

FILED
SUPREME COURT
STATE OF WASHINGTON
8/10/2018 4:24 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.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

Gregory C. Link
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

Marla L. Zink
The Law Office of Marla Zink, PLLC
1037 NE 65th Street #80840
Seattle, WA 98115
(360) 726-3130

Attorneys for Respondent

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUE FOR WHICH REVIEW WAS GRANTED..... 1

C. STATEMENT OF THE CASE..... 2

 1. Drunk and armed, Abdi acted aggressively immediately before he was shot..... 2

 2. The trial court denied Henderson an excusable homicide instruction based on a case discussing a different defense 3

 3. A unanimous Court of Appeals remanded for a new trial because, on de novo review, the law and facts entitled Henderson to the requested accidental homicide instruction..... 5

D. SUPPLEMENTAL ARGUMENT 6

As the Court of Appeals held, Henderson’s jury should have been instructed on the defense theory of excusable homicide because it is a legally available defense and some evidence supported it 6

 a. The right to present a defense includes the right to have the jury instructed on any legally available theory of defense supported by some evidence 6

 b. The legislature authorized an excusable homicide defense to felony murder, and the case law confirms it..... 10

 c. Some evidence adduced at trial supported the excusable homicide defense, especially when viewed in the light most favorable to the defense 14

 d. Because the trial court improperly denied Henderson a jury instruction on his theory of defense, the Court of Appeals correctly remanded for a new trial 17

E. CONCLUSION 20

TABLE OF AUTHORITIES

Washington State Supreme Court Decisions

In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 385 P.3d 135 (2016). 12

In re Pers. Restraint of Schley, No. 94280-3, __ Wn.2d __,
2018 WL 3582964 (Jul. 26, 2018)..... 8

Reese v. City of Seattle, 81 Wn.2d 374, 503 P.2d 64 (1972) 16

State v. Brightman,155 Wn.2d 506, 122 P.3d 150 (2005) 5, 11, 12, 13

State v. Burt, 94 Wn.2d 108, 614 P.2d 654 (1980)..... 12

State v. Conklin, 79 Wn.2d 805, 489 P.2d 1130 (1971) 8

State v. Craig, 82 Wn.2d 777, 514 P.2d 151 (1973)..... 12

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2018) 9, 17

State v. Fisher, 185 Wn.2d 836, 374 P.3d 1185 (2016)..... 8, 9, 14

State v. Griffin, 100 Wn.2d 417, 670 P.2d 265 (1983) 7, 17, 18

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993)..... 8

State v. Ladiges, 66 Wn.2d 273, 401 P.2d 977 (1965) 18

State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990)..... 12

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 8

State v. Pearson, 37 Wash. 405, 79 P. 985 (1905) 9

State v. Rice, 102 Wn.2d 120, 683 P.2d 199 (1984)..... 18

State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999)..... 7

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 7

State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006) 7

State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980) 6

State v. Werner, 170 Wn.2d 333, 241 P.3d 410 (2010) 8

State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997)..... 9

Washington State Court of Appeals Decisions

State v. Birdwell, 6 Wn. App. 284, 492 P.2d 249 (1972). 5, 17

State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997) 8

State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856 (2006)..... 4

State v. Fondren, 41 Wn. App. 17, 701 P.2d 810 (1985) 13, 17, 19

State v. Keller, 30 Wn. App. 644, 637 P.2d 985 (1981) 19

State v. Slaughter, 143 Wn. App. 936, 186 P.3d 1084,
review denied, 164 Wn.2d 1033, 197 P.3d 1184 (2008) 5, 12, 13

Constitutional Provisions

Const. art. I, § 22..... 6

U.S. Const. amend. VI 7

Statutes

RCW 9A.16.030..... 6, 10

Rules

RAP 13.7..... 20

Other Authorities

Oral Argument, *State v. Pierce*, No. 74363-5 (Jan. 10, 2018)..... 10

WPIC 15.01..... 10

A. INTRODUCTION

A defendant decides the theory of his defense, not the prosecution, trial court or appellate courts. The State nominally argues accidental homicide is not a defense to felony murder, which is legally inaccurate. Mostly, however, the State seeks to chip away at the defendant's right to present his defense by advocating for a higher burden to support defense jury instructions and for the trial court to weigh the evidence. The State's arguments lack basis in law and in fact and should be rejected.

