

No. 95603-1

NO. 75510-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HENDERSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The court prohibited Michael Henderson from raising an available defense.

Michael Henderson was entitled to a jury instruction on any theory supported by the evidence, or lack of it. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980); *see* U.S. Const. amend. VI. As the accused person, Henderson was not required to elect a single theory of defense. *State v. Slaughter*, 143 Wn. App. 936, 945, 186 P.3d 1084 (2008). If the evidence supported multiple theories, Henderson was entitled to instructions on each of those theories.

“In a case where a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable . . . homicide.” *State v. Slaughter*, 143 Wn. App. 936, 942, 186 P.3d 1084 (2008). Henderson asked the court to instruct the jury on self-defense as well as accidental murder (excusable homicide). RP (6/2/16) 820-31; Resp. Br. at 15 (“it appears the defense did request that WPIC 15.01 be given”). The court provided self-defense instructions, but it denied the requested instructions on excusable homicide. RP (6/2/16) 831-36.

The State now claims that “It would defeat the purpose of the [felony murder] doctrine to allow a defense when the defendant claims

that he accidentally killed the victim during the course of a felony.” Resp. Br. at 17. This is hyperbole. Excusable homicide serves as a defense only if the death is not the result of the defendant’s intentional action, that is, only where death results from accident or mistake. Felony murder provides liability for intentional murders committed in the course of an enumerated felony, even though excusable homicide is an available defense.

Moreover, as *Slaughter* recognized, self-defense is the lawful act that precedes an accidental killing in an excusable homicide case like this. 143 Wn. App. at 942. That lawful act of self-defense was at issue here as well. Likewise, the charge in *Slaughter* was the same as here—felony murder based on assault. Our courts have indicated in other cases as well that excusable homicide is a defense to felony murder. *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) (approving use of excusable homicide instruction on remand for charges that include felony murder); *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 142, 385 P.3d 135 (2016) (quoting *Brightman* with approval for notion that accidental killing committed while acting in self-defense constitutes the defense of excusable homicide without limitation as to the type of homicide charged).

The State's alternative argument, that an excusable homicide defense is not factually supported, is meritless. As the State admits, defense-proposed instructions should be provided if there is any evidence supporting them and the court must view the evidence in the light most favorable to the accused. Resp. Br. at 20-21. The State also notes in its statement of the case that Henderson testified to facts that support an accidental killing. Resp. Br. at 5-6 (Henderson testified he did not intentionally pull the trigger). The State then selectively excerpts the record in its argument section. Resp. Br. at 21-22. But the jury, not the State, should be left to determine whether it found Henderson's testimony on cross-examination or on direct and redirect more credible, or even whether the testimony was internally inconsistent.

2. The outcome was prejudiced when the trial court approved of the prosecutor's argument that exceeded the court's instructions and called into question the reach of Henderson's sole defense.

In closing argument, the prosecutor must adhere to the law as set forth in the court's instructions. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). Misstatements of this law constitute misconduct. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015).

The prosecutor here misstated the law and encouraged the jury to go beyond the instructions to consider the appropriateness of the law by arguing in closing:

Is that really what we have come to? Is that really what the law is, that if a person can convince themselves that another person is armed and is threatening to them, that they can shoot them? Is that what these laws are intended for?

RP (6/2/16) 914-15. The prosecutor thereby called into question Henderson's only remaining defense—that the homicide was committed in self-defense.

Henderson objected to the prosecutor's misstatement of the law, but the court overruled the objection. RP (6/2/16) 914-15. Accordingly, the court increased the likelihood that the misconduct affected the jury's verdict. *State v. Swanson*, 181 Wn. App. 953, 964, 327 P.3d 67 (2014).

The State argues in its Response Brief that the prosecutor's argument was a fair response to defense counsel's argument, which according to the State first stretched the law on self-defense. Resp. Br. at 23. If the State believed defense counsel misstated the law, its obligation was to object, not to try to correct it with its own misstatement during rebuttal. Defense counsel appropriately objected

when the prosecutor took the liberty of encouraging the jury to decide the law for itself. The trial court should have sustained the objection.

3. The State concedes that the *Townsend* rule, which prohibits courts from informing jurors that a murder case does not involve the death penalty, is incorrect and harmful.

