NO. 90417-1

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-PETITIONER,

v.

BARBARA ANN CLAYTON, PETITIONER/CROSS-RESPONDENT

Court of Appeals Cause No. 43240-4
Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 11-1-01404-7

ANSWER TO PETITION/CROSS-PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

The State of Washington, plaintiff in the trial court and respondent below, asks this court to deny the petitions for review filed by Barbara Ann Clayton ("defendant") and to grant review of the portion of the Court of Appeals' decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of that portion of the published opinion, filed on May 13, 2014, in ***State of Washington v. Barbara Ann Clayton***, No. 43240-4-II, where the court found a double jeopardy violation when the trial court merged the jury's verdicts convicting defendant of intentional murder (Count I) and felony murder (Count II) into a single count and imposed sentence on only a single count (Count I), because the court referenced in the judgment that Count II was "[m]erged into Count I."

C. ISSUE PRESENTED FOR REVIEW.

1. When a jury convicts a defendant of two alternative means of committing the same crime, which were presented in separate counts, does the court violate double jeopardy by merging the two counts into one count, imposing a single

sentence, and referencing the fact of the merger in the judgment?

2. Does the decision below conflict with the decision of Division I of the Court of Appeals in ***State v. Johnson***, 113 Wn. App. 482, 54 P.3d 155 (2002), *review denied*, 149 Wn.2d 1010, 69 P.3d 874 (2003)?

D. STATEMENT OF THE CASE.

The State proceeded to trial on an Amended Information charging defendant with murder in the first degree (premeditated - Count I), one count of murder in the second degree (felony murder – Count II), unlawful possession of a firearm in the first degree (count III) and malicious mischief in the second degree (Count IV). CP 6–8. The counts alleging murder also included a firearm enhancement, an allegation that the murder was a crime of domestic violence, and alleged an aggravating circumstance of domestic violence. *Id.* CP 6–8.

After conclusion of the evidence, the State proposed, and the court gave, a lesser-degree jury instruction on intentional murder in the second degree on Count I. RP 644; CP 158–60. Defendant obtained instructions on the defense of insanity. CP 140-185. Although the jury could not reach agreement on the charge of murder in the first degree, they found

defendant guilty of the lesser-degree offense of murder in the second degree (intentional), felony murder in the second degree, unlawful possession of a firearm in the first degree, and malicious mischief in the second degree. CP 186–90 (Verdict forms A–E). The jury also found affirmatively for the firearm enhancements and domestic violence aggravating factors on both the murder and felony murder charges. CP 191–94 (Special verdict forms).

At the sentencing hearing, the court merged the jury's verdicts finding defendant's guilty of second-degree felony murder and second-degree intentional murder conviction into a single count (Count I) and imposed a single sentence. CP 246-48, 251–63; 3/23/12 RP 23- 39. The judgment indicates that Count II was "[m]erged into count I." CP 253-54. The court found that defendant had been previously convicted of two prior most serious offenses in Washington (a 1996 first degree robbery and a 2002 second degree assault) then sentenced defendant to life without the possibility of parole under the Persistent Offender Accountability Act (POAA) for the conviction of murder in the second degree. CP 251-63 (Judgment and sentence, paragraph 4.5); 3/23/12 RP 50-53. The court imposed concurrent standard range sentences on the other counts. CP 251-63.

On appeal, defendant argued that: 1) the trial court erred in making certain evidentiary rulings; 2) the trial court violated her right to be free from double jeopardy when it merged into a single count the jury's findings that she had committed second degree murder by both intentional and felony murder alternative means rather than vacating one conviction; and, 3) her persistent offender sentence violated due process and equal protection. The Court of Appeals found no evidentiary error of impropriety in the imposition of a persistent offender sentence; it did find, however, a double jeopardy violation because the trial court had indicated in the judgment that Count II had merged into Count I.

Defendant filed a petition for review on July 16, 2014, seeking review of the evidentiary and persistent offender issues. The State now files an answer seeking cross-review of the double jeopardy issue.

E. ARGUMENT WHY CROSS-REVIEW SHOULD BE ACCEPTED.

1. AS THE JUDGMENT PROPERLY IMPOSED A SINGLE SENTENCE ON ONE COUNT OF MURDER IN THE SECOND DEGREE, WHICH THE JURY HAD UNANIMOUSLY FOUND HAD BEEN COMMITTED USING TWO ALTERNATIVE MEANS, THE COURT OF APPEALS ERRED IN FINDING A DOUBLE JEOPARDY VIOLATION; THE DECISION BELOW CONFLICTS WITH A DECISION FROM DIVISION I OF THE COURT OF APPEALS.