The Court of Appeals held Michael Henderson is entitled to a new trial at which the jury is instructed on excusable homicide. This Court should affirm.

B. ISSUE FOR WHICH REVIEW WAS GRANTED

A trial court must instruct a jury on any defense requested by the accused person, if grounded in law and supported by at least some evidence. Under the statutes, pattern instructions, and case law, excusable homicide, an accident that occurs while committing a lawful act, is a defense to second degree felony murder. At his trial for felony murder predicated on assault, Henderson requested the jury be instructed on excusable homicide. His testimony supported the theory that the charged assault predicate was a lawful act of self-defense that resulted in an accidental killing. Should the Court of Appeals be affirmed where the trial

court committed reversible error in denying Henderson’s requested instruction on excusable homicide?

C. STATEMENT OF THE CASE

1. Drunk and armed, Abdi acted aggressively immediately before he was shot.

Abubakar Abdi died after consuming alcohol and marijuana, and while carrying a screwdriver as a weapon and intending to fight an unrelated “dude” for knocking out his tooth. RP (5/24/16) 250, 254-55, 260-65, 280-82, 323-24; RP (5/25/16) 426-28, 432-33. Abdi was with his friends, arguing with Nekea Terrell. RP (5/23/16) 142-53. Terrell’s friend Henderson came upon the group and gave her a hug. *Id.* at 152.

Abdi’s banter with Terrell escalated, causing their friends to fear Abdi. RP (5/23/16) 155-56, 165; RP (5/24/16) 326-28; *see* RP (6/1/16) 726-28 (Henderson thought Abdi would fight). Abdi was gesturing, puffing out his chest, waving his arms, moving closer, and “bucking up.” RP (5/23/16) 166-67. Then, Abdi “flinched” his shoulders, lunged forward, moved his arms towards his waist, and seemed to reach for something in his pocket. RP (6/1/16) 643-44, 682-83, 736-39, 747-50; Ex. 26. In response, Henderson drew a gun as a warning and it fired. RP (6/1/16) 666, 682-83, 739-41 (Henderson was afraid Abdi would start shooting), 750-52, 789-90. The bullet killed Abdi. RP (5/25/16) 519-20.

2. The trial court denied Henderson an excusable homicide instruction based on a case discussing a different defense.

The State tried Henderson for felony murder predicated on assault with a deadly weapon. CP 1-8, 56; RP (6/1/16) 804.¹

Henderson requested jury instructions on justifiable and excusable homicide. RP (6/2/16) 820-31, 837-38; Petit. for Rev. at 7 n.3. He asserted that the charged assault predicate occurred when he intentionally acted in lawful self-defense to an imminent injury, and the weapon accidentally discharged (excusable homicide). In the alternative, Henderson argued he acted in self-defense to imminent serious bodily injury or death (justifiable homicide). RP (6/1/16) 652-56; RP (6/2/16) 820-27.

The evidence supported both defenses. The State conceded the evidence supported an instruction on justifiable homicide: Henderson and other witnesses testified they were fearful and anticipated a fight; the evidence also showed Abdi was drunk, had a screwdriver as a weapon, and made movements consistent with escalating the confrontation and reaching for a weapon. RP (6/2/16) 829 (State concedes self-defense evidence). The evidence warranted a justifiable homicide instruction.

¹ Henderson did not contest the unlawful possession of a firearm charge, and it is not at issue here. CP 1-2; RP (6/2/16) 875-77.

The State also noted Henderson testified he did not intentionally pull the trigger. RP (6/2/16) 821; *State v. Henderson*, No. 75510-2-I, Br. of Rep't at 5-6 (filed Jun. 12, 2017). Evidence showed Henderson reasonably drew his weapon in self-defense to an imminent injury from Abdi, possibly intentionally fired a warning shot, but accidentally shot Abdi. RP (6/1/16) 683, 789-91. This evidence supported the requested excusable homicide instruction. *See Slip Op.* at 5-9.

