SUPREME COURT NO. 95603-1
COURT OF APPEALS NO. 75510-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL DAVID HENDERSON,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this Court to accept review of the decision designated in Part B of this petition.

B. DECISION.

In the unpublished decision dated February 12, 2018, the Court of Appeals reversed the conviction for murder in the second degree, concluding that the trial court erred in failing to instruct the jury on the defense of excusable homicide. See Appendix.

C. ISSUES PRESENTED FOR REVIEW.

1. Whether the Court of Appeals opinion holding that an excusable homicide instruction was necessary in this felony murder case conflicts with this Court's decisions that accident is not a defense to felony murder.

2. Whether the Court of Appeals opinion holding that an excusable homicide instruction was necessary in this felony murder case conflicts with this Court's long-standing rule that jury instructions are sufficient if they allow the defendant to argue his theory of the case, where the court's instructions required the jury to find an intentional shooting to convict Henderson.

3. Whether this case presents an issue of substantial public importance where current case law is contradictory and confusing as to what quantum of evidence is needed to support a defense-proposed instruction such as excusable homicide.

D. STATEMENT OF THE CASE.

A jury found Michael Henderson guilty of the crime of felony murder in the second degree while armed with a firearm and unlawful possession of a firearm. CP 71-73.

The facts presented at trial established that on October 11, 2015, 20-year-old Abubaker Abdi was socializing with friends. RP 207, 209, 252. They went to a restaurant and then proceeded to a gas station across the street. RP 263, 269. Abdi started an argument with Nekea Terrell at the gas station. RP 271-73.

Terrell was extremely drunk that evening. RP 133-34, 138. She was purchasing alcohol at the gas station when Abdi called her a "fat bitch" and told her to hurry up. RP 143. This started a prolonged verbal altercation between Abdi and Terrell, starting at the gas station and continuing across the street. RP 143-46.

An acquaintance of Terrell's, known as "Spoon," tried to calm her down. RP 147. One of Abdi's friends, Siyad Shamo, tried

to calm Abdi down. RP 276-77, 291. Terrell testified that she thought that there was going to be a fight between herself and Abdi, but Abdi did not display a weapon and made no mention of having a weapon. RP 163-65, 169, 173. She was not afraid of Abdi, and was ready to fight him. RP 184.

Michael Henderson was acquainted with Terrell because she had previously dated his cousin. RP 135. Terrell knew Henderson by his street name, "Evil." RP 135. Henderson joined the small group that was gathered around Abdi and Terrell as they continued arguing. RP 152, 165, 293. Henderson and Abdi exchanged profanity. RP 296. At that, Henderson drew a handgun out of his rear pants pocket, pointed it directly at Abdi, and pulled the trigger at close range. RP 296-98. The shooting was captured on surveillance video. Ex. 25, 26, and 27. After the shooting, Henderson can be seen casually strolling away, as Abdi lays on the ground, motionless. Ex. 25, 26 and 27.

The single bullet entered Abdi's left shoulder, travelled through his upper arm, reentered his body through the left chest wall, lacerated his left lung, lacerated his aorta and then lodged in his vertebral column. RP 515. Abdi suffered massive internal hemorrhaging into the chest cavity which likely caused death within

seconds. RP 517-19. He had no pulse when firefighters arrived on the scene. RP 383-88.[1] Blood and urine samples revealed that Abdi had a blood alcohol level of .058 and tested positive for a small amount of marijuana. RP 416-21.

Henderson testified in his own defense. RP 663. He admitted to shooting Abdi. RP 666. He characterized the Rainier Valley, where the shooting took place, as a "war zone." RP 669. He testified that he was carrying a gun for protection because he had been shot twice before. RP 668-69.[2] Henderson was not with Terrell that evening, but witnessed her argument with Abdi at the gas station. RP 676. He approached the group and told Abdi's friends that they should tell him to go away because he was drunk. RP 679. He testified that the argument continued, but that he was not involved in the argument. RP 680. He testified that Abdi suddenly became very aggressive and "lunged forward" and that is when Henderson decided to pull out his gun and fire a single shot at Abdi. RP 683. He testified that, "I fired a warning shoot. It just so happened it lined up in the direction of Mr. Abdi." RP 683. He

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[1] Firefighters were the first to arrive at the scene because the 911 caller reported a medical emergency, not a shooting. RP 383, 392-93.

