

FILED
SUPREME COURT
STATE OF WASHINGTON
9/25/2018 3:16 PM
BY SUSAN L. CARLSON
CLERK

NO. 95603-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL HENDERSON,

Respondent.

**STATE'S RESPONSE TO BRIEF OF
WACDL AS AMICUS CURIAE**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ARGUMENT</u>	1
1. WACDL'S ARGUMENT REGARDING THE USE OF NON-DEADLY FORCE RESULTING IN ACCIDENTAL DEATH OF THE VICTIM IS BEYOND THE SCOPE OF THIS APPEAL	1
2. EVEN WHERE A CLAIM THAT LAWFUL USE OF NON-DEADLY FORCE RESULTED IN ACCIDENTAL DEATH IS PROPERLY PRESENTED, AN EXCUSABLE HOMICIDE INSTRUCTION IS UNHELPFUL AND UNNECESSARY	4
3. WACDL'S RELIANCE ON <u>BRIGHTMAN</u> ; <u>SLAUGHTER AND CRAIG</u> IS MISPLACED: NONE OF THOSE CASES SQUARELY ADDRESSED THE NECESSITY OF AN EXCUSABLE HOMICIDE INSTRUCTION UNDER THE POST-1975 HOMICIDE STATUTES	6
4. WACDL MISSTATES THE POLICY BEHIND THE FELONY MURDER DOCTRINE	7
5. THE STATE HAS NEVER ARGUED THAT FELONY MURDER IS A STRICT LIABILITY OFFENSE	8
C. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Anderson, 141 Wn.2d 357,
5 P.3d 1247 (2000)..... 8

State v. Brightman, 155 Wn.2d 506,
122 P.3d 150 (2005)..... 6

State v. Churchill, 52 Wash. 210,
100 P. 309 (1909)..... 3

State v. Craig, 82 Wn.2d 777,
514 P.2d 151 (1973)..... 6

State v. Gamble, 154 Wn.2d 457,
114 P.3d 646 (2005)..... 8

State v. Slaughter, 143 Wn. App. 936,
186 P.3d 1084 (2008)..... 6, 7

State v. Walden, 131 Wn.2d 469,
932 P.2d 1237 (1997)..... 2

State v. Walker, 136 Wn.2d 767,
966 P.2d 883 (1998)..... 2, 3

State v. Wanrow, 91 Wn.2d 301,
588 P.2d 1320 (1978)..... 8

Statutes

Washington State:

RCW 9A.16.030 9

RCW 9A.32.030 8

RCW 9A.32.050 7

Other Authorities

WPIC 15.01..... 1, 4, 5, 6, 7, 9
WPIC 16.02..... 1, 2
WPIC 17.02..... 1, 2, 4, 5, 7

A. INTRODUCTION.

Amicus curiae WACDL¹ posits that excusable homicide is a necessary defense where a defendant acts lawfully by using *non-deadly force* to repel a threat of mere *bodily injury* and accidentally kills the victim. See Brief of WACDL, at 4. The argument offered by WACDL is beyond the scope of this appeal because Henderson has never assigned error to the justifiable homicide self-defense standard, patterned after WPIC 16.02. Thus, the scenario posited by WACDL, the lawful use of non-deadly force, which would require an instruction patterned after WPIC 17.02, is not presented in this case. Moreover, WACDL fails to explain how WPIC 15.01 would be helpful to the jury in such a circumstance.

B. ARGUMENT.

1. WACDL'S ARGUMENT REGARDING THE USE OF NON-DEADLY FORCE RESULTING IN ACCIDENTAL DEATH OF THE VICTIM IS BEYOND THE SCOPE OF THIS APPEAL.

In this case, Henderson was charged with felony murder based on assault with a deadly weapon. He admitted to pointing the gun at Abdi and pulling the trigger. He claimed that he acted in

¹ Washington Association of Criminal Defense Lawyers.

self-defense. The jury was instructed on justifiable homicide patterned after WPIC 16.02, which requires fear of death or great personal injury. Henderson has never assigned error to the trial court's giving the justifiable homicide instruction and not giving the lesser self-defense standard set forth in WPIC 17.02. Thus, WACDL's argument that an instruction defining excusable homicide is necessary in a felony murder based on assault in the second degree where the defendant uses non-deadly force that results in an accidental killing is beyond the scope of this appeal.