The trial court provided the self-defense instruction (justifiable homicide) but denied the excusable homicide instruction. CP 43-70; RP (6/2/16) 820-31, 837-38. The court felt bound by a decision discussing justifiable homicide, or self-defense, to deny Henderson's requested excusable homicide instruction. RP (6/2/16) 830 (discussing *State v. Ferguson*, 131 Wn. App. 855, 129 P.3d 856 (2006) (justifiable homicide defense unavailable where defendant uses excessive force)).

Ferguson does not discuss accidental homicide. Rather, *Ferguson* discusses the applicable self-defense standard for felony murder. 131 Wn. App. at 860-61. The court held that to justify killing in self-defense, even by felony murder, "the slayer must believe he or someone else is about to suffer death or great personal injury." *Id.* That is the justifiable homicide standard used here. CP 60. But, it does not resolve the issue on review: whether an excusable homicide instruction should have been provided.

3. A unanimous Court of Appeals remanded for a new trial because, on de novo review, the law and facts entitled Henderson to the requested accidental homicide instruction.

After a jury convicted Henderson, the Court of Appeals reversed and remanded for a new trial in a unanimous unpublished opinion.

“[W]hile the trial court properly instructed the jury on justifiable homicide, [the court] agree[d] with Henderson that the trial court erred in failing to also instruct the jury on the defense of excusable homicide.” Slip Op. at 1. “Washington courts do recognize the defense of excusable homicide” applies to felony murder charges “when the defendant argues the felony was committed in self-defense but the killing was an accident.” Slip Op. at 4. Appellate courts approved of excusable homicide instructions in *State v. Brightman* and *State v. Slaughter*. *Id.* at 4-5. And, “some evidence” supported Henderson’s requested accidental homicide instruction. *Id.* at 5-9 (“Henderson consistently testified at trial that he did not intend to shoot Abdi.”).

“A trial court’s failure to instruct the jury on a party’s theory of the case, where there is evidence supporting that theory, is reversible error. *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249 (1972).” Slip Op. at 9. Thus, the trial court’s failure here to instruct on Henderson’s theory of the case required reversal for a new trial. *Id.*

D. SUPPLEMENTAL ARGUMENT

As the Court of Appeals held, Henderson’s jury should have been instructed on the defense theory of excusable homicide because it is a legally available defense and some evidence supported it.

The defense theory was simple and supported. Abdi signaled he was about to engage in a fight. Henderson withdrew a weapon in a lawful act of self-defense. It then accidentally discharged and killed Abdi. Or, Henderson intentionally fired a warning shot in self-defense and the bullet accidentally killed Abdi.

An accidental homicide defense is also known as excusable homicide. A homicide is excusable when it is committed by accident or misfortune in doing any lawful act by lawful means. RCW 9A.16.030.

Even if the trial court did not believe Henderson’s defense, the jury should have been instructed on excusable homicide because some evidence supported it, viewed in the light most favorable to Henderson.

- a. The right to present a defense includes the right to have the jury instructed on any legally available theory of defense supported by some evidence.

As the defendant in a criminal trial, Henderson had a constitutional right to present his defense and was 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). “A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Failure to fully instruct the jury is prejudicial error. *State v. Riley*, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

In particular, the accused person is entitled to have the jury instructed. Allowing the defendant to present evidence or argument related to his theory of defense is not sufficient. *E.g.*, *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006) (error for trial court to decline to instruct on involuntary intoxication, despite defendant’s ability to present evidence of intoxication). Where the defense refutes an element, it is also not sufficient to simply instruct the jury on the elements. *E.g.*, *id.* (error despite instruction on State’s burden to prove intent); *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983) (error for trial court to fail to provide diminished capacity instruction, although defendant was allowed to present evidence of mental disorders and impairment of ability to form intent and jury was instructed State had to prove intent). Rather, the trial court must instruct the jury on how to consider the evidence relating to the accused’s theory. *E.g.*, *Stevens*, 158 Wn.2d at 310 (reversing conviction for failure to provide specific instruction on involuntary intoxication defense); *Griffin*, 100 Wn.2d at 420 (reversing conviction for failure to

instruct on defense theory); *State v. Conklin*, 79 Wn.2d 805, 489 P.2d 1130 (1971) (reversing conviction for failure to provide intoxication instruction, although instruction provided on burden for specific intent).