[2] Although the trial court ruled that Henderson had opened the door to his gang affiliation with this testimony about his fear of gang violence, the prosecutor elected not to offer that evidence. RP 698-711, 741.

stated during direct examination that he did not intend to shoot Abdi but he did intend to fire a warning shot to "get everybody calmed down." RP 683-84. He left the scene knowing that Abdi had been shot. RP 685.

On cross-examination, Henderson admitted that he voluntarily joined the altercation. RP 728-30. He denied exchanging any words with Abdi. RP 736. He stated that he pulled his gun when Abdi "flinched" and "backed up to reach in his waist." RP 739. He did not see anything in Abdi's hands. RP 739. Henderson admitted that he intentionally pulled the trigger, and intentionally aimed the gun directly at Abdi from a short distance away, which is also apparent in the surveillance video. RP 742-43, 748; Ex. 25, 26, 27. When interviewed by police, he lied and denied any involvement in the shooting. RP 759-60, 787.

In redirect examination, he again stated that "I fired a shot, which was supposed to be a warning shot." RP 790. But then, when asked if he "purposely pulled the trigger" or "purposely pointed the gun at the victim" he answered "no." RP 790.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS OPINION CONFLICTS WITH THIS COURT'S PREVIOUS HOLDING THAT ACCIDENT IS NOT A DEFENSE TO FELONY MURDER.

Although the jury was instructed as to the defense of justifiable homicide, the Court of Appeals concluded that the trial court erred in refusing to give additional instructions as to excusable homicide. This is incorrect. This Court has long held that the felony murder doctrine does not require that the defendant intend to kill the victim, and is intended to punish accidental killings that occur in the course of a felony. As such, accident cannot be a defense to felony murder. Moreover, excusable homicide does not apply to felony murder because it requires that the defendant be committing a lawful act.

RAP 13.4(b) sets forth the considerations governing acceptance of review. Review is warranted if the decision of the Court of Appeals conflicts with a decision of this Court. The Court of Appeals decision in this case conflicts with cases from this Court that explain that the felony murder doctrine encompasses accidental killings that occur during the course of a felony.

The excusable homicide instruction that the Court of Appeals held should have been given, WPIC 15.01,[3] reads:

> It is a defense to a charge of [murder] [manslaughter] that the homicide was excusable as defined in this instruction.
>
> Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.
>
> The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 15.01. The comment to the WPIC 15.01 reads,

> Unlike other defenses, the "defense" of excusable homicide adds little if anything to the jury's analysis. "[T]he statutory definition of excusable homicide is merely a descriptive guide to the general characteristics of a homicide which is neither murder nor manslaughter. The characteristics of excuse do not have to be independently proved or found." State

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[3] There was no excusable homicide instruction in the defense proposed instructions that were filed with the trial court. However, in discussing jury instructions, defense counsel stated the following:

> Your Honor, so my record is complete, I made reference to WPIC 15.01, which reads, "It is a defense to a charge of murder that the homicide was excusable as defined in this instruction," et cetera. I had prepared -- and I thought I had sent to the Court and counsel -- a written instruction in that language. I don't find it in the packet that I have on my counter.
>
> I would like the record to reflect that I brought that instruction to the Court's attention. And with the argument I previously made, that instruction would have been requested if my argument had been granted. If it wasn't granted, it's now not available because it's not under WPIC 16 that's being pursued.

RP 837-38 (emphasis added). The trial court agreed that "It's in there." RP 838. Thus, it appears that the defense did request that WPIC 15.01 be given.

