No. 311384

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

MATTHEW DAVID LEONARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE RUTH E. REUKAUF, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether, in light of the rule of lenity, the current second-degree felony murder statute should be interpreted so as to permit a conviction based upon the predicate crime of assault only if the assault is not the conduct which results in the death of the victim?
2. Does the current second-degree felony murder statute violate equal protection?
3. Does a "to-convict" instruction, which informs a jury that it has a duty to return a verdict of guilty if it finds all of the elements of an offense have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial?
4. Should the trial court's findings that the defendant had the current or future ability to pay legal financial obligations be stricken as clearly erroneous, where they are not supported in the record?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The Court should reject the Appellant's invitation to violate the separation of powers doctrine, and refuse to impose the

"merger doctrine" by since the decision on whether to allow felony murder to be predicated on assault is a question of legislative intent.

2. The Appellant has failed to meet his heavy burden of proving that the felony murder statute is unconstitutional beyond a reasonable doubt.

3. The "to-convict" instruction did not deprive Mr. Leonard of his right to a jury trial.

4. The court's findings that the Appellant, Mr. Leonard, had the present or future ability to pay his legal financial obligations should not be stricken. He did not object to the entry of the findings at the time of sentencing, and is precluded from raising the issue for the first time on appeal.

II. STATEMENT OF FACTS

The Respondent does not dispute the Appellant's Statement of the Case. RAP 10.3(b)

III. ARGUMENT

1. **The Appellant has failed to meet his heavy burden of proving the felony murder statute is unconstitutional beyond a reasonable doubt.**

A statute is presumed to be constitutional, and the party challenging it bears the burden to prove that it is unconstitutional beyond a reasonable doubt. State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled on other grounds by* Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). An appellate court reviews the constitutionality of a statute *de novo*. Id. Here, Mr. Leonard argues that application of the current felony murder statute, subsequent to the Supreme Court's ruling in In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), violates both his equal protection and due process constitutional guarantees. He has not met his burden.

The Equal Protection Clause of the United States Constitution's Fourteenth Amendment requires that all persons "similarly circumstanced shall be treated alike." The equal protection clause of our State constitution, Article I, s. 12, provides the same protection as the federal constitution. State Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); Tunstall v. Bergeson, 141 Wn.2d 201, 225, 5 P.3d 691 (2000). The equal protection clause does not require equal treatment under the law for things that are different in fact or opinion. State legislatures have the initial

discretion to determine what is "different" and what is the "same". In exercising authority, states have substantial latitude to establish categories that roughly approximate the nature of the problem, where it is necessary for a state to balance competing public and private concerns and take into consideration the limited ability of the state to address every problem.

One of three standards for review is employed when analyzing equal protection claims. State v. Shawn, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993).

> *Strict scrutiny* applies when a classification affects a suspect class or threatens a fundamental right. *Intermediate or heightened scrutiny*, used by this court in limited circumstances, applies when important rights or semisuspect classifications are affected. The most relaxed level of scrutiny, commonly referred to as the *rational basis or rational relationship test*, applies when a statutory classification does not involve a suspect or semisuspect class and does not threaten a fundamental right.
>
> Manussier, 129 Wn.2d at 672-73 (emphasis in original)

Normally, the equal protection clause merely requires that a classification in some state action bears some fair relationship to a legitimate public purpose. Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d. 786 (1982). Essentially, this means that the state action will be upheld unless it is wholly irrelevant to the achievement of a legitimate state objective. The equal protection clause generally prohibits government from engaging in intentional or purposeful discrimination by

giving disparate treatment to classes of individuals. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). If there are reasonable grounds for distinguishing between those who are members of the class and those who are not, and the action applies equally to all members of the class, then the governmental action will be upheld unless the action is wholly irrelevant to the achievement of a legitimate state objective.