The defense is entitled to an instruction when “some evidence” supports it. Some evidence is a low standard equivalent to “any evidence.” *In re Pers. Restraint of Schley*, No. 94280-3, ___ Wn.2d ___, 2018 WL 3582964, *4 (Jul. 26, 2018) (lead opinion); *id.* at *7 (González, J. concurring); *State v. Fisher*, 185 Wn.2d 836, 849-52, 374 P.3d 1185 (2016); *see State v. Janes*, 121 Wn.2d 220, 237, 242, 850 P.2d 495 (1993).

In determining whether some evidence supports the requested instruction, the evidence must be viewed in the light most favorable to the defendant. *Fisher*, 185 Wn.2d at 849.

Further, the evidence may derive from any source. *Id.* (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)). And it may be inconsistent with other evidence in the case, including the defendant’s own testimony. *Id.*; *State v. Werner*, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010) (per curiam) (if evidence supports accident and self-defense, jury should be instructed on both); *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997) (defense may be based on facts inconsistent with defendant’s testimony).

Neither the trial court nor the appellate courts determine whether the evidence supporting an instruction is credible or weighty in comparison to the other evidence in the case. *E.g.*, *Fisher*, 185 Wn.2d at 851-52; *State v. Fernandez-Medina*, 141 Wn.2d 448, 460-61, 6 P.3d 1150 (2018) (in evaluating adequacy of the evidence to support an instruction, the court cannot weigh the evidence because the jury determines weight and credibility); *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (questions of fact are for the jury to resolve, not the court); *State v. Pearson*, 37 Wash. 405, 407, 79 P. 985 (1905) (appellate court should not invade the province of a jury by weighing evidence or passing upon credibility; “but [it] may examine the record, and ascertain whether, upon the evidence as presented and admitted, the jury was properly instructed”).

In *Fisher*, for example, the defendant relied on a transcript of portions of her interview with investigators to support the requested defense. 185 Wn.2d at 851. This Court noted the evidence was confusing to decipher and inconclusive. *Id.* at 851-52. However, viewed in the light most favorable to the defendant, it was possible that a juror would believe the transcript supported the defense. *Id.* at 852. Therefore, the trial court erred in denying a defense instruction. *Id.*

In short, some evidence simply requires more than none. *Fisher*, 185 Wn.2d at 851 (defendant fails to present sufficient evidence for an

instruction if she can point only to an absence of evidence). A trial court justifiably denies a jury instruction on the defense only if no evidence in the record supports it. *Id.* at 489.

- b. The legislature authorized an excusable homicide defense to felony murder, and the case law confirms it.

Excusable homicide is a legally available defense to the felony murder charge in this case. The legislature codified the defense of excusable homicide to apply to all homicides.

Homicide—When excusable.

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.16.030.²

Without qualification as to the type of homicide charged, the Washington Pattern Instructions likewise provide that excusable homicide is a defense. WPIC 15.01.³ The Notes on Use make clear the excusable homicide “instruction may be used in any homicide case in which the defense of excusable homicide is an issue supported by the evidence.” WPIC 15.01 (notes on use) (emphasis added).

² The State conceded excusable homicide is a legally available defense to the charge here in a recent case in Division One. Oral Argument, *State v. Pierce*, No. 74363-5, at 11:20-12:38 (Jan. 10, 2018).

³ A copy of WPIC 15.01 is attached as an appendix.

Thus, it is unsurprising that in *State v. Brightman*, this Court approved the use of an excusable homicide instruction on remand for felony murder where the defendant produced some evidence the gun discharged accidentally. 155 Wn.2d 506, 518-19, 524-27, 122 P.3d 150 (2005). The State charged Brightman with felony murder in the alternative to premeditated murder. *Id.* at 511. Brightman requested a justifiable homicide instruction, for intentional self-defense, but did not assert an excusable homicide defense. *Id.* at 511-12. The Court reversed on other grounds, for a public trial violation, and addressed the defendant's challenge to the Court of Appeals holding that the defense actually presented only a case of excusable homicide. *Id.* at 518. The Court first held the trial court properly denied instructing the jury on justifiable homicide because Brightman "did not show that he *intentionally* used deadly force . . . or that *deadly* force was necessary to defend himself." *Id.* at 526.

