same acts and no basis for treating similarly situated defendants differently? Further, does it offend fundamental principles of fairness to allow such unfettered discretion to arbitrarily select which defendant faces far greater punishment for the exact same act?

3. The trial court declined to give appellant's proposed self defense instructions. The court agreed that appellant presented some evidence that she subjectively feared she was in danger and that her fear was objectively reasonable, but the court concluded that the amount of force she used was not reasonably necessary. Where appellant presented expert testimony regarding her mental state from which the jury could find that she used the amount of force which under the circumstances appeared reasonably necessary to her, was the court required to instruct the jury on self defense?

4. The jury's role is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of

the allegation. Nonetheless, the jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal?

5. Principles of double jeopardy prohibit punishing a defendant twice for the same offense. Appellant was convicted of both felony murder and second degree manslaughter for the same offense. The court merged the offenses for sentencing purposes but refused to vacate the manslaughter conviction, stating that to do so would be unjust because the jury had returned that verdict. Where the existence of the second conviction constitutes punishment in violation of double jeopardy, must the manslaughter conviction be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

On December 19, 2011, the Pierce County Prosecuting Attorney charged appellant Denise Larkins with one count of second degree murder based on intent to kill and one count of second degree felony murder, with first or second degree assault as the predicate felony. CP 1-2; RCW 9A.32.050(1)(a); RCW 9A.32.050(1)(b). The State amended the information to include an alternative of third degree assault in the felony

murder charge. CP 3-4. The case proceeded to jury trial before the Honorable Jerry Costello. The jury returned a guilty verdict on the lesser included offense of second degree manslaughter on Count I and a guilty verdict on the felony murder charge. CP 176-77. Finding that the manslaughter conviction merged with the felony murder conviction, the court imposed a standard range sentence of 220 months on the latter. CP 232. Larkins filed this timely appeal. CP 274.

2. Substantive Facts

On the morning of December 16, 2011, Michelle Johnson had a dispute with her boyfriend, and she called her friend Denise Larkins, asking Larkins to come pick her up. 6RP[2] 581. Johnson and Larkins spent the day together running errands. 6RP 563, 581. They eventually arrived at Johnson's mother's house in Spanaway, where Johnson's daughter, Mika-Ann Jeter, lived. 4RP 338-39. Larkins became upset while there, saying more than once that she wanted to leave. 5RP 402. They finally left, agreeing to give Jeter a ride to her other grandmother's house to visit her father and brothers. 4RP 338; 5RP 403. Johnson drove because Larkins was unfamiliar with the area. 5RP 406.

[2] The Verbatim Report of Proceedings is contained in eight volumes, designated as follows: 1RP—5/29/13; 2RP—5/29/13; 3RP—5/3/13, 6/3-4/13; 4RP—6/5/13; 5RP—6/13/13; 6RP—6/17/13; 7RP—6/18/13; 8RP—6/19-20/13, 8/20/13.

Larkins and Johnson argued during the entire drive. Johnson was upset because Larkins mentioned Johnson's drug use in front of Jeter, and Johnson felt that was disrespectful. 4RP 346; 5RP 407. Johnson was the type of person who wanted to win in an argument, and she was pretty good at it. 5RP 404. She slapped Larkins while they were stopped at a gas station. 5RP 406, 423.

When they arrived at Jeter's grandmother's house, Johnson got out of the car and Larkins moved to the driver's seat. 4RP 347. Larkins started to drive away, but Johnson held on through the open driver's window, because her bags were still in the car. 5RP 411. Larkins stopped and stepped out of the vehicle, and the argument continued. 4RP 349. Johnson struck Larkins in the head twice and then got her bags out of the car. 4RP 350-51, 371; 5RP 413-14. Larkins did not fight back. Instead, she got back in the car and called 911 to report that she had been assaulted. 4RP 372-73; 5RP 414. Jeter went into the house, and Johnson started walking down the street. 4RP 374.

Neighbors and passersby noticed the argument. 4RP 304; 5RP 387, 450. More than one called police to report a domestic dispute. 4RP 306; 5RP 390, 427.

