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No. 95603-1

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner

v.

Michael David Henderson,

Respondent

BRIEF OF WACDL AS AMICUS CURIAE

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A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondent Michael David Henderson. WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has approximately 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. This brief is filed in pursuit of that mission.

B. ISSUE OF CONCERN TO AMICUS

1. Whether a person who stands accused of felony murder, where the underlying felony is assault, and produces evidence that his/her action stemmed from self-defense and resulted in an accidental killing is entitled to a jury instruction of excusable homicide under RCW 9A.16.030 as contemplated by both the legislature and the case law of Washington State?

C. STATEMENT OF THE CASE

Amicus incorporates here the statement of facts set forth in the decision of the Court of Appeals, State v. Henderson, 2 Wn. App. 2d

1031, 2018 WL 834216 at 1, 3-4.

D. ARGUMENT AND AUTHORITY

1. EXCUSABLE HOMICIDE IS A DEFENSE TO FELONY MURDER.

a. Legislative History and Legislative Intent Provide that Excusable Homicide is a Defense to Felony Murder

Felony murder is a legal doctrine of criminal liability for a death where the underlying felony offense presents a foreseeable danger to life and there is a direct link between the offense and the death. *See generally State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005). When the underlying felony is assault, as here, the analysis is unique and excusable homicide is a defense to felony murder.¹

Assault can give rise to a self-defense theory which is available as a defense to a charge of assault. *See e.g., State v. Dyson*, 90 Wn. App. 433, 952 P.2d 1097 (1998). When that is the case, the link between the offense

¹ Because this case concerns assault as the charged felony, the Court need not decide whether excusable homicide is, under appropriate circumstances, a defense to felony murder by felonies other than assaults. Those facts are not present here, and we ask the Court to defer this issue to another day. The only issue here is whether the defense of excusable homicide is straight-forward and available when the felony is assault. We note that while the felony charged in *State v. Brightman*, 155 Wn.2d 506, 526, 122 P.3d 150 (2005), was robbery, the defense argued that the alleged victim tried to rob and assault Brightman and – as here – Brightman’s argument was that he lawfully acted in self-defense during which the accidental killing occurred. This Court focused on this argument and held, “If, on remand, Brightman argues that he committed an excusable homicide that was precipitated by an act of self-defense, then the trial court will have to evaluate whether he has raised sufficient evidence to support jury instructions on those issues.”

and the death is broken for purposes of felony murder because the assault is not a felony, it is a lawful self-defense. And where self-defense is raised as a defense to assault where an unintentional killing has occurred, the legislature has designated excusable homicide as a proper defense in Washington. The statute so provides: “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.” RCW 9A.16.030.

Self-defense is a lawful act and if an accidental death occurs during the course of a lawful act, the legislature intended to excuse the homicide as an accident. Therefore, excusable homicide is a defense to assault felony murder as contemplated by the legislature.

The state argues, nonetheless, that if the jury is properly instructed as to the elements of murder, homicide by abuse or manslaughter, the definition of excusable homicide is unnecessary in any homicide case and potentially confusing. See state’s Supplemental Brief of Petitioner at 11. The state’s argument is mistaken for the following two reasons.

First, the state’s argument fails because necessity is not the standard for whether to provide a defense instruction and whether a defense is available does not turn on whether it is necessary. As stated in Mr. Henderson’s Supplemental Brief, a defendant decides the theory of his

defense, not the prosecution. A defendant at a criminal trial has a constitutional right to present his defense and is entitled to jury instructions on any defense theories supported by some evidence. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980); Const. art. I, § 22 (guaranteeing the right to present a defense); U.S. Const. amend. VI (same.)

Second – and most importantly -- when the underlying felony is assault in a felony-murder case, the excusable homicide instruction is necessary to give the jury a proper avenue to render their verdict based on its weighing of the evidence. The jury here was presented with some evidence of self-defense to the assault and an accidental shooting but did not receive instructions on excusable homicide. This was error. If a defendant acts lawfully in self-defense to a threat of bodily injury, an accidental killing as a result is not justified, but excused, and the proper instructions to the jury should have been excusable homicide. Justifiable homicide, unlike excusable homicide, does not apply to accidental deaths; it applies only where an intentional killing is a justified response to an imminent threat of injury. See *State v. Slaughter*, 143 Wn. App. 936, 186 P.3d 1084 *review denied* 164 Wn.2d 1033, 197 P.3d 1184 (2008) (in a case where defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable

homicide). Without the excusable homicide instruction, the jury had no means of acquitting based on a finding that the homicide occurred by accident during the course of self-defense.

Additionally, the legislature's intent as demonstrated in RCW 9A.32.050 cuts against the state's argument that felony murder is strict liability. There, the legislature created an explicit exception to felony murder:

Murder in the second degree.

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), 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; *except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:*

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

RCW 9A.32.050 [emphasis added].

This explicit exception to felony murder created by the legislature is further proof of legislative intent that felony murder is not strict liability and buttresses the conclusion by analogy that accident is a defense to felony murder.

Finally, the legislature provided its principles of construction that clearly state its intent and further provides this Court with guidance. RCW 9A.04.020 specifies that conduct without culpability should be safeguarded from condemnation as criminal conduct. The statute reads as follows:

RCW 9A.04.020

Purposes—Principles of construction.

