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SUPREME COURT
STATE OF WASHINGTON
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No. 97045-9

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOSEPHINE ELLEN JOHNSON,

Petitioner.

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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PROSECUTING ATTORNEY**

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TABLE OF CONTENTS

Page

A. IDENTITY OF RESPONDENT 1

B. ISSUES PRESENTED FOR REVIEW 1

1. Did the trial court error when it concluded there was no evidence of self-defense when there was no evidence of subjective fear and the defendant claimed she was not afraid of the victim? 1

2. If there was an error in not presenting a self-defense instruction, was it harmless given that the jury never reached the crime self-defense was applicable to? 1

3. Did the trial court err in excluding evidence of battered spouse syndrome when there was no connection to self-defense or diminished capacity? 1

4. Did the trial court abuse its discretion in declining to admit evidence of dementia when it was not helpful to the jury? 1

5. Should appellate courts review de novo anything that can tangentially be called "constitutional?" 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT WHY REVIEW SHOULD BE DENIED 5

1. There was no evidence of subjective, imminent fear or harm to Ms. Johnson, thus the court properly rejected the self-defense claim. 5

TABLE OF CONTENTS

Page

D. ARGUMENT WHY REVIEW SHOULD BE DENIED (continued)

2. There needs to be more than a diagnosis of mental illness to get to diminished capacity 6

3. The court properly excluded evidence of dementia as unhelpful to the jury. 7

4. The decision below did not conflict with *State v. Fisher*, 185 Wn.2d 836, 374 P.3d 1185 (2016). 7

5. The factual conclusions that touch upon constitutional issues are properly reviewed for abuse of discretion. 8

E. CONCLUSION 8

TABLE OF AUTHORITIES

Page

State Cases

State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001) 6

State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997) 5

State v. Fisher, 185 Wn.2d 836, 374, P.3d 1185 (2016).............................7

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992) 8

State v. Mitchell, 102 Wn. App. 21, 997 P.2d 373 (2000)...........................6

Statutes and Other Authorities

RCW 9A.16...8

A. IDENTITY OF RESPONDENT

The State of Washington is the respondent in this petition and plaintiff below.

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court error when it concluded there was no evidence of self-defense when there was no evidence of subjective fear and the defendant claimed she was not afraid of the victim?

2. If there was an error in not presenting a self-defense instruction, was it harmless given that the jury never reached the crime self-defense was applicable to?

3. Did the trial court err in excluding evidence of battered spouse syndrome when there was no connection to self-defense or diminished capacity?

4. Did the trial court abuse its discretion in declining to admit evidence of dementia when it was not helpful to the jury?

5. Should appellate courts review de novo anything that can tangentially be called "constitutional?"

C. 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.

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, 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, nor 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 for 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 intentional action (e.g. a psychotic person may intentionally harm another individual because they believe that their life is in danger when this in fact is not the case). Information from police reports and Ms. Johnson's account of the alleged events describe numerous examples of behavior on the part of 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 the first degree.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. There was no evidence of subjective, imminent fear of harm to Ms. Johnson, thus the court properly rejected the self-defense claim.

Ms. Johnson is correct that evidence of battered spouse syndrome would be relevant to explain the reasonableness of her fear. The problem with her self-defense theory is she never claimed she had imminent fear of Mr. Bitterman, reasonable or not. She introduced plenty of evidence that, if believed, had she actually been in fear, a jury could have found that fear reasonable.[1] She is simply lacking that first, subjective step.

As the Court of Appeals held, citing *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997), a subjective, imminent fear is necessary to claim self-defense. Because there was no evidence of subjective, imminent fear the evidence that such a fear might have been objectively reasonable is irrelevant.

In any event failure to give a self-defense instruction was harmless for the reasons discussed in the State's Court of Appeals brief.

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[1] The Court found at sentencing Ms. Johnson was not credible about these incidents.

2. There needs to be more than a diagnosis of mental illness to get to diminished capacity.

Ms. Johnson overstates the holding in *State v. Mitchell*, 102 Wn. App. 21, 27, 997 P.2d 373 (2000). In *Mitchell* the defendant had to know the person he was assaulting was a police officer, and he had just done an irrational and odd behavior by punching a child for no reason. Dr. Muscatel could say that it was possible *Mitchell* had diminished capacity based on paranoid schizophrenia. Notably there was absolutely no explanation for the defendant's actions.

Here Dr. O'Donnell opinioned that Ms. Johnson's reported actions were consistent with intentional action. While dementia in some scenarios could remove the ability for an intentional act, there was simply no expert opinion that that could have occurred here. The opposite is true, Dr. O'Donnell was of the opinion there was an intentional act, and no contradictory expert testimony. "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." *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626, 633 (2001). There was no expert offering the forensic application. There

simply is no evidence of diminished capacity. There is no conflict of cases, and no overriding issue for the Supreme Court to review.

3. The court properly excluded evidence of dementia as unhelpful to the jury.

In addition to the issues raised by the Court of Appeals decision, Ms. Johnson does not explain how evidence of dementia helps or hurts her credibility. She gave conflicting statements. Without expert testimony relating to when and how the dementia affected her when she made her original statement and her later one, the fact that she had some form of dementia was not helpful. In simple terms the jury was not in a position to evaluate whether her dementia affected her first statement, her second or both, and to what degree. It simply would not have helped the jury to decide any relevant fact.

4. The decision below did not conflict with *State v. Fisher*, 185 Wn.2d 836, 374 P.3d 1185 (2016).

There is no doubt the evidence to support a self-defense claim can come from the evidence produced by either side. The Court of Appeals did not hold otherwise. Instead it held, correctly, that there was no evidence from either party of the subjective element of self-defense. The decision below does not conflict with *Fisher*.

5. The factual conclusions that touch upon constitutional issues are properly reviewed for abuse of discretion.

"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). The standards of review, de novo, clear error, and abuse of discretion, are more about what court is the most competent to decide the issue, not whether something is constitutionally based or statutory. Indeed the categories do not lend themselves to easy definition. Self-defense is statutorily based, RCW 9A.16, yet the right to present a defense is constitutional. There are many areas of the law, some of which are described in the State's Court of Appeals brief, that touch upon constitutional rights, yet are reviewed for abuse of discretion or clear error. There is no conflict with other cases.

E. CONCLUSION

The Court of Appeals decision followed well established legal principles. There are no conflicting cases or significant legal issues for the Court to review. Even if there were, the record in this case is confused

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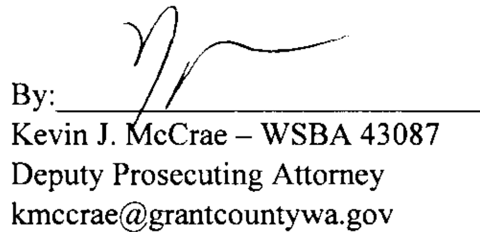
and unclear because of the shifting defense strategies, making it a poor vehicle to resolve any issues. Review should be denied.

Dated this 8th day of May, 2019.

Respectfully submitted,

GARTH DANO
Prosecuting Attorney



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CERTIFICATE OF SERVICE

That on this day I served a copy of Response to Petition for Discretionary Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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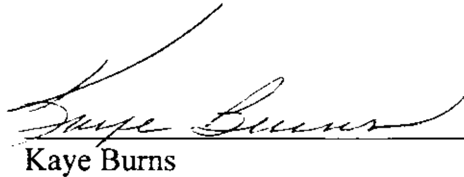

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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