However, this Court agreed with the Court of Appeals that an excusable homicide instruction would be legally available if, on remand, evidence supported the argument that an accidental killing was precipitated by an act of self-defense. *Brightman*, 155 Wn.2d at 526. Thus, pursuant to this Court's opinion, excusable homicide was a legally available defense to the charge of felony murder. *Id.* at 525-27.

This Court recently confirmed that excusable homicide applies to accidental killings committed while acting in self-defense, without limitation as to the type of charge. *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 142 & n.5, 385 P.3d 135 (2016) (quoting *Brightman* with approval for proposition that an accidental killing committed while acting in self-defense constitutes the defense of excusable homicide without limitation as to the type of homicide charged).⁴

Even prior to Henderson's case, the Court of Appeals followed *Brightman* to hold the trial court properly provided an excusable homicide instruction in defense to felony murder predicated on assault. *State v. Slaughter*, 143 Wn. App. 936, 945, 186 P.3d 1084, *review denied*, 164 Wn.2d 1033, 197 P.3d 1184 (2008). In *Slaughter*, the trial court provided the jury with an excusable homicide instruction, accompanied by a self-defense instruction that explained the extent of the lawful use of force supporting the accidental killing. *Id.* at 941, 942-43. On appeal *Slaughter*

⁴ *State v. Craig*, 82 Wn.2d 777, 781, 514 P.2d 151 (1973), relied upon by the State, also recognizes excuse is a defense to felony murder. *See* *Petit. for Rev.* at 8-9. *Cf. State v. Burt*, 94 Wn.2d 108, 110-11, 614 P.2d 654 (1980) (noting excuse available as defense to any murder or manslaughter charge). *Craig* and *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990), explore the extent of the link between the felony and the death. They do not support departing from *Brightman*, *Craig*, *Caldellis*, or *Burt* on the availability of excuse as a defense to a felony murder charge.

disputed the lawful use of force instruction that accompanied the excusable homicide instruction. *Id.* at 941.

Relying on *Brightman*, the Court of Appeals upheld the trial court's instructions. *Slaughter*, 143 Wn. App. at 943. "In a case where a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable, not justifiable, homicide." *Id.* at 942 (citing *Brightman*, 155 Wn.2d at 525). The Court of Appeals upheld the lawful use of force instruction because it defined the scope of the lawful act upon which the excusable homicide could be predicated. *Id.* at 942 (citing *Brightman*, 155 Wn.2d at 525 n.13).

Therefore, *Slaughter's* jury was properly instructed that excusable homicide is a defense to felony murder predicated on assault: "The defense of excusable homicide and the State's corresponding burden of proof were correctly stated in the excusable homicide instruction. It was that instruction which set forth the applicable defense to the murder charge." *Id.* at 943. The court noted its holding was consistent with *Brightman*: "the instructions the trial court gave here were precisely what the court suggested in *Brightman*." *Id.* at 944. *Cf. State v. Fondren*, 41 Wn. App. 17, 24, 701 P.2d 810 (1985) (reversing for failure to provide instructions on defense theories of excusable and justifiable homicide at trial for second degree felony murder predicated on assault).

Thus, it has long been settled that, in defense to felony murder, an excusable homicide instruction should be provided where requested and supported by some evidence.

- c. Some evidence adduced at trial supported the excusable homicide defense, especially when viewed in the light most favorable to the defense.

Ample evidence supported Henderson's requested excusable homicide instruction. As discussed, any amount of evidence is sufficient; it can come from any source; it can be inconsistent with other evidence in the case; it must be regarded in the light most favorable to Henderson; and the jury alone weighs the evidence. *E.g., Fisher*, 185 Wn.2d at 849, 851-52. Here, the evidence supported two excusable homicide narratives.