The double jeopardy provisions of the federal and state constitutions protect a defendant from being punished multiple times for the same offense. ***State v. Allen***, 150 Wn. App. 300, 312, 207 P.3d 483 (2009); Fifth Amendment; Art. I, sec. 9 state constitution. These provisions prohibit (1) a second prosecution for the same offence after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding without legislative authorization. ***In re Personal Restraint of Percer***, 150 Wn.2d 41, 48–49, 75 P.3d 488 (2003). The fact of conviction can raise double jeopardy concerns, even if the court has imposed concurrent sentences. ***State v. Calle***, 125 Wn.2d 769, 774, 888 P.2d 155 (1995); ***State v. Meas***, 118 Wn. App. 297, 304, 75 P.3d 998 (2003).

The crime of murder in the second degree may be committed by several alternative means. RCW 9A.32.050(1); ***State v. Berlin***, 133 Wn.2d 541, 553, 947 P.2d 700 (1997). Second degree intentional murder under RCW 9A.32.050(1)(a) and second degree felony murder under RCW 9A.32.050(1)(b) are alternative means of committing the single crime of second degree murder rather than separate crimes. ***Berlin***, 133 Wn.2d at 552-53; ***State v. Ramos***, 163 Wn.2d 654, 661, 184 P.3d 1256 (2008). Where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged, but unanimity is not required, as to the means by which the crime was committed so long as substantial evidence supports[1] each alternative means submitted to the jury. ***Ramos***, 163 Wn.2d at 660 (describing this principle as "well-settled."). "Felony murder and intentional murder of the same victim are alternative means of committing one offense and are therefore the same offense for double jeopardy purposes." ***State v. Johnson***, 113 Wn. App. 482, 487, 54 P.3d 155 (2002), *review denied*, 149 Wn.2d 1020 (2003).

[1] If one alternative means is not sufficiently supported, then reversal and remand for new trial will follow: "The alternative means principle dictates that when a jury renders a guilty verdict as to a single crime, but one of the alternative means for committing that crime is later held to be invalid on appeal and the record does not establish that the jury was unanimous as to the valid alternative in rendering its verdict, double jeopardy does not bar retrial on the remaining, valid alternative mean." ***Ramos***, 163 Wn.2d at 660.

The State may charge and prosecute a defendant for alternative means of committing the same crime and it is immaterial whether the State charges the defendant with one count, committed by alternate means, or with separate counts.[2] ***State v. Womac***, 160 Wn.2d at 660 n. 9, 160 P.3d (2007).

The Court of Appeals below found that defendant's sentence violates double jeopardy because the trial court refused to vacate either of her murder convictions and merged them instead. *See* Opinion at p. 7-8 ("And we remand to the trial court to strike her second degree felony murder conviction, count II, from the judgment and sentence"). The cases relied upon by the Court of Appeals, however, are inapposite to the case

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[2] There are reasons why a prosecutor might decide to charge alternative means of a single crime in separate counts. For example, a defendant charged with premeditated murder in the first degree might expect that the prosecution would seek instruction on the lesser degree of intentional murder in the second degree but may not comprehend that the prosecution would also seek instruction on a lesser degree felony murder theory. By charging second degree felony murder in a separate count the defendant is put on notice of this theory from the outset and informed of the alleged predicate felonies underlying the charge. The trial court is also notified of this theory, which might affect its evidentiary rulings. Separate counts provides assurance that the court will instruct the jury as to felony murder.

Additionally, jury instructions may be easier to understand if the felony murder charge is in a separate count from the other means of committing murder as there can be significant differences in the applicable law. Such differences include the difference between felony murder liability and traditional accomplice liability, the statutory defense available only for felony murder; and the availability of lesser included offenses. By charging separate counts, it is easy to limit consideration of an instruction that is relevant to only one of the alternative means by specifying that the instruction pertains only to a particular count. By charging separate counts the prosecution foregoes the opportunity to obtain a unanimous verdict on a crime without unanimity as to the means. The defendant, in turn, benefits from separate counts in that he will only be convicted if the jury is unanimous as to a particular means.

before the court as the cited cases involved multiple convictions where the criminal defendant was convicted of greater and lesser offenses. ***State v. Turner***, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (Turner was convicted of first degree robbery and second degree assault; in a consolidated case, Faagata was convicted of first degree murder and second degree murder of the same victim); ***Womac***, 160 Wn.2d at 657 (Womac was convicted of homicide by abuse, second degree felony murder and first degree assault); and ***State v. Trujillo***, 112 Wn. App. 390, 49 P.3d 935 (2002) (attempted first degree murder and first degree assault). None of these cases have required the vacation of one alternative means of the same crime when the jury has convicted on more than one means. Nor have these cases held that imposition of a single sentence on a single count of an offense based upon verdicts finding two alternative means violates double jeopardy. The cases relied upon by the court below are not controlling of the situation presented here.