Larkins followed Johnson as she walked down the street. 4RP 272. She was still on the phone with 911, and Larkins told the 911

operator that she was following Johnson. 6RP 571. She said that Johnson had gone inside the house, maybe to get a gun, and when Johnson came out Larkins started following her. 6RP 604. The operator told Larkins to let Johnson leave and to find a street sign and pull over so she could identify her location. 6RP 571.

When Johnson entered the intersection, Larkins's car veered toward her and knocked her down. The front and back tires went over Johnson, and Larkins drove away. 4RP 274-76; 5RP 431. Johnson died at the scene as a result of blunt force injury to the head. 6RP 619.

Larkins, still on the phone with 911 and requesting assistance, kept driving. She pulled into a parking lot and waited for police. When Officer Eric Barry arrived, she flashed her lights and honked her horn to get his attention. 5RP 478.

Barry contacted Larkins and asked her what happened. Larkins said she had given Johnson a ride to the area of 43rd and J Streets, and she started feeling unsafe, because she believed Johnson's family members were involved with gangs and weapons. 5RP 483, 498, 504. Larkins said she and Johnson started to argue, then Johnson started punching her. Johnson had a bottle of Mike's Hard Lemonade in her hand, and she was swinging it at Larkins. When Johnson walked into the house, Larkins started to drive off, but then Johnson ran toward the car and started hitting

the passenger side of the vehicle. Larkins kept driving, and when she looked in the rearview mirror she saw Johnson in the street. 5RP 484-85. Larkins told Barry she did not think she ran over anything. She drove away because she felt unsafe, and she called 911. 5RP 486.

Larkins also told Barry that she has Post Traumatic Stress Disorder (PTSD) and takes prescribed medications. 5RP 486. She asked several times if she could take her medication or have some water, but Barry told her she could not. 5RP 506.

While Larkins was talking to Barry in the parking lot, other officers transported a woman who had witnessed Johnson and Larkins arguing in the street. The witness identified Larkins one of the people she had seen. 5RP 454-55; 487-88.

Barry then drove Larkins to the police station, and they continued their conversation. 5RP 489. Larkins told him that she was concerned "the Feds" were looking at her, because she had noticed weird cars following her. She thought "the Feds" were interested in her because of her boyfriend's drug dealing. 5RP 497. Larkins mentioned that she had used methamphetamine around 2:00 that morning. 5RP 498.

Detective Ryan Larsen interviewed Larkins at the police station. Larkins told Larsen that she and Johnson had been arguing all day. 5RP 564. She told Johnson several times that she wanted to go home, but

Johnson dismissed her concerns. When she accused Johnson of being a crack smoker, Johnson felt disrespected. Johnson hit Larking in the head twice. Instead of fighting back, Larkins called 911. 6RP 656. Larkins described her 911 calls to Larsen, and her description was consistent with the recordings of the actual calls. 6RP 567.

Larkins told Larsen that she had PTSD and suffered from anxiety and panic attacks. 6RP 595. Larkins said a couple of times during the course of the interview that her panic attack had kicked in. 6RP 570.

Larsen asked Larkins several times if she had hit Johnson, and Larkins said she had not. He asked if she had maybe bumped Larsen, and Larkins said absolutely not. Larkins said she had turned in front of Johnson, and as she drove away she saw in her rearview mirror that Johnson was lying in the road. Larkins thought it might have been a ploy and that Johnson was trying to set her up to come back. 6RP 571. Larkins said that one of the reasons she kept driving was that Johnson's "gangster ass kid with guns" was coming. 6RP 597. She thought everyone was going to come and harm her. Id. Larkins was surprised when Larsen told her that Johnson was dead. 6RP 598.

Larkins told Larsen that she was afraid of Johnson, and she had been dealing with her assaultive and argumentative behavior for 13 years. 6RP 594. Larkins knew that Johnson had been in a physical altercation

with her boyfriend that day, and earlier that week she had struck another woman. 6RP 594. Larkins also believed that Johnson's family members were associated with gangs, were violent, and had guns. She thought that Johnson might even have a gun and that she went into the house to get it. 6RP 594, 596.