First, some evidence showed Henderson intentionally withdrew a gun in self-defense to dissuade Abdi, and the gun accidentally discharged. Henderson presented copious evidence that he acted in lawful self-defense. *E.g.*, RP (6/1/16) 739-41 (“[Henderson] was afraid [Abdi] was going to start shooting.”); RP (6/2/16) 829 (State concedes self-defense evidence); Slip Op. at 6 (noting trial court found sufficient support for lawful self-defense claim).⁵

⁵ Henderson and other witnesses testified they were afraid and expected a fight; Abdi was drunk, had a screwdriver as a weapon, and made movements consistent with escalating the confrontation and reaching for a

Evidence also supported that Abdi was accidentally shot while Henderson engaged in this lawful act of withdrawing a gun in self-defense. RP (6/2/16) 821 (prosecutor notes, Henderson testified “he accidentally fired the gun. So it was an accident.”); Br. of Rep’t, No. 75510-2-I, at 5-6 (Henderson testified he did not intentionally pull the trigger). Indeed, Henderson testified that firing the gun was an accident:

Q. You meant to fire the gun, did you not, Mr. Henderson?

A. I did fire the gun. I didn’t mean to fire the gun, but I did fire the gun.

Q. Was it an accident that you fired the gun?

A. Yes, it was.

RP (6/1/16) 751; *accord id.* at 790 (“Q: . . . Did you purposefully pull the trigger? A: No.”). Henderson further testified that other bystanders touched his arm or interfered with his movement causing the firearm to accidentally discharge. RP (6/1/16) 789-91. Thus, at least some evidence showed Henderson was acting in self-defense when the gun accidentally discharged, warranting an excusable homicide instruction.

Some evidence supported a second, independent theory of accidental homicide. The evidence showed Henderson withdrew a gun,

weapon. *E.g.*, RP (5/23/16) 165-67; RP (5/24/16) 261-62, 306-07, 324; RP (6/1/16) 666-75, 681-84, 694, 717-19, 731-32, 739, 752-53.

raised it to issue a warning shot to dissuade Abdi in self-defense, and the resulting shot accidentally hit and killed Abdi. *E.g.*, RP (6/1/16) 683-84 (Henderson intended to fire a warning shot, but did not intend to aim and shoot at Abdi); *id.* at 742-43 (same). For example, Henderson testified he did not intend to aim at or shoot Abdi:

Q. Did you purposely point the gun at Mr. Abdi –

A. No.

Q. -- for the purpose of shooting him and striking him with a bullet?

A. No.

Id. at 791; *see id.* at 683 (“I fired a warning [shot]. It just so happened it lined up in the direction of Mr. Abdi. . . . From the movement of [others].”); *id.* at 750 (intended to fire warning shot). Henderson also testified he intended to fire into the air, felt his hand go up in the air, and thought he fired into the air. *Id.* at 740-41.

An excusable homicide defense can be predicated on an accidental killing that resulted from an intentionally fired gun. *Reese v. City of Seattle*, 81 Wn.2d 374, 384, 503 P.2d 64 (1972); *accord* Slip Op. at 9 (discussing *Reese*). Therefore, this evidence provided a second means of supporting the requested excusable homicide instruction.

Neither this Court nor the prosecution needs to be persuaded by either theory. *E.g.*, *Fernandez-Medina*, 141 Wn.2d at 460-61. Even in the face of inconsistencies in the evidence, the factfinder alone must be empowered to “separate the wheat from the chaff.” *Id.* at 461.

- d. Because the trial court improperly denied Henderson a jury instruction on his theory of defense, the Court of Appeals correctly remanded for a new trial.