Leonard asserts here, and the State agrees, that the loss of liberty implicates the "rational relationship" test. Manussier, 129 Wn.2d at 674, *cert. denied* Manussier v. Washington, 520 U.S. 1201 (1997); State v. Armstrong, 143 Wn. App. 333, 337-38, 178 P.3d 1048 (2008); State v. Coria, 120 Wn.2d 156, 171, 839 P.2d 890 (1992).

Applying the "rational relationship" test, Division I of this Court has found that the inclusion of assault, as a predicate felony on which the charge of felony murder may be brought, was rationally related to a legitimate goal-punishing under the applicable murder statute those who commit a homicide in the course and in furtherance of a felony. Armstrong, 143 Wn. App. at 339-40. The purpose of the felony murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. State v. Leech, 114 Wn.2d 700, 708, 790 P.2d 160 (1990). Statutes which deter persons from committing felonies, in general, and homicides during the commission of a

felony, in particular, promote the public peace and make the community safer for its citizens. This is a legitimate legislative goal and the felony murder statute is rationally related to this goal. Mr. Leonard's claim that the statute violates equal protection is without merit.

Leonard also asserts that the statute gives the prosecution too much discretion in making a charging decision. The Washington Supreme Court has rejected this challenge as it pertained to the pre-1975 felony murder statute. State v. Wanrow, 91 Wn.2d 301, 312-13, 588 P.2d 1320 (1978). It held that there is no equal protection violation when the crimes that the prosecuting attorney has the discretion to charge require proof of different elements. State v. Leech, 114 Wn.2d 700, 711, 790 P.2d 160 (1990); Wanrow, 91 Wn.2d at 311. As the elements of felony murder differ from those of first degree manslaughter there is no violation of equal protection. State v. Parr, 93 Wn.2d 95, 97, 606 P.2d 263 (1980). Divisions I and III have rejected this claim as it pertained to the former felony murder statute in effect from 1975 to 2003. State v. Gilmer, 96 Wn. App. 875, 981 P.2d 902 (1999); State v. Goodrich, 72 Wn. App. 71, 79, 863 P.2d 599 (1993). Division I has rejected this claim as it pertains to the current statute in Armstrong, 143 Wn. App. at 340-41. Simply put, no Washington court has ever found any merit to this contention and the Court should reject his argument.

Leonard claims that he is in a class of defendants who commit second degree assault which results in death, and there is no distinction between the far more serious penalties associated with second degree felony murder, and the less serious potential penalties for second degree manslaughter. The elements of those two offenses, however, are different. Manslaughter in the second degree requires proof that the defendant: 1) engaged in conduct of criminal negligence; and 2) that a person died as a result of the defendant's negligent acts. RCW 9A.32.070(1). By contrast, the predicate offense of second degree assault requires proof that the defendant assaulted another with a deadly weapon. RCW 9A.36.021(1)(c).

Finally, Leonard argues that the use of the felony murder statute is unconstitutional as it applies to him because he was denied his right to have the jury instructed on lesser included offenses. A defendant may request instructions on necessarily included offenses under RCW 10.61.006, and lower degree crimes under RCW 10.61.003. It is well-settled that manslaughter is not a lesser included offense or a lower degree of felony murder. State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998). There is, therefore, no right to an instruction on manslaughter as a lesser degree or a lesser included offense.

The Appellant correctly predicts that the State will rely upon State v. Gordon, 153 Wn. App 516, 223 P.3d 519 (2009), in which Division I of this Court has previously addressed this equal protection argument, and rejected it:

> In re Personal Restraint of Andress, 147 Wn.2d 602, 616, 56 P.3d 981 (2002) held that the legislature did not intent that assault be a predicate felony in the felony murder scheme. In response, the legislature provided a statement of intent when it amended the second degree felony murder statute in 2003 to specifically include assault. *See* RCW 9A.32.050(1)(b) (stating that any felony, "including assault," can serve as the predicate felony). The legislature explained its purpose was to "[p]unish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony." LAWS OF 2003, ch. 3, s. 1.
>
> The statute achieves the legislature's express goal of punishing those who commit a homicide in the course of and in furtherance of a felony in the same manner as those who intend to kill. Armstrong, 143 Wn. App. at 340. Including assault as a predicate felony is rationally related to achieving that objective. Manussier, 129 Wn.2d at 673. While this is certainly a harsh policy, and does vest immense discretionary power in the prosecutor, it is nevertheless a policy choice well within the province of the legislature. *See* Armstrong, 143 Wn. App. at 340.
>
> Further, the equal protection challenge based on the unavailability of the lesser included offense instruction of manslaughter for those charged with felony murder is a matter courts have already settled. The court held in Gamble [State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005)] that because manslaughter requires proof of a mens rea element vis-à-vis the resulting death, whereas felony murder does not when second degree assault is the predicate felony, manslaughter cannot be a lesser included

> offense of second degree felony murder. 154 Wn.2d at 466-69; *see also* Armstrong, 143 Wn. App. at 341.
>
> A rational basis exists for the distinctions the legislature made in the statute, so it does not violate equal protection.
>
> Gordon, 153 Wn. App. at 527.

It is important to note that a person who causes an unintentional death while in the course of committing a felony is not in the same position as a person who causes an unintentional death. A person who causes an unintentional death while engaged in felonious activity has a greater degree of culpability than someone who causes a death recklessly or negligently but is not engaged in felonious conduct. This is not a matter of differing punishments for similarly situated persons. In any event, the State would urge this Court to adopt the logic and analysis of Division I in Gordon and hold that the current statute does not violate equal protection.

2. This Court should reject the Appellant's invitation to apply the merger doctrine to the felony murder statute, as to do so usurps a legislative function.

Until the decision in Andress, the Washington State Supreme Court consistently rejected arguments that the merger doctrine should preclude the use of a felony assault as a predicate crime for felony murder. Wanrow, 91 Wn.2d at 301; State v. Roberts, 88 Wn.2d 337, 344, 562 P.2d 1259 (1977); State v. Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977); State

v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966). These decisions made it clear that the use of assault as a predicate felony presented an issue that was a question of legislative intent rather than one of constitutional dimension. *See* Thompson, 88 Wn.2d at 17-18.

Also, early Supreme Court cases indicated that the 1975 criminal code revisions, which were effective July 1, 1976, had not changed the Court's view on whether the assault merger doctrine should be applied to Washington's felony murder statute. Thompson, 88 Wn.2d at 17; Wanrow, 91 Wn.2d at 313. The Court refused to reconsider Wanrow and constitutional challenges to felony murder in State v. Leech, 114 Wn.2d 700, 712, 790 P.2d 160 (1990). Assault was specifically recognized as a predicate offense for felony murder in Tamalini, 134 Wn.2d at 734, and State v. Davis, 121 Wn.2d 1, 7, 846 P.2d 527 (1993).

In Andress, however, the Court made it clear that the comments it had made in Wanrow, Thompson and Roberts were not equivalent to actually analyzing the changes to the statutory language and held that it had not, in fact, previously analyzed whether the changes to the statute enacted in 1975 somehow signaled a legislative intent to exclude felony assault as a predicate for felony murder. Andress, 147 Wn.2d at 609-16. The Court interpreted that the legislative addition of the "in furtherance of" language to the felony murder statutes signaled an intent by the

legislature to remove assault as a predicate felony from the felony murder rule. Id., at 616.

Following the Andress decision, however, the legislature amended the second degree felony murder statute, effective February 12, 2003, to expressly declare that assault is included among the predicate crimes under the second degree felony murder statute. LAWS OF 2003, ch. 3, s. 2. The statute proscribing felony murder in the second degree now reads, in relevant part:

> (1) A person is guilty of murder in the second degree when:
>
> > (b) He or she commits or attempts to commit any felony, ***including assault***, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.
>
> RCW 9A.32.050 (emphasis added)

In Washington, the determination of whether felony assault can be a predicate felony for the felony murder statute has always been an issue of legislative intent rather than a constitutional question:

> [W]e are now firmly convinced that adoption of the merger doctrine is not compelled either by principles of sound statutory construction or by the state or federal constitutions, and that adoption of the doctrine by this court would be an unwarranted and insupportable invasion of the legislative function in defining crimes. We therefore reaffirm this court's refusal to apply the doctrine of merger to the crime of felony-murder in this state.