> v. Baker, 58 Wn. App. 222, 226, 792 P.2d 542 (1990). In many cases, an instruction on excusable homicide will confuse the jury without providing any meaningful guidance.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 15.01 (4th Ed).

Excusable homicide is not a defense to felony murder because the felony murder doctrine is intended to punish accidental killings committed during the course of a felony. The felony murder doctrine requires the State to prove a killing by the defendant and that the killing was done in connection with the underlying felony, in this case, assault in the second degree (with a deadly weapon). State v. Craig, 82 Wn.2d 777, 782, 514 P.2d 151 (1973). The State does not need to prove the state of mind of the defendant at the time of the killing beyond the mens rea of the underlying felony. Id. The State does not need to prove that the homicidal act was committed with malice, design or premeditation. State v. Bolar, 118 Wn. App. 490, 78 P.3d 1012 (2003). "Even if the murder is committed more or less accidentally in the course of the commission of the predicate felony, the participants in the felony are still liable for the homicide." Id. (citing State v. Leech, 114 Wn.2d 700, 708, 790 P.2d 160 (1990)). Indeed, this Court has long held that the very purpose of the felony murder doctrine is to "deter

felons from killing negligently or accidentally by holding them strictly responsible for killings they commit" in the course of committing enumerated felonies. Leech, 114 Wn.2d at 708. In State v. Harris, 69 Wn.2d 928, 932, 421 P.2d 662 (1966), abrogated by In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), this Court held that felony murder in the second degree could be predicated on assault. Id. at 933. In reaching its conclusion, the court explained the common law origin of the felony murder doctrine:

> As early as 1536, it was held that if a person was killed accidentally by one of the members of a band engaged in a felonious act, all could be found guilty of murder.

Id. at 931 (quoting The Felony Murder Doctrine and Its Application Under the New York Statutes, 20 Cornell L.Q. 288, 289 (1935); Mansell & Herbert's Case, 2 Dyer 128b (1536)). It would defeat the purpose of the doctrine to allow a defense when the defendant claims that he accidentally killed the victim during the course of a felony.

A homicide is "excusable" only when the defendant was committing a lawful act by lawful means. But a person engaged in a felony is not committing a lawful act by lawful means. If the jury concludes the defendant was committing a felony, and the victim

was killed in the course of that felony, the defendant is guilty of felony murder. If the jury concludes the defendant was not committing a felony, the defendant is not guilty. As the comment to WPIC 15.02 states, an excusable homicide instruction adds nothing to the jury's analysis.

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), does not support the Court of Appeals' conclusion that an excusable homicide instruction was required. Brightman claimed that in an altercation with the victim he tried to club the victim with a gun which discharged and killed the victim. Id. at 510. Brightman was alternatively charged with premeditated first degree murder and felony murder based on robbery. Id. at 512. The trial court refused to instruct the jury as to excusable homicide or justifiable homicide. Id. On appeal, this Court clarified that the proper defense for an accidental killing is excusable homicide, not justifiable homicide. Id. at 525. This Court noted that an excusable homicide instruction *might* be warranted on remand, without specifying whether the defense was applicable to premeditated murder or felony murder. Brightman did not discuss previous cases that hold that the felony murder doctrine is intended to punish accidental killings. Importantly, the conviction was reversed due to

an open courts violation. Id. at 518. This Court did not hold that failure to give an excusable homicide instruction was reversible error.

The Court of Appeals' reliance on this Court's decision in Reese v. City of Seattle, 81 Wn.2d 374, 503 P.2d 64 (1972), is puzzling. Reese was a wrongful death action involving the use of deadly force in making an arrest for a felony. Id. The felony murder doctrine was not at issue or discussed in Reese.