At trial, Larkins presented a defense of diminished capacity. Dr. Gregg Gagliardi and Dr. Delton Young testified that they conducted forensic psychological examinations and determined that Larkins suffers from a host of mental health problems originating in early childhood, including complex PTSD. 7RP 701, 749. Both experts gave their opinion that Larkins's mental health disorders impaired her ability to form the intent to kill or cause bodily harm. 7RP 711, 718, 765-66.

The jury was instructed on intentional murder and the lesser included offenses of first and second degree manslaughter. It returned a guilty verdict on second degree manslaughter. The jury was also instructed on felony murder predicated on first, second or third degree assault, and it returned a guilty verdict on that count as well.

C. ARGUMENT

1. LARKINS'S CONDUCT DID NOT VIOLATE THE SECOND DEGREE FELONY MURDER STATUTE, AND HER CONVICTION MUST BE DISMISSED.

The felony murder statute is ambiguous and therefore must be interpreted in Larkins's favor. Under the rule of lenity, where a statute is ambiguous and thus subject to several interpretations, the Court is required to adopt the interpretation most favorable to the defendant. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Further, when interpreting a statute, a reviewing court must try to construe it in order to effect its purpose, but "'strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided.'" State v. Leech, 114 Wn.2d 700, 708-709, 790 P.2d 160 (1990) (quoting State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989)). In addition, because it is presumed that the Legislature does not intend absurd results, courts will not construe a statute to allow such a result. In re the Personal Restraint of Andress, 147 Wn.2d 602, 610, 56 P.3d 981 (2002); see State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1985).

After the decision in Andress, the Legislature amended the second degree felony murder statute to provide, in relevant part:

> A person is guilty of murder in the second degree when ... he or she commits or attempts to commit any felony, including assault ... and, in the course of and in furtherance of such crime or in

> immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants [.]

RCW 9A.32.050(1)(b); Laws of 2003, ch.3, § 1 (statute amended in response to Andress). Although the statute does not specify whether it applies to an assault which is the act resulting in death or only to separate assaults, the Washington State Supreme Court has examined the "in furtherance of" language in another context and held that it means that the death has to be "sufficiently close in time and place" to the underlying felony so as "to be part of the res gestae of that felony." Leech, 114 Wn.2d at 706.

In Andress, the Court applied Leech and held that the language of the felony murder statute requiring the death to be "in the course of and in furtherance of the predicate felony, or in immediate flight therefrom," meant that the Legislature could not have intended to include assault as a predicate felony, because:

> the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to that assault to be part of the res gestae of the assault. *It is nonsensical to speak of a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same.* Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide.

Andress, 147 Wn.2d at 610 (emphasis added). It was necessary to reject this "absurd" interpretation, the Court held, because otherwise "the 'in furtherance of' language would be meaningless as to that predicate felony" as "the assault is not independent of the homicide." 147 Wn.2d at 610. Indeed, as the Supreme Court later noted, the "felony murder statute is intended to apply when the underlying felony is distinct from, yet related to, the homicidal act." In re Bowman, 162 Wn.2d 325, 331, 172 P.3d 681 (2007).

Although the new statute specifically includes reference to assault as the predicate felony, it still suffers from the same infirmity as that which led the Andress Court to its inescapable conclusion. The statute still contains the same "in furtherance of" language which the Supreme Court found in Andress would be rendered superfluous by allowing conviction for felony murder based upon an assault which causes death. And the statutory language is still nonsensical if applied to such situations, because it still speaks of "a criminal act—an assault, that results in death as being part of the res gestae of that same criminal act," even though "the conduct constituting the assault and the homicide are the same." Andress, 147 Wn.2d at 610

Because the statute does not specify whether it applies to all assaults, or only to those which are separate from the act which causes the

death, but it still contains the "in furtherance of" language, it is ambiguous. Applying the rule of lenity and the rules of statutory construction against absurd results, and assuming the Legislature did not intend such results, the Court is required to interpret the statute to apply only to assaults which are separate from the act causing death. This is the only way to avoid rendering superfluous the "in furtherance of" language or requiring an absurd result. It is also the only way to honor the Legislature's apparent desire to include at least some assaults as predicate felonies for second-degree felony murder while following these mandates of statutory construction.

