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No. 95603-1

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Court of Appeals  
Division I  
State of Washington

**CORRECTED**

NO. 75510-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HENDERSON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

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**CORRECTED BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. Whether State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), should be overruled where it is incorrect and harmful and the state supreme court has concluded that jurors are not less careful simply because they know a defendant will not be executed.

2. Whether the defendant has failed to show that reversal is warranted due to the excusal of four jurors for cause based on their stated inability to follow the law where that issue is raised for the first time on appeal, where the court followed established case law, where the defendant has no right to a particular juror, and where there is no indication that the resulting jury was not fair and impartial.

3. Whether the trial court properly refused an instruction on excusable homicide where that defense was not available as a matter of law to felony murder based on an intentional shooting and where, even if legally available, the defense was not factually supported.

4. Whether the prosecutor committed misconduct by correctly explaining the objective aspects of the self-defense standard in closing argument in response to defense counsel's

argument characterizing the standard as being almost entirely subjective.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Michael Henderson with the crime of murder in the second degree while armed with a firearm, and unlawful possession of a firearm. CP 1-2. Although Henderson was charged in the alternative with both intentional second degree murder and second degree felony murder, the State elected at trial to submit only felony murder to the jury. RP 804;<sup>1</sup> CP 56. The felony murder was based on assault in the second degree with a deadly weapon. CP 56. The jury found Henderson guilty as charged. CP 71-73. Henderson was sentenced to 351 months of total confinement. CP 77.

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<sup>1</sup> The verbatim report of proceedings from May 23, 2016, through June 2, 2016, is consecutively paginated and will be referred to herein as "RP." The verbatim report of proceedings from May 17, 18, and July 15, 2016, is separately paginated and citations to these volumes will specifically reference the hearing date, such as "RP (5/18/16) at 10."

2. FACTS OF THE CRIME.

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 on 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 that started at the gas station and continued 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 tape. 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.<sup>2</sup> 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.

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<sup>2</sup> Firefighters were the first to arrive at the scene because the 911 caller reported a medical emergency, not a shooting. RP 383, 392-93.

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.<sup>3</sup> 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 shot. It just so happened it lined up in the direction of Mr. Abdi." RP 683. He stated during direct examination that he did not intend to shoot Abdi. RP 683.

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

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<sup>3</sup> 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.

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. Although there was some evidence that Abdi had a screwdriver in his pocket that night, Henderson never saw the screwdriver. RP 307, 739. Henderson admitted that he intentionally pulled the trigger, and intentionally aimed the gun at Abdi, which is also apparent in the surveillance video. RP 742-43, 748; Ex. 25, 26, 27. He knew he had shot Abdi when he walked away. RP 754-56. When interviewed by police, he lied and denied any involvement in the shooting. RP 759-60, 787. On redirect, he contradicted himself and testified that he did not purposely pull the trigger. RP 790.

C. ARGUMENT

1. HENDERSON’S CLAIM THAT JURORS WERE ERRONEOUSLY EXCUSED FOR CAUSE MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL; HOWEVER, THE STATE AGREES THAT STATE V. TOWNSEND IS INCORRECT AND HARMFUL.

Henderson contends that he was prejudiced because jurors were excused for cause from his case based on their views of the death penalty. Consistent with current Washington case law, the trial court was restrained from informing the jury that the case did not involve the death penalty. Instead, the trial court instructed the

potential jurors that they could not consider punishment. The State agrees with Henderson that the rule set forth in Townsend is both incorrect and harmful. However, Henderson may not raise this issue for the first time on appeal because it is not of constitutional magnitude. Moreover, Henderson was not prejudiced.

During voir dire, one of the potential jurors asked whether capital punishment was a possible outcome of a guilty verdict. The trial court responded:

Under well-established law, I cannot tell you whether this case is subject to the death penalty. The legislature and the Court determine the punishment that will be imposed if the defendant is found guilty of any of the counts charged. Those of you who are selected to serve will be so instructed. You will be further instructed that the fact that punishment will follow conviction cannot be considered by you except insofar as it may tend to make you careful.

RP (5/18/16) 127. The parties had agreed to this approach prior to the start of voir dire. RP (5/17/16) 38-40. As a result, four jurors stated they could not set their objections to the death penalty aside and render a decision in the case, and were excused for cause without objection. RP (5/18/16) 128-52.