An excusable homicide instruction is not warranted when the charge is felony murder. When the defendant is charged with felony murder, the issues for the jury are whether the defendant committed the underlying felony, and whether the victim's death was caused during the course of the felony. If the jury concludes that the defendant was not committing a felony, then the jury cannot convict the defendant of felony murder. If the jury concludes that the defendant was committing a felony, then the homicide cannot be excusable. A felony is not a "lawful act," so instructing the jury that a homicide is excusable if committed during a "lawful act by lawful means" is both irrelevant and confusing. This Court should accept review and clarify that excusable homicide is

not a defense that should be presented to the jury when the defendant is only charged with felony murder.

2. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S LONG-STANDING RULE THAT INSTRUCTIONS ARE ADEQUATE IF THEY ALLOW EACH PARTY TO ARGUE THEIR THEORY OF THE CASE.

This Court has long adhered to the rule that jury instructions are adequate if they allow each party to argue its theory of the case and do not mislead the jury or misstate the law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006); State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). The Court of Appeals decision reversing Henderson's conviction is in error because the instructions were adequate to allow the defense to argue that he should be acquitted unless he intentionally shot the victim.

The underlying felony for the felony murder charge was assault in the second degree. The jury was instructed that "a person commits the crime of assault in the second degree when he assaults another with a deadly weapon." CP 57. The only definition of assault given to the jury was "an assault is an intentional shooting of another person, with unlawful force, that is harmful or offensive." CP 59.

Under the trial court's instructions, the State was required to prove that Henderson intentionally shot Abdi. Thus, Henderson was allowed to argue that he was not guilty because he did not intentionally shoot Abdi. The jury could not have convicted Henderson without finding beyond a reasonable doubt that Henderson intentionally shot Abdi. The Court of Appeals' decision fails to analyze the court's instructions or to acknowledge that a theory of an accidental shooting was not foreclosed to the defense. Although Henderson's primary theory of the case was that he shot Abdi in self-defense and he received a justifiable homicide instruction,[4] the instructions also allowed Henderson to argue that he did not intentionally shoot Abdi. In closing argument, defense counsel presented both theories:

> Now, whether he intended to shoot the gun in the air and his arm was hit or whether he intended to fire a shot in the direction of Mr. Abdi to make a loud noise and to frighten him or if he felt it was necessary to shoot him to prevent harm from coming, that doesn't change the legal relationship in the instructions you have been given.

RP 905. The trial court's instructions allowed Henderson to argue his theory of the case. The Court of Appeals erred, and

[4] CP 60.

disregarded long-standing precedent, by reversing the murder conviction.

3. WHAT QUANTUM OF EVIDENCE IS REQUIRED TO SUPPORT A DEFENSE INSTRUCTION IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE; THERE WAS NO CREDIBLE EVIDENCE THAT HENDERSON SHOT ABDI ACCIDENTALLY.

Finally, even if excusable homicide is legally available as a defense to felony murder in some circumstances, it was not factually supported in this case given the substance of Henderson's testimony and the video. RAP 13.4(b) provides that review should be accepted when the petition involves an issue of substantial public interest that should be decided by this Court. What quantum of evidence must be presented to warrant an instruction is an issue of substantial public interest that should be determined by this Court.

This Court has previously held that to be entitled to an instruction on a defense, the defendant must produce "some evidence" supporting the defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). While the threshold burden of production for a defense instruction is low, it is not nonexistent. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The

trial court must view the evidence in the light most favorable to the defendant. State v. Fisher, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). But the court may deny a defense-proposed instruction if there is "no credible evidence" to support it. Id. (quoting State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (emphasis added)). In State v. Thysell, 194 Wn. App. 422, 426, 374 P.3d 1214 (2016), Division 3 stated, "We hold that 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). This appears to conflict with this Court's decision in McCullum, which stated, "Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of the jurors on that issue." 98 Wn.2d at 488. However, McCullum cites to State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977) for that formulation, but that formulation was not used in Roberts. Rather, Roberts states that, "Where no credible evidence appears in the record upon which a claim of self-defense might be based, the burden has been effectively discharged and no instruction with regard to the issue need be given." Id. at 346.