In response, the State may cite to State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), reversed on other grounds, 172 Wn.2d 671 (2011). In Gordon, Division One first declared, without explanation, that the second degree felony murder statute "is not ambiguous." Gordon, 153 Wn. App. at 529. The Court then stated that, if the statute was ambiguous, looking at the legislative history clarified that the Legislature "wants assault to be a predicate felony," which means it should be so. Id. This Court should decline to follow Gordon, because that case was not well-reasoned and does not withstand scrutiny.

First, Gordon ignored the very language of the statute in finding it was not ambiguous. The language used by the 2003 Legislature did not

clarify which assaults it intended to qualify as predicate felonies, because it still included the "in furtherance of" language in the statute. See Laws of 2003, ch.3. Further, in amending the statute, the 2003 Legislature specifically stated that the purpose of the second degree felony murder statute was to punish those who "commit a homicide in the course and in furtherance of a felony," which the Legislature said meant the death was to be "sufficiently close in time and proximity to the predicate felony." Laws of 2003, ch. 3, § 1 (emphasis added). Thus, the mere fact that the Legislature included the word "assault" in the statute does not answer the question raised by the statute's ambiguity, contrary to Division One's declaration in Gordon.

Further, Division One's ruling failed to apply the rule of lenity, despite the mandate to do so under such cases as Roberts, supra. See Gordon, 153 Wn. App. at 524-27. And it ignored the Supreme Court's holding in Bowman, supra, that the felony murder scheme is intended to apply "when the underlying felony is distinct from, yet related to, the homicidal act"—a distinction which is lost if the underlying felony is the assault which results in death but not if the underlying felony is an assault and a different act causes the death. Bowman, 162 Wn.2d at 331. Because Gordon is not well-reasoned and ignores fundamental law and principles, it should not be followed by this Court.

The only way to interpret the post-Andress RCW 9A.32.050(1)(b) to make sense of all of the language, avoid absurdity, and follow the rule of lenity as required is to hold that the statute applies only when the predicate assault is an assault separate from the act which caused the death. This Court should so hold and should reverse Larkins's conviction, because the evidence was insufficient to support a conviction under the statute.

2. ALLOWING PROSECUTION FOR SECOND DEGREE MURDER BASED UPON AN ASSAULT PREDICATE VIOLATES EQUAL PROTECTION PRINCIPLES AND DUE PROCESS MANDATES OF FUNDAMENTAL FAIRNESS.

Even if RCW 9A.32.050(1)(b) could be interpreted to apply to this case, application was still improper because allowing prosecution for second degree murder based upon an assault predicate violates the constitutional mandates of equal protection and the fundamental fairness requirements of the state and federal due process clauses.

Both Article I, §12, of the Washington constitution and the Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 US. 471, 518, 90 S. Ct. 1153, 25

L. Ed. 2d 491 (1970).[3] When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This is done by looking at the nature of the interests or class affected. State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Although physical liberty is an important liberty interest, the Supreme Court has held that it implicates only the "rational relationship" test. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), cert. denied sub nom Manussier v. Washington, 520 U.S. 1201 (1997). Under that test, the courts ask 1) whether the classification applies to all members of the class, 2) whether there was some rational basis for distinguishing between those within and those outside the class, and 3) whether the challenged classification bears a "rational relationship" to the legitimate state objective which must be the basis for the classification. In re Bratz, 101 Wn. App. 662, 669, 5 P.3d 755 (2000).