Henderson’s requested excusable homicide instruction should have been provided because some evidence supported two accidental homicide theories. The Court of Appeals properly held the trial court’s failure to instruct on the defense of excusable homicide required reversal. Slip Op. at 9 (citing *Birdwell*, 6 Wn. App. at 297); *accord Griffin*, 100 Wn.2d at 420; *Fondren*, 41 Wn. App. at 24 (reversing for failure to provide instructions on defense theories of accident and self-defense at trial on second degree felony murder predicated on assault). Because evidence supported Henderson’s theory that he killed Abdi accidentally when he brandished a gun in self-defense, he deserves a new trial with complete instructions. *See id.*

The State claims the verdict should be affirmed because Henderson could argue his theory of defense without an accidental homicide instruction. *Petit. for Rev.* at 12-13. The State is wrong for two reasons. First, under the instructions provided, Henderson could argue for acquittal

but not based on an excusable homicide theory. The instructions only permitted Henderson to argue he did not commit an intentional assault. Henderson's theory was that he committed an assault in self-defense, but the resulting homicide was an accident. Where felony murder is predicated on assault and that assault is purportedly committed in self-defense, excusable homicide is a defense to both the assault and the homicide. The State's predicate felony charge is, under the defense theory, the act of lawful self-defense. Without an accidental homicide instruction, the jury could not find the act the State charged as assault was committed in lawful self-defense of a simple injury (self-defense to an imminent assault from Abdi). Thus, Henderson was precluded from arguing his theory.

Moreover, the State's claim is wrong because courts presume prejudice from denial of a defense instruction. *E.g.*, *Griffin*, 100 Wn.2d at 419-20 (failure to instruct on party's theory of the case constitutes reversible error); *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (instructional error is presumed prejudicial and is only harmless if it had "no effect on the final outcome of the case"). The error generally requires reversal even if the court does not restrict the defendant's ability to present and discuss evidence supporting the defense. *E.g.*, *Rice*, 102 Wn.2d at 123 (failure to instruct on voluntary intoxication required reversal); *State v. Ladiges*, 66 Wn.2d 273, 401 P.2d 977 (1965) (reversing where jury not

adequately instructed on defense theory of self-defense); *Fondren*, 41 Wn. App. at 24 (where accident and self-defense “were the key issues at trial,” court’s failure to instruct jury on excusable homicide defense to felony murder requires reversal); *State v. Keller*, 30 Wn. App. 644, 649, 637 P.2d 985 (1981) (failure to instruct on supported theory requires reversal).

A defense instruction provides a legal basis or tool for the jury to understand the defense theory. It cannot be equated with the defendant’s ability to argue that an element has not been satisfied. For example, in *Griffin*, the trial court allowed evidence regarding the defendant’s diminished capacity defense. 100 Wn.2d at 419. But the court declined to provide the defendant’s proposed instruction on diminished capacity, ruling the other instructions allowed the defendant to argue his theory. *Id.* at 418. This Court reversed because, without a specific instruction on defendant’s theory, the jury lacked the tools “to understand the effect diminished capacity had upon formation of criminal intent.” *Id.* at 419-20.

Likewise, in *Fondren*, the jury received evidence showing the charged felony murder predicated on assault could have occurred by accident. 41 Wn. App. at 19-20. However, the jury was not properly instructed on excusable homicide. *Id.* at 21-22. The appeals court reversed and remanded for a new trial. *Id.* at 23-24.

As in *Griffin* and *Fondren*, Henderson’s jury received evidence showing he acted in lawful self-defense and accidentally killed Abdi, but the court did not provide the jury with the tool to fit this evidence to Henderson’s defense. Because the trial court failed to provide the requested and supported excusable homicide instruction, the Court should affirm the Court of Appeals.⁶

E. CONCLUSION

Henderson’s requested excusable homicide instruction was grounded in law—the legislature authorized the defense to felony murder and our courts have approved it—and fact—some evidence supported the theory. The trial court’s failure to instruct on Henderson’s theory requires reversal. This Court should affirm the unanimous Court of Appeals.

Respectfully submitted this 10th day of August, 2018.



s/ Gregory Link
Gregory Link, WSBA #25228
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
greg@washapp.org

Marla L. Zink, WSBA 39042
The Law Office of Marla Zink, PLLC
1037 NE 65th St #80840
Seattle, WA 98115
(360) 726-3130
marla@marlazink.com

⁶ If, nonetheless, the Court reverses the Court of Appeals, the Court should remand to the Court of Appeals to decide prosecutorial misconduct and the issues raised in the statement of additional grounds, which the Court of Appeals explicitly declined to address. Slip Op. at 10; RAP 13.7(b).