(1) The general purposes of the provisions governing the definition of offenses are:

(a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;

(b) To safeguard conduct that is without culpability from condemnation as criminal;

(c) To give fair warning of the nature of the conduct declared to constitute an offense;

(d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

(2) The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title.

[Emphasis added.]

RCW 9A.04.020(1)(b) precisely illustrates the principles advocated by *amicus*. We urge this Court to uphold those principles by finding that when the underlying felony is assault in a felony murder charge, and evidence of self-defense is presented, that self-defense should not be condemned as criminal conduct. The defense of Excusable Homicide should be declared available to the felony murder charge.

b. Case Law Supports Excusable Homicide as a Defense to Felony Murder

Washington courts have consistently recognized that excusable homicide is an available defense to felony murder. In *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) this Court held that a defendant may take actions in self-defense and argue the homicide was an accident, thereby making available the defense of excusable homicide to felony murder.

The state nonetheless argues *Brightman* does not support the assertion that accident is a defense to felony murder. See state's Supplemental Brief of Petitioner at 9-10. The state erroneously says:

[T]he trial court refused to instruct the jury as to excusable homicide or justifiable homicide...[o]n appeal this Court clarified in dicta that the proper defense for an accidentally killing is excusable homicide, not justifiable homicide, without specifying which alternative means of murder that defense would apply to.

Id. at 10. The state is wrong; it misreads *Brightman*.

The *Brightman* court was addressing the trial court's refusal to instruct the jury on justifiable homicide, it was not asked to address the trial court's refusal to instruct the jury as to excusable homicide. *State v. Brightman*, 155 Wn.2d at 514, 518. In addressing the refusal to give a justifiable homicide instruction, however, the court acknowledged the availability of excusable homicide as a defense to felony murder on remand. The court stated:

Thus, the trial court did not err in refusing to instruct the jury on justifiable homicide. If, on remand, *Brightman* argues that he committed an excusable homicide that was precipitated by an act of self-defense, then the trial court will have to evaluate whether he has raised sufficient evidence to support jury instructions on those issues.

State v. Brightman, 155 Wn.2d at 526.

Accordingly, in keeping with *Brightman* and this Court's

precedent, excusable homicide is an available defense to felony murder and the state is wrong to argue otherwise.

In *State v. Slaughter*, 143 Wn. App. 936, 186 P.3d 1084, *review denied*, 164 Wn.2d 1033, 197 P.3d 1184 (2008), as in *Brightman*, the court implicitly held that a defendant can argue his action precipitating an accidental killing amounted to self-defense even if he cannot argue that an accidental killing is a justifiable homicide, rather, the defense of excusable homicide is the proper defense.

The state proposes that *Slaughter* does not support the argument that accident is a defense to felony murder. See state's Supplemental Brief of Petitioner at 9-10. For its argument, the state offers the following:

Because an excusable homicide instruction was given in that case [the *Slaughter* case], there was no discussion of whether it was actually necessary, or whether it applied to both alternative means of murder.”

Id. at 11.

The state's argument is without merit. The absence of discussion about whether the excusable homicide instruction was necessary is not proof of anything. Rather, the fact that the excusable homicide instruction was actually given in a case where the defendant was charged with intentional second degree murder and second degree felony murder based on assault is evidence on its face that the excusable homicide defense is

available to defendants charged with felony murder.

In *State v. Craig*, 82 Wn.2d 777, 514 P.2d 151 (1973), where the defendant was charged with felony murder and robbery, the analysis of this Court supports the unique analytical differences between felonies such as robbery and felonies such as assault when they serve as the underlying felonies for a felony murder charge. The *Craig* court held that the state need only prove there was a robbery and a murder; it need not prove what the defendant was thinking or if he intended to commit robbery at the moment of the murder.

When considering this language in the analysis of assault as the underlying felony in a felony murder charge, if the assault was a lawful action in self-defense, the analysis shifts because the defendant's actions did not constitute a felony at all. In that scenario, where a killing has occurred, it is an available defense that the killing was accidental and therefore the defense of excusable homicide is available.

Here, the court of appeals below found, consistent with precedent, that a felony assault committed in self-defense renders available the defense of excusable homicide to a charge of felony murder. *State v. Henderson*, 2 Wn. App. 2d 1031, 2018 WL 834216 (2018) *unreported*.

The state asks this Court to “end the considerable confusion surrounding excusable homicide by holding that excusable homicide is not

a defense, and no excusable homicide instruction is required when the elements of murder, homicide by abuse or manslaughter are properly set forth in the “to convict” instructions. See state’s Supplemental Brief of Petitioner at 14.

What the state asks for would result in unjust outcomes where the underlying felony for a charge of felony murder is assault and would deny a person charged with the crime of felony-murder assault the right to a defense. If this Court accepts the state’s invitation, one unfortunate outcome, *inter alia*, will be that citizens who act lawfully in self-defense could face a charge and conviction of felony murder without the benefit of raising the defense of excusable homicide. This Court should reject that invitation and recognize its own precedent and the intent of the legislature that where the underlying felony is assault, excusable homicide is available as a defense.

C. CONCLUSION

Amicus urges the Court to affirm the Court of Appeals in this case, reversing the trial court and Mr. Henderson’s conviction for felony murder and remand for a retrial in which he can have the jury instructed on excusable homicide.

Respectfully submitted,

DATED this 24th day of August, 2018

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