While identical treatment is not required in all circumstances, it is still required that any distinction "have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Further, even a seemingly valid

[3] Washington courts have thus far construed the Washington clause as "substantially identical" to the federal clause, and use the same analysis. See State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

law will violate equal protection if it is administered in a manner which unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

Here, Larkins is in a class of defendants who commit an assault which results in death. Under the statutes, the prosecution is given the astounding choice of charging such persons with either second degree felony murder or the much lesser crime of manslaughter, as the Supreme Court noted in Andress and Bowman, or, as in this case, the discretion to charge both and seek sentence only on the greater offense. Yet there is absolutely no distinction between the people who would be subject to the far disparate punishments and higher crimes, save for the prosecutor's unfettered discretion. The complete lack of any standards for treating similarly situated defendants who commit exactly the same acts so differently cannot possibly serve any legitimate state objective, so that the "rational relationship" test was not met and concepts of fundamental fairness were violated.

In response, the prosecution may again attempt to rely on Gordon, in which Division One held that there was no equal protection violation. Any such reliance would be misplaced. In Gordon, Division One relied on its own decision in State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048 (2008), review denied, 164 Wn.2d 1035 (2008), holding that it was

sufficient that the Legislature had declared that it intended to "[p]unish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony." Gordon, 153 Wn. App. at 546.

But Armstrong itself specifically recognized that equal protection is violated when a statutory scheme proscribes crimes that do not require proof of different elements. Armstrong, 143 Wn. App. at 338. Put simply, the Armstrong Court noted, "[w]hen the crimes have different elements, the prosecutor's discretion is not arbitrary, but is constrained by which elements can be proved under the circumstances." Id.

Further, in Gordon, Division One completely ignored the Supreme Court's holdings in a related, instructive area of the law. Applying equal protection principles and the need to limit the prosecution's discretion, the Supreme Court has held that, "where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute." State v. Shriner, 101 Wn.2d 576, 579, 681 P.2d 237 (1984) (quoting State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)); see State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982). Both the Court of Appeals and the Supreme Court have indicated that equal protection principles underlie this rule, because those principles are offended when the prosecutor is allowed to make a choice of which comparable crime to charge when one

is far more serious. State v. Pyles, 9 Wn. App. 246, 511 P.2d 1374, review denied, 82 Wn.2d 1013 (1973); State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960). This line of cases illustrates the equal protection problems with application of the second degree felony murder statute to Larkins in this case.

Further, the Supreme Court has stated that, under equal protection principles, the prosecution should not be permitted the discretion to choose "different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations." Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956).

For example, if a defendant commits an intentional assault and unintentionally but recklessly inflicts substantial bodily harm which results in death, the prosecution can charge either second degree murder or manslaughter, with the resulting differences in punishment and consequence. Similarly, with assault as the predicate felony for second degree felony murder, "a negligent third degree assault resulting in death can be second degree murder," although RCW 9A.32.070 provides that a person who with criminal negligence causes the death of another is guilty only of second degree manslaughter." Andress, 147 Wn.2d at 615; RCW 9A.32.070(1).

The unfairness which can result from such discretion is evident, and the harshness of punishing an unintentional homicide this way has been recognized by the Supreme Court itself. See Andress, 147 Wn.2d at 612. By giving the prosecution this expansive discretion to charge a higher or lesser crime for the same conduct, RCW 9A.32.050 as currently written violates the prohibitions against equal protection. This Court should reverse Larkins's conviction for second degree felony murder.

3. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON SELF DEFENSE VIOLATED LARKINS'S RIGHT TO PRESENT A DEFENSE.

At the close of evidence, defense counsel asked the court to instruct the jury on self defense. 7RP 832; CP 111-125. Counsel argued that there was testimony from Jeter that Johnson assaulted Larkins, and there was evidence from the detectives and the 911 tapes that Larkins was afraid Johnson had a gun and was reaching in her purse for it. The jury could find from this evidence that Larkins acted in self defense, and the instructions were therefore appropriate. 8RP 874.

The court acknowledged that there was evidence Larkins was physically assaulted, that she saw Johnson reach into her purse, possibly for a weapon, and that Larkins may have had reason to fear that Johnson's friends or family were following her. 8RP 879. It found, however, that there was no evidence that a reasonable person, even knowing what

Larkins knew, would have felt it was necessary to strike Johnson with a car. 8RP 879. The court declined to give the proposed self defense instructions. Id.