In State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), a murder case, the State informed the potential jurors during voir dire that "This case does not involve the death penalty." Id. There was

no objection by the defense. Id. On appeal, the state supreme court held that defense counsel was deficient in not objecting to the State's comment. Id. at 847. The court expressed concern that informing the jury that a murder case does not involve the death penalty would result in jurors being "less attentive during trial, less deliberative in their assessment of the evidence and less inclined to hold out if they know that execution is not a possibility." Id. The court's concern employs a startling presumption that jurors do not do their job properly unless they think the defendant could be executed. The Townsend court could conceive of "no possible advantage" to be gained by the defense from such an instruction. Id. at 847. However, after finding counsel's performance to be deficient, the court found that the defendant was not prejudiced. Id. at 848.

Six years later, in State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), the state supreme court addressed the issue again. During voir dire, one juror responded to a question about the ability to follow the law by stating, "If it were the death penalty. I don't support the death penalty. I would have a hard time with that." Id. at 929. The trial court responded by stating "I will respond by informing you that this is not a capital case. In other words, this

case does not involve a request for the death penalty.” Id. In affirming the conviction, the supreme court expressed its willingness to reconsider its holding in Townsend: “If . . . there are legitimate strategic and tactical reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial, then counsel should zealously advance the arguments.” Id. at 930. However, because defense counsel had objected, the court found that the advisement was error, but harmless error. Id.

In State v. Hicks, 163 Wn.2d 477, 482-83, 181 P.3d 831 (2008), one juror expressed that her religious beliefs regarding capital punishment might interfere with her ability to decide the case. After a sidebar, the trial court told the jury, “This is not a death penalty case.” Id. at 483. Both the prosecutor and defense counsel subsequently referenced the fact that the death penalty did not apply during voir dire. Id.

Relying on Townsend and Mason, the majority opinion summarized: “Under our precedent, in response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing.” Id. at 487. The court concluded that defense counsel was deficient insofar as counsel participated

in informing the jury that the case was noncapital, but that the error was not prejudicial because there was “no indication that the jurors failed to take their duty seriously.” Id. at 488.

In a concurrence, Judge Chambers explained why informing the jury that a case did not involve the death penalty would be helpful to the defense:

What is a trial lawyer to do when she has three potential jurors whom she would love to sit on her client’s case? The jurors share similar backgrounds, occupations, and experiences with her client, which causes her to believe they will relate to her client. They have made statements during jury selection which lead her to believe they will be sympathetic to the arguments she intends to advance on behalf of her client. But all three have made statements to suggest they are morally opposed to the death penalty. Trial counsel could be reasonably concerned that, if in doubt as to whether or not the case involves capital punishment, the jurors will simply declare that they cannot be fair and impartial. Trial counsel knows the law and knows her duty but could well make a calculated decision that her client has a significantly better chance of acquittal if these jurors are informed that the case is not capital and that they may, in good moral conscience, become a juror. While counsel may not mislead the court as to the law, in such a case counsel should not be faulted for not objecting to the jury being informed that the case does not involve the death penalty.

Id. at 496 (Chambers, J., concurring).

This question was recently addressed again, albeit briefly, in State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017). In Clark,

defense counsel did not object when the State informed the prospective jurors that the case did not involve the death penalty. Id. at 654. Noting that the jury was properly informed of its duties, and there was “no indication that the jury disregarded its instructions or paid less attention to the evidence presented throughout Clark’s trial because it was told that the death penalty was not at issue,” the court held that Clark was not prejudiced and there was no ineffective assistance of counsel. Id. at 655.

The State agrees with Henderson that Townsend is incorrect and harmful and should be overruled. First, the holding of Townsend is incorrect. Informing potential jurors that a murder case does not involve the death penalty is not, in fact, informing the jury of the punishment that will result. The standard range punishment for murder in the second degree could be anything from 123 months to life in prison without parole (if the defendant is a persistent offender). The defendant could also succeed in obtaining a sentence below the standard range. The jury that is informed that it is not a death penalty case has no way to determine what the actual punishment will be.

More importantly, there is no reason to believe that a juror in a murder case would not take his duties seriously. There certainly

should be no *presumption* that jurors become lackadaisical and inattentive as soon as they know execution is not a possible sentence.