Wanrow, 91 Wn.2d at 303.

Thus, whether a felony assault can act as a predicate for felony murder is a question of legislative intent. *See* also In Re Personal Restraint of Bowman, 162 Wn.2d 325, 335, 172 P.3d 681 (2007). The legislature indeed made its intent clear in amending RCW 9A.32.050 by enacting an intent statement; stating, in part:

> **The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder.** The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twnty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. **The legislature does not agree with or accept the court's findings of legislative intent in State v. Andress, Docket No. 71170-4 (October 24, 2002), and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.**
>
> LAWS OF 2003, ch. 3, s. 1 (emphasis added)

Thus, for crimes committed after February 12, 2003, it is beyond dispute that the legislature intended "that assault *is* included as a predicate crimeunder the second degree felony murder statute." Bowman, 162 Wn.2d at 335.

It is equally clear that the legislature did not agree with the Andress court's interpretation of its prior intent and sought to nullify the impact of Andress with the 2003 amendment.

Essentially, Mr. Leonard is asking this Court to apply the doctrine of merger, such that the crime of assault cannot be a predicate for felony murder. This is an invitation to usurp a legislative function, by judicial fiat. Such an application would violate the separation of powers doctrine, and should be rejected by this Court, as Division I did in Gordon. There, as here, the defendant argued that "under canons . . . of statutory construction and rule of lenity, this court should interpret the second degree felony murder statute to allow assault to serve as the predicate felony only where the assault is not also the act that causes the death." Gordon, 153 Wn. App. at 527. Compare Brief of Appellant, p. 5-10. However, the Court of Appeals concluded that:

> [t]he [second-degree felony murder] statute is not ambiguous. But, even if we assume the statute was ambiguous and look at the legislative history of the statute as Gordon urges, we see the res gestae issue is no longer problematic. The reasoning in Andress concerning res gestae involved statutory construction principles to derive the legislature's intent. **The 2003 amendments in response to the holding in Andress and its accompanying statement of intent make it clear the legislature wants assault to be a predicate felony.**
>
> Id., at 529 (emphasis added)

3. Leonard's right to a jury trial was not violated by the "to-convict" instruction.

The right to a trial by jury is and has been a fundamental right afforded to the citizens of Washington:

> The effect of the declaration of the Constitution above set out is to provide that the right of trial by jury as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate. Whallon v. Bancroft, 4 Minn. 213, 41 N.W. 1020 [3 L.R.A. 510]; Taliaferro v. Lee, 97 Ala. 92, 13 So. 125. This appears to be the rule generally recognized by the authorities.
>
> State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958, 959 (1897).

See, also, Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 467 P.2d 372 (1970); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910). Const. art. 1, s. 22; Const. art. 1, s. 21.

The right is also guaranteed under the Sixth Amendment to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> U.S. Const. amend. 6.

Leonard claims that the trial court here impermissibly interfered with his constitutional jury trial rights when it gave this pattern instruction to the jury:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> **(CP 135; WPIC 28.02)**

He is incorrect. In fact, the case authority on this point is well-settled. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968). The trial court is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). A defendant is entitled to an instruction on the defendant's theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010).

Leonard argues that the "to-convict" instruction was erroneous because the court informed the jury that it had a duty to convict if it found all of the elements of the crime beyond a reasonable doubt. He cites, and asks this court to reach a different result from, State v. Meggyesy, 90 Wn.

App. 693, 696, 958 P.2d 319, *review denied*, 136 Wn.2d 1028, 972 P.2d 465 (1998), *overruled on other grounds by* State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), (applying the six-step analysis set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Division I held:

> Arthur Heggins and Thomas Meggyesy challenge the giving of standard WPIC "to convict" jury instructions used in their respective trials. Each contends the trial court erred by instructing the jury that if it found that the State had proved beyond a reasonable doubt all elements of the charged crime, then it had "a duty to return a verdict of guilty." We hold that neither the federal nor the state constitution precludes such an instruction. Accordingly, we affirm.
>
> Id.