In the present case, there was no credible evidence that the shooting was committed by accident during a lawful act. The defendant *admitted repeatedly* that he intentionally pulled the trigger and intentionally aimed toward Abdi at close range.[5]

> "I fired a warning shoot. It just so happened it lined up in the direction of Mr. Abdi."

RP 683.

> "Q. It's true, is it not, Mr. Henderson, that when you initially pulled the gun out, you pointed at Mr. Abdi?
> A. Yes."

RP 740.

> "Q. I'm going to back it up one more time. When you first pull the gun out, isn't it true you first raise it above your shoulder, point it at Mr. Abdi, and then reposition the gun below so as not to shoot Mr. Shamo?
> A. Yes, it is.
> Q. Because you were aiming the gun at Mr. Abdi?
> A. Yes, I was."

RP 750.

> "Q. You pointed your arm directly at Mr. Abdi and fired, correct?
> A. Yes."

RP 751.

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[5] The only definition of assault that the jury received was "An assault is an intentional shooting of another person, with unlawful force, that is harmful or offensive." CP 59.

"Q. So you did intentionally pull the trigger?
A. Yes."

RP 752.

In light of this testimony, Henderson's attempts to characterize the shooting as "a warning shot" or "an accident" were simply not credible. Moreover, the video of the shooting, which can be viewed frame-by-frame in Ex. 26, clearly shows Henderson pointing the gun directly at Abdi at close range and pulling the trigger, as he admitted. Shooting toward Abdi constituted assault in the second degree. There was no credible evidence supporting a defense that Henderson shot Abdi accidentally during a lawful act by lawful means. Thus, even if excusable homicide was a legal defense to felony murder based on assault with a deadly weapon, the Court of Appeals erred in concluding that Henderson was entitled to an excusable homicide instruction.

F. CONCLUSION.

This Court should accept review.

DATED this 14th day of March, 2018.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID HENDERSON, Appellant.	)	No. 75510-2-I DIVISION ONE UNPUBLISHED OPINION FILED: February 12, 2018

MANN, J. — Michael Henderson appeals his felony murder conviction for the shooting of Abubakar Abdi. Henderson argues that the trial court erred in failing to instruct the jury on both defenses of justifiable homicide and excusable homicide. While the trial court properly instructed the jury on justifiable homicide, we agree with Henderson that the trial court erred in failing to also instruct the jury on the defense of excusable homicide. We reverse and remand for a new trial.

FACTS

On October 11, 2015, Abdi instigated a verbal altercation with Nekea Terrell at a gas station. Both were intoxicated. Terrell and Abdi were both with a group of friends. The verbal altercation continued as Terrell, Abdi, and their friends moved across the street. Terrell and Abdi's friends attempted to calm them down. Terrell testified that

she thought that there was going to be a fight between herself and Abdi, and was ready to fight him.

Henderson knew Terrell, and at some point, joined the group that was gathered around Abdi and Terrell as they continued arguing. Henderson and Abdi exchanged words, and Abdi asked Henderson if he wanted "to get into it, too?" One of Abdi's friends stood between Abdi and Henderson. Terrell testified that Abdi was acting physically aggressive.

Henderson testified that Abdi "flinched" his shoulders and lunged forward, then stepped backward, and moved his arm towards his waist, seeming to be reaching for a weapon. Henderson drew a handgun out of his pants pocket, pointed it in the direction of Abdi, and fired. The bullet hit and killed Abdi. The shooting was captured on surveillance tape.

The State charged Henderson with second degree felony murder, based on assault in the second degree with a deadly weapon, and with unlawful possession of a firearm. At trial, Henderson requested a justifiable homicide instruction and an excusable homicide instruction. After hearing arguments from both sides, the trial court agreed to include only the justifiable homicide instruction. The jury found Henderson guilty of all charges. Henderson appeals.