Each party is entitled to have the jury instructed on its theory of the case if there is evidence to support it. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Jury instructions are constitutionally sufficient only if they permit each party to argue its theory and properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The court's refusal to give the proposed instructions on self defense rendered the instructions in this case inadequate. The instructions that were given to the jury did not properly inform the jury regarding the lawful use of force or the State's burden of proof. Failure to give the proposed instructions denied Larkins her right to present a defense.

The trial court's determination of whether the defendant produced sufficient evidence to raise a claim of self defense is a matter of law. State v. Janes, 121 Wn.2d 220, 238 n.7, 850 P.2d 495 (1993). Where the trial court refuses to give a self defense instruction based on a ruling of law, review is de novo. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005) .

A defendant is entitled to instructions on self defense when the record contains some evidence, from whatever source, which tends to prove the defendant acted in self defense. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); State v. Roberts, 88 Wn.2d 337, 345, 562 P.2d 1259 (1977). Self defense is at issue when there is evidence that (1) the defendant subjectively feared that he was in imminent danger of injury; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997).

The defense's threshold burden of production is low. The defendant is not even required to present evidence which would be sufficient to create a reasonable doubt; rather, any evidence that the defendant acted out of fear of injury will suffice. Janes, 121 Wn.2d at 237; McCullum, 98 Wn.2d at 488; State v. Adams, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982). Only where no plausible evidence appears in the record upon which a claim of self defense might be based may the trial court refuse a self defense instruction. McCullum, 98 Wn.2d at 488; Adams, 31 Wn. App. at 395.

Evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing

all the defendant sees." Janes, 121 Wn.2d at 238. The degree of force which may be used in self defense depends on what a reasonable person would find necessary under the circumstances as they appeared to the defendant. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). It is not the amount of force the jury might say is reasonably necessary, but what appeared reasonably necessary to the defendant under the circumstances, which is relevant to a self defense determination. Adams, 31 Wn. App. at 396 (quoting State v. Tyree, 143 Wash. 313, 316, 255 P. 382 (1927)). Thus, in determining whether to give self defense instructions, the court must consider all the facts and circumstances known to the defendant and then determine what a reasonable person in the same situation would have done. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

In this case, the defense presented evidence that Larkins's perceptions of the circumstances surrounding Johnson's death were colored significantly by her mental disorder. Dr. Gagliardi testified Larkins has been diagnosed with complex PTSD originating in early childhood. 7RP 701. This disorder predisposes her to a number of other conditions, including depression, anxiety disorders, and substance abuse disorders, and it handicaps her interpersonal relationships. 7RP 701. She also has a serious substance abuse problem that figures prominently in this

situation. 7RP 702. Over the years she has been diagnosed with schizophrenia, experiencing psychotic symptoms like hallucinations and delusions, and depression. 7RP 702. With these conditions Larkins may periodically lose touch with reality or go in and out of a psychotic frame of mind. 7RP 704.

Because of the conflicted interpersonal situation between Larkins and Johnson, during which Larkins was actually assaulted, Larkins felt seriously threatened. 7RP 712. Gagliardi explained that one characteristic of PTSD is hyper-vigilance, which causes Larkins to always be on edge, afraid something bad is going to happen, and expect the worst from others. 7RP 712-13. Her PTSD impairs her ability to appraise danger and predisposes her to react impulsively and emotionally, not reflecting on what is going on. 7RP 713. Gagliardi explained that the tape of the 911 call Larkins made at the time showed she was very scared and disorganized to the point of not being able to follow directions to stop the car and identify her location. She also expressed a lot of beliefs that were clearly untrue or delusional. 7RP 720.

In addition, Larkins's verbal IQ is only 78, which is substantially below normal. Gagliardi testified that on that basis alone her ability to appraise situations is impaired. A conflict situation with high emotionality further degrades her ability to make decisions and foresee consequences.