Meggyesy was followed in State v. Brown, 130 Wn.App. 767, 770-71, 124 P.3d 663 (2005), which also relied upon a similar decision in State v. Bonisisio, 92 Wn. App. 783, 793, 964 P.2d 1222 (1998):

> Brown argues that Bonisisio and Meggyesy are distinguishable because in those cases each defendant asked the court to instruct the jury that it "may" convict. Here, Brown argues that the language of the "to convict" instruction affirmatively misleads the jury about its power to acquit. Brown points to the jury's power to acquit against the evidence, citing to Hartiganv. Territory of Wash., 1 Wash. Terr. 447, 449 (1874). Brown also argues that the court's use of the word "duty" in the "to convict" instructions conveyed to the jury that they could not acquit if the elements had been established.
>
> . . .

> We find no meaningful difference between Brown's argument and the issues raised in Bonisisio and Meggyesy.
>
> . . .
>
> The power of jury nullification is not an applicable law to be applies in a second degree burglary case. We reject Brown's argument that the court erred in giving the "duty" instruction.
>
> Id.

There is no difference between the issue on appeal raised here, and the decisions in Meggyesy, Bonisisio, and Brown. Leonard argues that Meggyesy was incorrectly decided, but does not set forth why the facts of this case should compel this court to set aside those decisions and reach a different result. This court should follow Meggyesy as well as Division II's decision in Brown.

Further, the court in Meggyesy has already applied the six-step analysis set forth in Gunwall and found no independent state constitutional basis to invalidate the challenged instructions. Meggyesy, 90 Wn. App. at 703-04.

Leonard did not object to the "to convict" instruction. An instructional error not objected to below may be raised for the first time on appeal only if it is "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v.Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An

error is manifest if it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009).

4. Leonard is also precluded from challenging the court's findings as to his ability to pay his legal financial obligations for the first time on appeal.

For the first time on appeal, Mr. Leonard challenges the trial court's findings as to his ability to pay his legal financial obligations. He argues that since the court had nothing upon which to base those findings, they should be struck as clearly erroneous. A recent case published by Division II of this Court casts some doubt on that argument.

In State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), the defendant argued that the record there did not support the trial court's finding that he had the present or future ability to pay his financial obligations, as there was no discussion on the record or documentary evidence to support the finding. He relied upon State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied* 175 Wn.2d 1014 (2012), also cited here, which requires that a trial court first"[take] into account the financial resources of the defendant and the nature of the burden" imposed by the legal financial obligations. In that case, as here, the defendant did not object to the court's findings. Further:

> While we addressed the finding of current or future ability to pay in *Bertrand* for the first time on appeal under RAP 2.5(a), that rule does not compel us to do so in every case.

> We noted that Bertrand had disabilities that might reduce her likely future ability to pay and that she was required to begin paying her financial obligations within 60 days of sentencing Bertrand, 165 Wn. App. at 404. Nothing suggests that Blazina's case is similar. Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.
>
> Id., at 911.

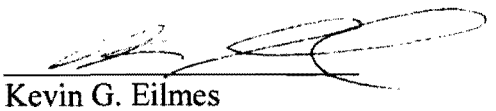
This Court recently held that as ample protection for a defendant's constitutional rights exists "if and when the State takes action to collect" legal financial obligations, it would decline to consider an assignment of error challenging LFO's when raised for the first time on appeal under RAP 2.5(a). State v. Kuster, 175 Wn. App. 420, 425-26, ___ P.3d___, (2013).

Nothing in this case suggests that Leonard's situation is so similar to that in Bertrand that he should be allowed to raise this issue for the first time on appeal. The Court should reject the challenge.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction, and the financial order.

Respectfully submitted this 23rd day of August, 2013.



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