ANALYSIS

Excusable homicide instruction

Where a trial court has refused to give a justifiable homicide, excusable homicide, or self-defense instruction, the standard of review depends upon why the trial court did so. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the trial

court's refusal was based on a factual dispute, we review the decision for abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). If the trial court's refusal to give the requested instruction was based on a ruling of law, our review is de novo. Brightman, 155 Wn.2d at 519.

At trial, Henderson argued that the inclusion of the excusable homicide instruction was supported under Brightman and State v. Slaughter, 143 Wn. App. 936, 941, 186 P.3d 1084 (2008). Henderson argued that "there is testimony given by Mr. Henderson that allows for consideration of both an excusable and an accidental and a justified claim for lawful use of force." The trial court agreed to instruct the jury on self-defense using deadly force based on Washington Pattern Jury Instruction (WPIC) 16.02.[1] The trial court declined, without explanation, to instruct the jury on the defense of excusable homicide based on WPIC 15.01.

The parties agree the trial court did not analyze whether the excusable homicide instruction was factually supported on the record. Without factual analysis or conclusions with which to review the trial court's decision, we consider de novo whether, as a matter of law, "excusable homicide" is available as a defense to felony murder, and whether the facts in this case support such a defense. Brightman, 155 Wn.2d at 519.

An excusable homicide defense is available only when "committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." RCW 9A.16.030; WPIC 15.01. A justifiable homicide defense is available when the homicide was committed in the lawful defense of the

[1] 11 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.02 (4th ed. 2016) (WPIC).

slayer when the slayer "reasonably believes he or she is threatened with death or great personal injury." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); WPIC 16.02.

The State argued before the trial court that Henderson could not request both a self-defense and an excusable homicide defense instruction. This was incorrect. Washington courts have repeatedly held instructions for self-defense and excusable homicide "are not invariably inconsistent and mutually exclusive." State v. Callahan, 87 Wn. App. 925, 932-33, 943 P.2d 676 (1997); Slaughter, 143 Wn. App. at 945. Inconsistent defenses may be permitted so long as sufficient evidence is presented by either party to affirmatively establish the defendant's theory. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); see also Brightman, 155 Wn.2d at 526, n.14 (acknowledging that if there is evidence that excusable homicide was predicated on self-defense both instructions are available).

The State now argues that excusable homicide should not be allowed as a defense to felony murder "because the felony murder doctrine is intended to punish accidental killings committed during the course of a felony." The State's argument misunderstands the use of excusable homicide in felony murder cases and the cases that have applied it. While it is true that the fundamental feature of felony murder is that the killing was an unintended consequence of the underlying felony, Washington courts do recognize the defense of excusable homicide in such cases when the defendant argues the felony was committed in self-defense but the killing was an accident.

In Brightman, our Supreme Court explained, "[e]xcusable homicide is the defense that by its plain language is intended to apply to accidental killings, while

justifiable homicide by its plain language applies to killings in self-defense. While a defendant may take actions in self-defense that lead to an accidental homicide, one cannot actually kill by accident and claim that the homicide was justifiable." Brightman, 155 Wn.2d at 525. Thus, in a case where a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable, homicide. Brightman, 155 Wn.2d at 525. The court explained,

> RCW 9A.16.020(3) establishes that the use of force is lawful when the person is about to be injured, so long as the force used is not more than necessary, a defendant could argue that his action that precipitated the accidental killing amounted to lawful self-defense under RCW 9A.16.020(3), even if he could not argue that an accidental killing was a justifiable homicide under RCW 9A.16.050.

Brightman, 155 Wn.2d at 525 n.13.

In Slaughter, this court also approved the use of excusable homicide as a defense to a felony murder charge predicated on assault. 143 Wn. App. at 941. In Slaughter, the trial court gave an instruction on excusable homicide and an instruction defining lawful force as it related to self-defense, explaining that the "lawful force" instruction was included to explain the term "lawful" in the excusable homicide instruction. Slaughter, 143 Wn. App. at 942. This court held the instructions were proper as they affectively allowed Slaughter to argue his theory of the case: "accidental homicide precipitated by an act of self-defense." Slaughter, 143 Wn. App. at 944. We see no reason to diverge from this precedent, and similarly hold that excusable homicide was legally available as a defense to felony murder in this case.