As set forth in Henderson's opening brief, the rule prohibiting courts from informing a jury in a noncapital case that the death penalty is not a possible sentence is incorrect because it does not serve the purpose for which it was created and causes the excusal of qualified jurors; and it is harmful because it leads to partial and less diverse juries. The State agrees. Resp. Br. at 11-12. The State also agrees that a new rule should be adopted. Resp. Br. at 12.

Nevertheless, the State claims that Henderson does not raise an error implicating his constitutional right to a fair trial by an impartial jury. Resp. Br. at 13. But that is precisely what Henderson argues. Op. Br. at 18 ("The *Townsend* rule harms Henderson and other defendants' right to a fair and impartial jury, violates the jurors' right to serve, and works a disservice to our system of justice.").

The rule prejudices Henderson's guarantee of a fair trial by an impartial jury for several reasons. First, research shows that, by excusing jurors who cannot impart judgment on one's death, the

remaining jurors are more likely to convict. Eisenberg, et al.,
Forecasting Life and Death: Juror Race, Religion, and Attitude Toward
the Death Penalty, *The Journal of Legal Studies*, Vol. 30, No. 2 at 283-
84 (Jun. 2001).¹ This is because the more a juror supports the death
penalty, the more likely she is to convict even a noncapital defendant.
Id.

The rule also leads to less diverse jury panels. Jurors that
disfavor the death penalty are more likely to be female or black.
Eisenberg, et al., *supra*, at 277, 279, 284. Excluding jurors because of
their view on the death penalty excludes these female and black jurors.
Moreover, a black juror is more likely to look critically at the State's
case than a white juror. Bowers, et al., *Death Sentencing in Black and
White: An Empirical Analysis of the Role of Jurors' Race and Jury
Racial Composition*, 3:1 *U. Penn. J. Const. Law* 171, 180-82, 187 (Feb.
2001).² This again leads to a more prosecution-friendly jury.

¹ Available at <http://www.jstor.org/stable/724674>; see *id.* at 286
(white jurors are roughly twice as likely to vote for death than black
jurors).

² Available at
[https://www.law.upenn.edu/journals/conlaw/articles/volume3/issue1/B
owersSteinerSandys3U.Pa.J.Const.L.171\(2001\).pdf](https://www.law.upenn.edu/journals/conlaw/articles/volume3/issue1/BowersSteinerSandys3U.Pa.J.Const.L.171(2001).pdf).

Tellingly, the State does not respond to these arguments. The Court should adopt a new rule that allows courts to inform juries in noncapital cases simply that the instant case does not implicate the death penalty. *See, e.g., State v. Richardson*, 2014 WL 6491066 (Tenn. 2014);³ *Arizona v. Mott*, 931 P.2d 1046, 1057 (Ariz. 1997); *Montana v. Wild*, 880 P.2d 840, 844 (Mont. 1994); *Colorado v. Smith*, 848 P.2d 365, 368-69 (Colo. 1993); *California v. Hyde*, 166 Cal. App. 3d 463, 479-80, 212 Cal. Rptr. 440, 450-51 (Ct. App. 1985); *Stewart v. Georgia*, 326 S.E.2d 763, 764 (Ga. 1985); *New Mexico ex rel. Schiff v. Madrid*, 679 P.2d 821 (N.M. 1984) (stating rule prior to abolishment); *Burgess v. Indiana*, 444 N.E.2d 1193, 1195-96 (Ind. 1983); *see Townsend*, 142 Wn.2d at 851 & n.1 (four-justice dissent notes rule in the majority of jurisdictions is to inform venire the death penalty does not apply).

³ Tenn. Rule 19(4) permits to the citation of unpublished opinions. A copy of this decision was attached to the opening brief.

B. CONCLUSION

The trial court denied Michael Henderson his right to choose and present his defense when it elected a single defense for him. The court also erred when it overruled Henderson's objection to the State's improper misstatement of the law of self-defense. Finally, adherence to an incorrect and harmful rule denied Henderson a constitutionally guaranteed fair trial by an impartial jury. Individually and collectively, these errors require remand for a new trial.

DATED this 11th day of August, 2017.

Respectfully submitted,

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