APPENDIX

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 15.01 (4th Ed)

Washington Practice Series TM | October 2016 Update
Washington Pattern Jury Instructions--Criminal
Washington State Supreme Court Committee on Jury Instructions

Part IV. Defenses
WPIC CHAPTER 15. Excusable Homicide

WPIC 15.01 Excusable Homicide—Definition

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.

NOTE ON USE

This instruction may be used in any homicide case in which the defense of excusable homicide is an issue supported by the evidence. See further discussion in the Comment.

Use WPIC 25.01 (Homicide—Definition) and WPIC 10.04 (Criminal Negligence—Definition) with this instruction. Use bracketed material as applicable.

COMMENT

RCW 9A.16.030.

Use of instruction. 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.

Burden of proof. The State bears the burden of proving the absence of excuse. See *State v. Fondren*, 41 Wn.App. 17, 701 P.2d 810 (1985); *State v. Baker*, 58 Wn.App. 222, 792 P.2d 542 (1990). The court in *Fondren* found that the State has the burden of proving the absence of excuse in prosecutions for first degree murder, because a claim of excuse (i.e., accident or misfortune) tends to negate the element of intent. For a general discussion of the burden of proof on defenses, see WPIC 14.00 (Defenses—Introduction).

Availability of defense. An excusable homicide defense “by definition is not available to a defendant who acts recklessly or with criminal negligence, even if otherwise acting lawfully in the exercise of religious belief.” *State v. Norman*, 61 Wn.App. 16, 28, 808 P.2d 1159 (1991).

An unintentional assault or killing can be excused through the defense of accident, but cannot be justified through a claim of self-defense. *State v. Hendrickson*, 81 Wn.App. 397, 914 P.2d 1194 (1996).

In a case where the defendant is claiming actions done in self-defense led to an accidental homicide, the appropriate defense is excusable, not justifiable, homicide. *State v. Slaughter*, 143 Wn.App. 936, 186 P.3d 1084 (2008).

The defenses of accident and self-defense are not mutually exclusive as long as there is evidence of both. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410, 411 (2010); *State v. Callahan*, 87 Wn.App. 925, 931–33, 943 P.2d 676 (1997). But, care should be taken when drafting instructions and assigning the burden proof for cases that include instructions on both defenses. See *State v. Slaughter*, 143 Wn.App. at 942–43.

Defendant's intent. The committee has not attempted to deal with potential problems that may arise when the jury is permitted to determine, without further guidance, whether the defendant's intent was lawful or unlawful. The instruction simply is drafted using the statutory language. In using this instruction, the parties may wish to modify or supplement the language of this instruction to address this issue.

[Current as of December 2015.]

Westlaw. © 2016 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Petitioner,)
) NO. 95603-1
 v.)
)
 MICHAEL HENDERSON,)
)
 Respondent.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF AUGUST, 2018, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE FILED IN THE WASHINGTON STATE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

ANN MARIE SUMMERS, DPA () U.S. MAIL
 [paoappellateunitmail@kingcounty.gov] () HAND DELIVERY
 [ann.summers@kingcounty.gov] (X) E-SERVICE VIA PORTAL
 KING COUNTY PROSECUTING ATTORNEY
 APPELLATE UNIT
 KING COUNTY COURTHOUSE
 516 THIRD AVENUE, W-554
 SEATTLE, WA 98104

MICHAEL HENDERSON (X) U.S. MAIL
 314148 () HAND DELIVERY
 STAFFORD CREEK CORRECTIONS CENTER () _____
 191 CONSTANTINE WY
 EBERDEEN, WA 98520

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF AUGUST, 2018.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

August 10, 2018 - 4:24 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_20180810162428SC044014_9639.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was washapp.081018-01.pdf

A copy of the uploaded files will be sent to:

- Jim.Whisman@kingcounty.gov
- ann.summers@kingcounty.gov
- greg@washapp.org
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Marla Leslie Zink - Email: marla@marlazink.com (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180810162428SC044014