We must next decide whether the evidence supports instructing the jury on the defense of excusable homicide. A defendant is entitled to an affirmative defense

instruction when he or she has raised some evidence, from whatever source, to establish that the killing occurred in circumstances that meet the requirements of that defense. Brightman, 155 Wn.2d at 520; State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court must view the evidence in the light most favorable to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. Because the defendant is entitled to the benefit of all the evidence, his defense may be based upon facts inconsistent with his own testimony. Callahan, 87 Wn. App. at 933 (citing State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986)).

Here, the trial court included the justification defense, allowing the jury to find Henderson shot Abdi in self-defense. The question therefore is whether Henderson presented evidence to support his theory that he intentionally fired a warning shot but accidentally shot Abdi.

Henderson consistently testified at trial that he did not intend to shoot Abdi. During direct examination, Henderson testified, "When [Abdi] lunged and I saw him reaching, I fired a warning [shot]. It just so happened it lined up in the direction of Mr. Abdi."[2] When asked what his intention was, he said it was "Basically, to get everybody calmed down. You know what I'm saying? You fire a warning shot, everybody will stop arguing. You look around and get the attention of everybody." Throughout direct examination, Henderson testified that he intended to fire the gun, but did not intend to aim at and shoot Abdi.[3]

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[2] Report of Proceedings (RP) (June 1, 2016) at 683.
[3] RP (June 1, 2016) at 683-84.

This was reiterated on cross-examination, when the prosecutor asked Henderson what happened after he saw Abdi reach for his waist:

> Q. At that point, you pulled out your gun to fire a warning shot?
> A. Yes.
> Q. How were you intending on firing this warning shot, Mr. Henderson?
> A. In the air.
> . . .
> Q. It's true, is it not, Mr. Henderson, that when you initially pulled the gun out, you pointed at Mr. Abdi?"
> A. Yes.
> . . .
> Q. You moved the gun after initially pointing it at Mr. Abdi, correct?
> A. No.
> Q. So you pulled the gun, and you just fire?
> A. Yes.
> Q. And you believe you are firing in the air?
> A. Yes.
> Q. You feel your hand go up in the air, and you fire?
> A. Yes.[4]

The prosecutor continued,

> Q. And so when you pulled the gun out, you fully intended on firing, correct?
> A. Yes.
> Q. It wasn't an accident that you pulled the trigger?
> A. Yes.
> Q. And your testimony is that your intent was simply to fire it in the air?
> A. Yes.[5]

Henderson later admitted he aimed directly at Abdi before he fired, however, he maintained he intended only to fire a warning shot:

> Q. I'm going to back it up one more time. When you first pull the gun out, isn't it true you first raise it above your shoulder, point it at Mr. Abdi, and then reposition the gun below so as not to shoot Mr. Shamo?
> A. Yes, it is.
> Q. Because you were aiming the gun at Mr. Abdi?
> A. Yes, I was.
> Q. It was not a warning shot, was it, Mr. Henderson?

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[4] RP (June 1, 2016) at 740-41.
[5] RP (June 1, 2016) at 742-43.