Second, the holding of Townsend is harmful. It causes much confusion and anxiety among some potential jurors during jury selection, and causes otherwise qualified jurors to be excused from jury service. Washington should join the other states that allow potential jurors to be informed in a murder case that the death penalty is not being sought. See State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997); People v. Hyde, 166 Cal. App. 3d 463, 212 Cal. Rptr. 440 (1985); Stewart v. State, 254 Ga. 233, 326 S.E.2d 763 (1985); Burgess v. State, 444 N.E.2d 1193 (Ind. 1983); State v. Wild, 266 Mont. 331, 880 P.2d 840 (1994).

Nonetheless, unlike Townsend, Mason, Hicks, and Clark, the prospective jurors in this case were not informed that conviction could not result in the death penalty. Henderson did not ask that the jury be informed that the case did not involve the death penalty below. The general rule is that appellate courts will not consider issues that are raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a)(3). The rule reflects a policy of encouraging the efficient use of judicial

resources. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Only a manifest error affecting a constitutional right may be raised for the first time on appeal. Kirkman, 159 Wn.2d at 926. The exceptions contained in RAP 2.5(a) are to be construed narrowly. Id. at 934.

Henderson claims for the first time on appeal that the trial court erred in granting the challenges for cause of the jurors who stated they could not follow the court's instructions if the case involved the death penalty. However, this is not a constitutional error. The constitution guarantees the defendant the right to a fair and impartial jury. State v. Davis, 141 Wn.2d 798, 855, 10 P.3d 977 (2000). Challenges for cause are governed by statute and court rule. Id.; CrR 6.4. An error in jury selection that does not implicate the right to a fair and impartial jury may not be raised for the first time on appeal. State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). Henderson does not contend that any of the jurors that served on his case were biased against him, and thus his claim of error is not of constitutional dimension.

Even if he could raise this issue for the first time on appeal, he cannot show that any error was prejudicial. A criminal defendant has no right to a particular juror as long as he is tried by

a fair and impartial jury. Gentry, 125 Wn.2d at 614. When jury selection is in substantial compliance with statutes, the defendant must show he was prejudiced by the erroneous excusal of a juror in order to obtain reversal of the conviction. State v. Tingdale, 117 Wn.2d 595, 817 P.2d 850 (1991). The selection process here was in compliance with controlling case law as well as the applicable statutes and court rule, and there is no showing of prejudice. Reversal is not warranted.

2. THE DEFENSE OF EXCUSABLE HOMICIDE WAS UNAVAILABLE AS A MATTER OF LAW AND FACT.

Although the jury was instructed as to the defense of justifiable homicide, Henderson contends that the trial court erred in refusing to give additional instructions as to excusable homicide. However, excusable homicide was not an available defense to the crime as charged. And even if it was, there was no credible evidence to support such a defense.

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.

WPIC 15.01 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 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 should not be presented 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 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, 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. 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 states, an excusable homicide instruction adds nothing to the jury’s analysis.

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), State v. Slaughter, 143 Wn. App. 936, 186 P.3d 1084 (2008), and State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012), do not support Henderson’s argument 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. Brightman, 155 Wn.2d 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, the state supreme court characterized an accidental killing as excusable homicide, not justifiable homicide. Id. at 525. The 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 acknowledge or discuss previous Washington 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. The court did not hold that failure to give an excusable homicide instruction was reversible error.

In Slaughter, the defendant was alternatively charged with intentional second degree murder and second degree felony murder based on assault. 143 Wn. App. at 941, 945. The jury was instructed on excusable homicide based on Slaughter's contention that the victim was accidentally stabbed in a struggle over a knife after the victim attacked him with the knife. Id. This Court affirmed

the conviction. Id. Because an excusable homicide instruction was given in that case, there was no discussion of whether it was actually necessary. Id. at 945-57. Moreover, Slaughter is factually distinguishable. In this case, there was no claim that Abdi assaulted Henderson, and, as explained below, no credible evidence that Henderson's use of deadly force was accidental.

Finally, in McCreven, 170 Wn. App. at 453, four co-defendants were jointly charged with second degree felony murder based on assault in the second degree. The murder victim was stabbed during a bar fight. Id. The court held that when the defendant is charged with felony murder based on assault with a deadly weapon (as opposed to assault without a deadly weapon), and asserts self-defense, the defendant must fear death or great personal injury, which is consistent with the self-defense instructions given in this case. Id. at 467. That decision did not discuss excusable homicide.