Washington state courts, however, have previously upheld judgments where—as is the situation here— the trial court merges multiple convictions of a single crime into a single count and imposes a single punishment. *See* ***Johnson***, 113 Wn. App. at 487–89 (finding no double jeopardy violation, Division I of the Court of Appeals upholds the trial court sentence that "merged" the jury's separate verdicts finding

Johnson guilty of felony murder and of intentional murder into a single count and then imposed a single punishment); ***State v. Fuller***, 169 Wn. App. 797, 282 P.3d 126 (2012) (Division II of the Court of Appeals upholds the trial court sentence that "merged" the jury's separate verdicts finding Fuller guilty of felony murder and of intentional murder into a single count and then imposed a single punishment); *see also* ***State v. Meas***, 118 Wn. App. 297, 304, 75 P.3d 998 (2003) (Division II adopts the analysis in ***Johnson*** and finds double jeopardy was not violated by Meas being sentenced on a single, "merged," count of murder in the first degree after jury finds that it was committed by both premeditated and felony murder means).

Under this Court's jurisprudence, the trial court did not violate double jeopardy by imposing a single sentence on a single count of murder in the second degree, which the jury unanimously found that defendant had committed under both the intentional murder means and the felony murder means of RCW 9A.32.020; *see also* ***State v. Bowerman***, 115 Wn.2d 794, 800, 802 P.2d 116 (1990) (where prosecutor has charged premeditated murder and felony murder in a single count, defendant may enter plea to entire information but may not enter plea to one alternative of his choosing). While this court has held that when a defendant is convicted of *greater* and *lesser* offenses the judgment should be entered

only on the greater with no reference to the lesser, *see* ***Turner***, 169 Wn.2d at 463-64; ***Womac***, 160 Wn.2d at 658-60, it has not held that conviction of two alternative means of the same crime may not appear on the judgment as long as there is but a single punishment imposed for the single crime. Unlike the situations in ***Womac*** and ***Turner***, Clayton was convicted of two alternative means of committing the same crime. The trial court properly recognized that convictions for two counts of murder of a single victim would be improper, so it merged the jury's verdicts into a single count (Count I) and imposed a single punishment.

In the decision below, the Court of Appeals seemed to recognize that merger was the proper remedy, *see* opinion at p. 8, *citing* ***Fuller***, but found that the notation on the judgment that Count II was "[m]erged into count I" created a double jeopardy problem because ***Turner*** stated that the judgment should be "without reference to the verdict on the lesser offense." *See* Opinion at p. 7-8, *citing*, ***Turner*** at 169 Wn.2d at 463. The court below failed to note that Clayton was not convicted of greater and lesser offenses, but rather that she committed a *single crime* of murder in the second degree by two alternative means. There is no prohibition about identifying both alternative means on the judgment as long as it is listed with a single count and a single punishment is imposed. The Court of Appeal's concern about the judgment containing a reference to Count II

being "merged" is unwarranted. The common dictionary meaning of the word "merge" is "to cause to be legally absorbed, sunk, or extinguished by merger" or "to cause to combine or unite." Webster's Third New International Dictionary (2002) at p. 1414. *Black's Law Dictionary defines* "merger" as " the act or an instance of combining or uniting." *Black's Law Dictionary* (9th ed. 2009). Regardless of whether one uses a technical or general definition, the use of "merged" conveys the concept that something no longer has an independent existence but has became part of something else; in short that two (or more) things have become one.

In this case, the record shows the trial court properly merged the jury's determination that defendant committed second degree murder by intentional and felony murder means into a single count and sentenced defendant only on a single count of second degree murder. The judgment and sentence reflects that the defendant was found guilty of murder in the second degree by both alternatives in Count I, unlawful possession of a firearm in Count III, and malicious mischief in the second degree in Count IV. CP 253 (paragraph 2.1). The judgment notes that Count II "Merged into Count I" but does not state whether there was a jury verdict on this count and does not identify the nature of that count. Under the "Sentencing Data" on the judgment and sentence, the trial court did not calculate an

offender score or standard range for count II, noting that the count had "Merged into Count I." CP 254 (paragraph 2.3). Finally, under its "Sentence and Order," the court sentenced defendant to count I (second-degree murder), count III (unlawful possession of a firearm in the first degree), and count IV (malicious mischief in the second degree). CP 257 (paragraph 4.5). Defendant's sentence does not violate double jeopardy because the trial court only sentenced her to one count of second-degree murder. The references on the judgment that Count II "merged into Count I" makes it clear that nothing exists of Count II as it has been subsumed by Count I. The judgment is not ambiguous and shows that only one conviction for murder exists, although it was committed by two alternative means. This judgment does not violate any of this Court's jurisprudence and the court below erred in finding a double jeopardy violation where none exists.

As discussed earlier, Division I has reached a contrary result under similar facts. *See* ***State v. Johnson***, 113 Wn. App. 482, 487, 54 P.3d 155 (2002), *review denied*, 149 Wn.2d 1020 (2003). This provides a basis for review in this court. *See* RAP 13.4(b)(2).

F. CONCLUSION.

For the foregoing reasons this Court should grant the State's petition for cross-review.

DATED: July 14, 2013.

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Attached is the State's Answer to Petition/Cross-Petition for Review