A. It was a warning shot.
Q. It was a warning shot intended to warn Mr. Abdi that you had a bullet in the gun?
A. No, it was a warning shot to let him know to calm down whatever he was reaching for.
Q. You pointed your arm directly at Mr. Abdi and fired, correct?
A. Yes.
. . .
Q. You meant to fire the gun, did you not, Mr. Henderson?
A. I did fire the gun. I didn't mean to fire the gun, but I did fire the gun.
Q. Was it an accident that you fired the gun?
A. Yes, it was.
Q. Previously, you testified when you fired the warning shot that you intentionally pulled the trigger to fire that warning shot. Are you now changing your testimony?
A. No. I said I meant to fire the gun.
Q. I asked you earlier if you intentionally pulled the trigger to fire a warning shot, and you said yes. Now you are saying no?
A. Yes. I'm saying yes.
Q. So you did intentionally pull the trigger?
A. Yes.[6]

On redirect, defense counsel asked Henderson to clarify what happened, and Henderson stated, "Mr. Abdi came forward and Shamo tried to intervene. And I pushed him out of the way and fired a shot, which was supposed to be a warning shot."[7] Defense counsel then clarified and asked, "Did you purposely pull the trigger?" and Henderson said no.[8] Henderson also claimed that someone had bumped his arm, possibly causing him to shoot directly at Abdi.[9]

On appeal, Henderson argues that his testimony was sufficient to support the defense of excusable homicide because he testified that he intentionally acted in lawful self-defense to an imminent injury when he drew his gun and attempted to fire a warning shot, but that the weapon accidentally discharged while it was pointed at Abdi.

[6] RP (June 1, 2016) at 750-52.
[7] RP (June 1, 2016) at 790.
[8] RP (June 1, 2016) at 790.
[9] RP (June 1, 2016) at 789-90.

In this case, the instructions, as given at the trial court, only allowed the jury to find Henderson acted in self-defense in shooting Abdi. Henderson's requested instructions would have allowed the jury to determine that Henderson reasonably drew his gun and fired a "warning shot" in self-defense, and then accidentally shot Abdi. A defendant need only demonstrate "some evidence" in support of an affirmative defense instruction. Walden, 131 Wn.2d at 473; State v. Fisher, 185 Wn.2d 836, 851, 374 P.3d 1185 (2016). Henderson's testimony is evidence in support of the instruction and the jury was "entitled to believe" his testimony. Reese v. City of Seattle, 81 Wn.2d 374, 384, 503 P.2d 64 (1972)

The State maintains excusable homicide is unavailable because Henderson testified he intentionally fired the gun. In Reese, our Supreme Court upheld the giving of an excusable homicide instruction even when "the firing of the gun was not by accident." 81 Wn.2d at 384. The court held excusable homicide was still available as a defense because "the officer was entitled to use deadly force" and the officer testified that he had "aimed at the tires intending to disable the vehicle in which the two occupants were fleeing, and that the shooting of Reese was not intended." Reese, 81 Wn.2d at 384. Thus, intentionally firing the gun does not bar the instruction.

Viewing the evidence in the light most favorable to Henderson, we hold there was some evidence to support the excusable homicide instruction, and the trial court erred in failing to include it. A trial court's failure to instruct the jury on a party's theory of the case, where there is evidence supporting that theory, is reversible error. State v. Birdwell, 6 Wn. App. 284, 297, 492 P.2d 249 (1972).

State v. Townsend

Henderson argues, for the first time on appeal, that this court should overturn State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) because it is "incorrect and harmful." State v. Kipp, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014) (before an established rule may be abandoned it must be shown to be both incorrect and harmful). In Townsend, our Supreme Court held it was error to inform jurors of possible sentencing during voir dire, specifically whether the death penalty was being sought. Henderson argues this rule is harmful because it results in the trial court unnecessarily excluding jurors that are otherwise qualified because they oppose the death penalty.

Although the State agrees that the rule in Townsend should be overturned, the State maintains Henderson waived this issue on appeal. We agree that the issue was waived. Moreover, it is not this court's role to overrule established Supreme Court precedent. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("Once [the Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts until [the Supreme Court overrules] it.").

Additional Assignments of Error

Henderson also argues the prosecutor committed misconduct during closing arguments and raises several other issues in his statement of additional grounds. Because we reverse on other grounds, we do not address these issues.

We reverse and remand for a new trial.

WE CONCUR:

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

March 14, 2018 - 11:35 AM

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