Washington law has long held that the felony murder doctrine punishes accidental killings that occur in the course of a felony. In State v. Harris, 69 Wn.2d 928, 932, 421 P.2d 662 (1966), abrogated by In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), the state supreme 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)). If the felony murder doctrine is intended to punish the accidental killing of a victim during commission of a felony as murder, then accident cannot be a defense to felony murder.

Moreover, 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. 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). The court may deny a defense-proposed instruction if there is no credible evidence to support it. Id. A trial court's factual determination that a defense instruction is not warranted is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

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 at Abdi at close range.<sup>4</sup>

"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."

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<sup>4</sup> 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. 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.

"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. 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 trial court did not abuse its discretion in refusing to give an excusable homicide instruction.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Henderson argues that the prosecutor committed misconduct in closing argument by misstating the law. This claim should be rejected. The prosecutor did not misstate the law and was responding to the defense argument, which attempted to portray the self-defense standard as being almost entirely subjective.

To prevail on a claim of prosecutorial misconduct, a defendant must show the prosecutor's argument was improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The court must review allegedly improper statements in the context of the entire argument, the issues in the case, the evidence and the jury instructions. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Even improper remarks from a prosecutor do not merit reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In closing argument, the prosecutor argued that Henderson shot Abdi out of annoyance and not in self-defense. RP 857, 868. The prosecutor argued that Henderson's testimony was plainly not credible, and emphasized the other witnesses' testimony that, at most, they thought a fistfight might occur. Thus, there was no justification for Henderson to use deadly force against Abdi. RP 846-53. The prosecutor disputed Henderson's characterization of the Rainier Valley as a "war zone" and argued, without objection, that "under his explanation, any person he came into contact with that made an aggressive move toward him in the Rainier Valley at night who was intoxicated, he would be justified to pull that gun and shoot that person." RP 864.

In closing, defense counsel argued that the jury should look at the facts through the eyes of Henderson and that "the only thing that matters is what Mr. Henderson reasonably believed," and that Henderson was "in a state of hypersensitivity" when he shot Abdi. RP 878, 879. Defense counsel argued that Henderson had acted reasonably based on his experiences. RP 909.

In rebuttal, the prosecutor noted that the video showed that Abdi was not threatening and was simply "talking with his hands" throughout the interaction. RP 910. The prosecutor clarified that

the self-defense standard was based upon what a reasonably prudent person under similar circumstances would do. RP 910; see CP 60, Instruction 14 (“the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.”) The prosecutor then applied that standard to the facts and contrasted it to Henderson’s testimony:

Was there anything reasonable about what the defendant did here, ladies and gentleman, based on the information and the evidence that you have?

He told you that “when I see someone who is making these hand gestures and moving, I naturally assume they are armed, so I’m going to shoot them if I think they are armed.”

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?

Remember what I said in my opening closing arguments. The laws are designed to make sense.

RP 914. Defense counsel objected, arguing that the prosecutor was inviting the jury to question the appropriateness of the law.

RP 914. The court overruled the objection. RP 915. The prosecutor invited the jury to examine the video and then stated,

“you have to ask yourself this: Was the defendant, given his situation, based on what you learned from him, reasonable?”

RP 915.

None of the prosecutor’s argument misstated the law. The self-defense standard in Washington has both subjective and objective elements. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The subjective element requires the jury to judge the defendant’s actions from the defendant’s perspective, which means all the facts and circumstances known to the defendant. Id. The objective element requires the jury to determine what a reasonable person similarly situated would have done. Id. As the court explained in State v. Janes:

The objective portion of the inquiry serves the crucial function of providing an external standard. Without it, a jury would be forced to evaluate the defendant’s actions in the vacuum of the defendant’s own subjective perceptions. In essence, self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs.

Id. at 239. The self-defense standard required the jury to consider the facts as they truly existed, not as they were perceived by Henderson based on his “hypersensitivity,” as defense counsel argued. The prosecutor’s argument in this case was in keeping with the holding of Janes, and was not a misstatement of the law. It

was a fair response to defense counsel's argument, which characterized the self-defense standard as being almost entirely subjective. It was not misconduct.

D. CONCLUSION

Henderson's conviction should be affirmed.

DATED this 21st day of June, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Marla Zink, the attorney for the appellant, at Marla@washapp.org, containing a copy of the Corrected Brief of Respondent, in State v. Michael David Henderson, Cause No. 75510-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 21<sup>st</sup> day of June, 2017.

U Brame

Name:

Done in Seattle, Washington

**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

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