Moreover, the trial court properly instructed the jury as to self-defense. In State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997), this Court explained that the degree of force that may be used in self-defense is limited to what a reasonably prudent person would find necessary. While a person may lawfully use non-deadly force when in fear of bodily injury, "deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or 'great personal injury.'" Id. This Court explained that this principle was "well settled in Washington." Id.

A year later, this Court applied that principle again in State v. Walker, 136 Wn.2d 767, 966 P.2d 883 (1998). This Court stated,

“A simple assault or an ordinary battery cannot justify the taking of a human life.” Id. at 774 (citing State v. Churchill, 52 Wash. 210, 224, 100 P. 309 (1909)). While this Court clarified that a defendant might reasonably fear great bodily harm from an unarmed assailant, it reiterated that a defendant who uses deadly force must introduce some evidence of reasonable fear of great bodily injury to be entitled to a self-defense instruction. Walker, 136 Wn.2d at 777.

In this case, Henderson was charged with second degree felony murder based on only one of the alternative means of assault in the second degree: assault with a deadly weapon. CP 57. Moreover, the only definition of assault that was presented to the jury was “an intentional shooting.” CP 59. The only definition of deadly weapon given to the jury was that a firearm was a deadly weapon. CP 58. Henderson was charged with using deadly force with a deadly weapon. As charged, the jury was properly instructed that Henderson could only be justified in using deadly force with a deadly weapon if he feared death or great personal injury. CP 60.

Given that Henderson was charged with using deadly force with a deadly weapon by intentionally shooting the victim with a firearm, the defense posited in WACDL’s brief is inapplicable. In order to convict Henderson, the State was required to prove

beyond a reasonable doubt that he intentionally shot Abdi with a firearm, which is deadly force. This was not a case that where the jury was required to evaluate whether the defendant lawfully used non-deadly force to repel a simple assault, and that non-deadly force accidentally resulted in the victim's death.

2. EVEN WHERE A CLAIM THAT LAWFUL USE OF NON-DEADLY FORCE RESULTED IN ACCIDENTAL DEATH IS PROPERLY PRESENTED, AN EXCUSABLE HOMICIDE INSTRUCTION IS UNHELPFUL AND UNNECESSARY.

WACDL fails to explain how an instruction with the definition of excusable homicide instruction patterned after WPIC 15.01 would add to the jury's analysis in a case where the defendant has used non-deadly force that nonetheless results in death. WPIC 17.02, which is the general self-defense standard for assault, provides that "the person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident." If the jury found that the defendant used no more force than a reasonably prudent person would use in self-defense, the defendant would be

acquitted, even if the non-deadly force resulted in accidental death. If the jury found that the defendant used excessive force in this situation, then the defendant would be guilty of felony murder based on assault. WPIC 17.02 provides the defendant with all the law needed to assert the defense: that the defendant acted reasonably in fear of bodily injury, and used reasonable force. Such a defendant would be acquitted if he lawfully used force in self-defense and accidentally killed the victim. The question for the jury in such a case is not whether the death was accidental, but whether the force used was felonious.

WPIC 15.01 would add nothing to the jury's analysis, and would introduce confusing undefined concepts. Again, if the jury found that the defendant was truly acting in self-defense, and used no more force than necessary, the defendant's use of force would be lawful, and WPIC 17.02 itself would require acquittal. If the jury found that the defendant was truly acting in self-defense but used excessive force, then the defendant's use of force was not lawful under WPIC 17.02. WPIC 15.01 would only confuse the jury's analysis. The terms "any lawful act," "criminal negligence" and "unlawful intent" are broad concepts for which the jury is given no

guidance. WACDL simply asserts, but does not explain, how WPIC 15.01 aids in the jury's analysis.