7RP 715-16. Gagliardi testified it is very plausible that, because of Larkins's mental disorder, she could hit someone with a car and believe it would not hurt that person very much. 7RP 715. There was good reason to question whether she understood that hitting Johnson with her car would cause great bodily harm. 7RP 718, 739.

Like Gagliardi, Young explained that one feature of PTSD is hyperarousal, which in circumstances of stress, violence, or threat can cause panic and impaired thinking. 7RP 764. In this case, Larkins was in total panic with disorganized, fragmented thinking. 7RP 765. In that state her capacity to think through the nature of an act and the likely consequences was terribly impaired. 7RP 765-66. Young also testified that the 911 call confirmed Larkins's delusional mental state. 7RP 766-67. Young's opinion was that not only was her mental state impaired, but she was also defending herself, believing she needed to act quickly. 7RP 768.

The expert testimony regarding Larkins's perceptions of the circumstances surrounding the charged act allows the jury to make the "critical determination of the degree of force which a reasonable person in the same situation, seeing what she sees and knowing what she knows, then would believe to be necessary." See Janes, 121 Wn.2d at 239 (internal quotations and ellipses omitted). Viewing the evidence in the

light most favorable to the defense, the jury could find that Larkins perceived an imminent danger of great harm from Johnson. She not only believed that Johnson was reaching for a gun, but she also believed Johnson's gang-related family and friends were closing in on her. She was terrified and perceived the need to act quickly so that she could escape the situation. In her disorganized state of reasoning, she believed she could tap Johnson with the car to stop her without actually doing any serious harm. Given Larkins's perceptions of danger and necessity, the jury could find that she acted reasonably. Thus, the evidence meets the threshold standard of "some evidence" of self defense.

"The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense." McCullum, 98 Wn.2d at 488. Because Larkins produced some evidence that she acted in self defense, she was entitled to have the jury instructed not only on the law regarding self defense but also on the State's burden of proving the absence of self defense beyond a reasonable doubt. Walden, 131 Wn.2d at 473-74. The court's failure to so instruct the jury in this case denied Larkins her right to present a defense and relieved the State of its burden of proof.

These constitutional errors are presumed prejudicial, and the State must prove beyond a reasonable doubt that the errors did not contribute to the jury's verdict. Clearly the jury found the expert testimony in this case credible. Based on the evidence presented, the jury was not convinced that Larkins killed Johnson either intentionally or recklessly, returning verdicts of guilty on second degree manslaughter and felony murder. It is possible that, had the jury been properly instructed that the homicide was excused if Larkins was acting in self defense, it would have returned not guilty verdicts on all counts. The court's instructional error requires reversal and remand for a new trial.

4. THE REASONABLE DOUBT INSTRUCTION UNDERCUTS THE STATE'S BURDEN OF PROOF BY ERRONEOUSLY EQUATING THE JURY'S JOB WITH A SEARCH FOR THE "TRUTH" RATHER THAN A TEST OF THE PROSECUTION'S CASE.

The State proposed a reasonable doubt instruction informing the jury that, "If, from such consideration [of the evidence or lack of evidence], you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 62. Defense counsel proposed a reasonable doubt instruction without this language, arguing that it leads to argument that the jury's job is to find the truth, which is error. CP 89; 7RP 836-37. The court rejected the defense proposed instruction and instead gave the State's proposed instruction, including the contested

language. 7RP 837; CP 144. Defense counsel objected to the court's instruction. 8RP 903.

A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn. App. 103, 120, 286 P.3d 402 (2012) ("...truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the jury instruction blurs the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" as it was inaccurate and misleading. Bennett,

161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318. The pattern instruction reads as follows:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

WPIC 4.01.

The Bennett Court did not comment on the "belief in the truth" language. More recent cases demonstrate the problem with such language, however. In Emery, the prosecutor told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges" is that the defendants are guilty. Emery, 174 Wn.2d at 751. The Court noted that these remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The Court ruled that "[a]ddition of the last sentence [regarding an abiding belief in the truth] was unnecessary but not an error." Id. at 658. The Pirtle Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth. Instead, it looked at whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. Id. at 657-58.

