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NO. 63040-7-I

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

In re the Personal Restraint Petition Of:

MANSOUR HEIDARI,

Petitioner

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

The Honorable Robert H. Alsdorf, Judge

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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A. ARGUMENT IN REPLY

STATUTORY AND CONSTITUTIONAL PROTECTIONS
PREVENT THIS COURT FROM SIMPLY FINDING HEIDARI
GUILTY OF A CRIME HIS JURY WAS NEVER ASKED TO
CONSIDER

The State cites to several cases from this Court in which the matter was remanded to the trial court for conviction on a lesser-included offense. See Brief of Respondent, at 11-12. As discussed in Heidari's supplemental brief, these decisions conflict with RCW 10.61.003 and 10.61.010, due process and the right to trial by jury, and the Supreme Court's opinion in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). See Petitioner's Supplemental Brief, at 1-11.

The State also cites three Washington Supreme Court decisions. The first case is State v. Watson, 2 Wash. 504, 27 P. 266 (1891). In Watson, the prosecutor intended to charge the defendant with assault with intent to commit murder, which consists of two elements: (1) an assault and (2) intent to commit murder. Through oversight, the prosecutor only charged assault, failing to include the second element in the information. Id. at 505-507. Based on the charging deficiency, the Supreme Court reversed Watson's conviction on the greater offense and remanded for sentencing on simple assault. Id. at 507-08.

Watson was properly decided. Unlike Heidari's case, it did not involve reversal of a conviction for insufficiency of the evidence and remand for conviction on a lesser-included offense jurors were never asked to consider. Rather, *Watson* was *only charged with the lesser offense*. And since the jury instructions for assault with intent to commit murder expressly required jurors to find that Watson committed the assault, the remedy was fully consistent with the jury's verdict. That remedy also is fully consistent with the requirements of Green. See Green, 94 Wn.2d at 234 (requiring instruction on elements of lesser and express finding by jury on each element of lesser).

The State's second case is State v. Friedrich, 4 Wash. 204, 29 P. 1055 (1892), a decision of dubious precedential value because it predates Green by almost 90 years and because of its subsequent history. See In re Friedrich, 51 F. 747, 748-749 (C.C.D. Wash. 1892) (questioning Supreme Court's authority to enter judgment for a crime the jury never considered).

The State's third case is State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970). In Miles, the Supreme Court reversed the defendant's conviction for assault in the third degree and remanded for entry of judgment on assault in the fourth degree. Id. at 599-601,

604. But in Miles, the defendant waived his statutory and constitutional rights to jury trial. Id. at 594. Thus, unlike Heidari's case, which was decided by a jury, neither RCW 10.61.003 and 10.61.010, nor due process and the right to trial by jury, would have limited the available remedy on remand.

Notably, not one of the Washington cases cited by the State addresses the other problem with remand for judgment on attempted molestation – that it would violate double jeopardy. Instead, the State primarily relies on two United States Supreme Court decisions: Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996) and Morris v. Mathews, 475 U.S. 237, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986). Supplemental Brief of Respondent, at 15-17. A thorough examination of those cases reveals they do not support the State's position.

Rutledge was charged, tried, and convicted by a jury on one count of participating in a conspiracy to distribute controlled substances and one count of conducting a continuing criminal enterprise ("CCE"). The Supreme Court held that the conspiracy charge was a lesser-included offense of CCE and double jeopardy protections only permitted one conviction. Rutledge, 517 U.S. at 294-295, 300, 307.

In an attempt to convince the Supreme Court not to vacate the lesser conviction, the Government argued:

Congress must have intended to allow multiple convictions because doing so would provide a “backup” conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether – even if the basis for reversal does not affect his conviction under the lesser.

Rutledge, 517 U.S. at 305.

In rejecting that argument, the Supreme Court noted that lower federal courts had approved of “entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense.” *Id.* at 306 (citing cases). Ultimately, however, the Court did not decide the constitutional limits of this practice: “There is no need for us to consider the precise limits on the appellate courts’ power to substitute a conviction on a lesser offense for an erroneous conviction on a greater offense.” *Id.* (footnote omitted). Instead, the Court simply rejected the Government’s assumption that when “a defendant is tried for greater and lesser offenses in the same proceeding[.]” Congress would want both convictions to stand. *Id.* at 306-307.

Notably, unlike Heidari’s case, in Rutledge the jury expressly

found the defendant guilty of both the greater *and* the lesser offense. The critical point is this: the Supreme Court was never asked to decide, and did not decide, whether an appellate court could reverse a conviction for insufficient evidence and remand for judgment on a lesser offense the jury was never asked to consider.

The second Supreme Court case relied upon by the State is Morris v. Mathews, a case cited in Rutledge. See Rutledge, 517 U.S. at 306. Mathews does not address the issue in question, either. Mathews pled guilty to robbery. Thereafter he was charged with aggravated murder (aggravated because of the robbery). Jurors were instructed on aggravated murder and the lesser-included offense of murder. The jury found him guilty of aggravated murder. Mathews, 475 U.S. at 240-242.

Based on Mathews' robbery conviction, his subsequent conviction for aggravated murder violated double jeopardy. But it was apparent that in finding Mathews guilty of aggravated murder, jurors found all the elements of murder, which were the same as those for aggravated murder absent the robbery element, *i.e.*, that he purposefully caused a death. Mathews, 475 U.S. at 243-244.

The Court held that where jurors convict on a jeopardy-barred offense, and the conviction is reduced to a lesser-included offense

not barred by jeopardy and clearly found by the jury, the defendant bears the burden to show he would not have been convicted of the lesser absent the jury's consideration of the greater. *Id.* at 247-247.

The Mathews Court did not decide the issue in Heidari's case. The issue in Mathews was to what extent courts can order judgment on a lesser offense when the greater offense is jeopardy barred. As in Rutledge, jurors in Mathews were instructed on both the greater and the lesser offenses. In contrast, the question in Heidari's case is to what extent a lesser offense is jeopardy barred when the greater offense is vacated for lack of evidence, and jurors were never instructed on the lesser offense.

While neither Rutledge nor Mathews provides the answer to this question, other established double jeopardy principles do. Unless jurors are instructed on a lesser-included offense at trial, an acquittal on the greater charge for lack of evidence – whether at the trial level or on appeal – necessarily implies an acquittal on all potential lesser-included offenses. Under these circumstances, remand for conviction on a lesser-included offense violates double jeopardy. To avoid the double jeopardy bar, prosecutors must request instructions on the lesser offense. See Petitioner's Supplemental Brief, at 11-18.

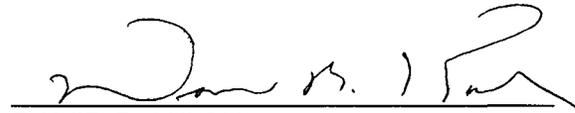
B. CONCLUSION

This Court must reverse and dismiss Heidari's conviction on count 4.

DATED this 16th day of April, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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WSBA No. 23789
Attorneys for Appellant

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DIVISION ONE**

In re the Personal Restraint Petition of:)	
)	
MANSOUR HEIDARI,)	COA NO. 63040-7-I
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SUPPLEMENTAL REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MANSOUR HEIDARI
 DOC NO. 847716
 MONROE CORRECTIONAL COMPLEX/TRU
 P.O. BOX 888
 MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*