3. **WACDL'S RELIANCE ON BRIGHTMAN, SLAUGHTER AND CRAIG IS MISPLACED: NONE OF THOSE CASES SQUARELY ADDRESSED THE NECESSITY OF AN EXCUSABLE HOMICIDE INSTRUCTION UNDER THE POST-1975 HOMICIDE STATUTES.**

Like Henderson, WACDL relies on State v. Brightman,² State v. Slaughter,³ and State v. Craig⁴ as approving excusable homicide as a defense to felony murder. However, none of these cases actually addressed the question presented here: whether the definition of excusable homicide is at all helpful in the wake of the 1975 amendments to the criminal code.

First of all, Craig predated the changes to the criminal code at issue here. As for Brightman, the holding was that the trial court did not err in refusing to give a justifiable homicide instruction. Brightman, 155 Wn.2d at 152. This Court opined that on remand that Brightman might be entitled to instructions that reflected his defense that he was using reasonable force to defend himself with

² 155 Wn.2d 506, 122 P.3d 150 (2005).

³ 143 Wn. App. 936, 186 P.3d 1084 (2008).

⁴ 82 Wn.2d 777, 514 P.2d 151 (1973).

non-deadly force that led to an accidental killing, but did not analyze how those instructions should read. Id. at 525. Finally, in Slaughter, the issue on appeal was whether an instruction that modified WPIC 17.02 needed to include a statement that the State bore the burden of disproving the defense. Slaughter, 143 Wn. App. at 943. Neither party assigned error to the trial court instructing the jury with WPIC 15.01, the definition of excusable homicide, and thus the propriety of that instruction was not at issue. This case presents this Court with an issue of first impression.

4. WACDL MISSTATES THE POLICY BEHIND THE FELONY MURDER DOCTRINE.

WACDL misstates the policy underlying the felony murder doctrine. WACDL asserts that “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 Brief of WACDL, at 2. However, RCW 9A.32.050(1)(b) defines felony murder in the second degree as occurring when a death results from “any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c).” There is no requirement that the underlying

felony presents a foreseeable danger to life. This Court never used the term “foreseeable” in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). Indeed, this Court stated “The intent of the legislature, in enacting the felony murder statutes, is ‘to punish those who commit a homicide in the course of a felony under the applicable murder statute.’” Id. at 468 (quoting State v. Wanrow, 91 Wn.2d 301, 308, 588 P.2d 1320 (1978)).

5. THE STATE HAS NEVER ARGUED THAT FELONY MURDER IS A STRICT LIABILITY OFFENSE.

WACDL misrepresents the State’s argument. WACDL suggests that the State is asserting that felony murder is a strict liability crime with no defenses. See Brief of WACDL, at 5. A strict liability crime is one in which the State is not required to prove any mental element. State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000). However, in proving felony murder the State must prove the mental element of the underlying felony. For example, in this case, the State was required to prove that Henderson intended to assault Abdi.

This Court should hold that the elements of murder and manslaughter together with the relevant self-defense standards

adequately convey the law to the jury without injecting the confusing definition of excusable homicide set forth in RCW 9A.16.030. This Court will not be creating a strict liability crime with this holding.

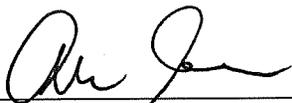
C. CONCLUSION.

This Court should disapprove of the use of WPIC 15.01, reverse the Court of Appeals and affirm Henderson's conviction.

DATED this 25th day of September, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

September 25, 2018 - 3:16 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95603-1
Appellate Court Case Title: State of Washington v. Michael David Henderson
Superior Court Case Number: 15-1-05587-5

The following documents have been uploaded:

- 956031_Briefs_20180925151432SC364373_5856.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was 95603-1 STATES RESPONSE TO BRIEF OF WACDL AS AMICUS CURIAE.pdf

A copy of the uploaded files will be sent to:

- Jim.Whisman@kingcounty.gov
- cjones@joneslegallgroup.net
- diane.kremenich@snoco.org
- greg@washapp.org
- griff1984@comcast.net
- marla@marlazink.com
- sfine@snoco.org
- wapofficemail@washapp.org

Comments:

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov

Filing on Behalf of: Ann Marie Summers - Email: ann.summers@kingcounty.gov (Alternate Email:)

Address:

King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9499

Note: The Filing Id is 20180925151432SC364373