Pirtle concluded that this language was unnecessary but not necessarily erroneous. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language fosters confusion about the jury's role and serves as a platform for improper arguments about the jury's role in looking for the truth. Emery, 174 Wn.2d at 760. It inevitably minimizes the State's burden and suggests that the jury should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). "[A] jury instruction

misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." Emery, 174 Wn.2d at 757 (quoting Sullivan, 508 U.S. at 281-82). Moreover, appellate courts have a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the State's burden of proof, confuses the jury's role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22.

5. THE COURT'S FAILURE TO VACATE THE MANSLAUGHTER CONVICTION VIOLATES DOUBLE JEOPARDY.

Defense counsel argued at sentencing that the manslaughter conviction should be vacated rather than merged with the felony murder conviction under double jeopardy principles. 8RP 975; CP 268-70. The court found that merger was appropriate. It ruled that there should be no mention of the manslaughter conviction in the judgment and sentence, but it refused to vacate the conviction, stating that would be unjust because the jury returned that verdict. 8RP 976. The "Confinement" paragraph of the judgment and sentence indicates that the manslaughter conviction (count

I) "merges with count II." CP 232. The court's failure to vacate the manslaughter conviction violates Larkins's constitutional right to be free from double jeopardy.

Both the federal and state constitutions contain protections against double jeopardy. U.S. Const. amend. V; Wash. Const. art. I, § 9. Both protect against (1) being prosecuted for the same offense after acquittal, (2) being prosecuted for the same offense after conviction, and (3) being punished multiple times for the same offense. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010).

For double jeopardy purposes, punishment encompasses more than just an imposed sentence. Even a conviction alone, without an accompanying sentence, can trigger double jeopardy protections. Id. (citing State v. Womac, 160 Wn.2d 643, 656–58, 160 P.3d 40 (2007)). A separate conviction has potential adverse consequences which may not be ignored. Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). For example, the presence of two convictions may impact the defendant's consideration for early release or result in an increased sentence for a future offense. The second conviction may also be used to impeach the defendant's credibility, and it "carries the societal stigma accompanying any criminal conviction." Id.

Thus, where a defendant is convicted of two crimes for the same offense, one of the convictions must be vacated to ensure that double jeopardy is not violated. Turner, 169 Wn.2d at 464-65. The judgment and sentence may not include any reference to the vacated conviction, and no reference may be made to the vacated conviction at sentencing. Id. "Double jeopardy prohibits courts from explicitly holding vacated lesser convictions alive for reinstatement should the more serious conviction for the same criminal conduct fail on appeal—by means of the judgment, orders, or otherwise." Id., at 465. In Turner, although the convictions on the defendants' lesser offenses were not actually reduced to judgment, double jeopardy was violated by a written order conditionally dismissing one defendant's lesser conviction, which was appended to the judgment and sentence, and the courts' statements at sentencing openly recognizing the validly of the vacated convictions. Id.

The court's refusal to vacate the manslaughter conviction in this case similarly violates double jeopardy, even though the conviction was not reduced to judgment. As in Turner, the reference to that conviction in the judgment and sentence (stating that count I merges with count II), as well as the court's statements at sentencing (that it would be unjust to vacate the conviction because the jury returned that verdict) openly recognized the validity of the manslaughter conviction. Larkins's second

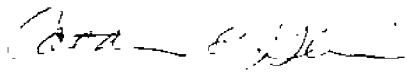
conviction for the same offense violates double jeopardy, and it must be vacated.

D. CONCLUSION

For the reasons discussed above, this Court must reverse the felony murder conviction and remand for a new trial on second degree manslaughter at which the jury is instructed on self defense and properly instructed regarding reasonable doubt. In the alternative, Larkins's second degree manslaughter conviction must be vacated.

DATED April 14, 2014.

Respectfully submitted,



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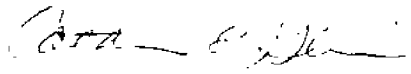

Catherine E. Glinski
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April 14, 2014

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