

77347-5

Supreme Court No. 77347-5
Consolidated with No. 77360-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MARIO MEDINA AND FELIPE RAMOS,

Appellants.

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR

1. Retrial of Mario Medina and Felipe Ramos on first-degree manslaughter would violate the Double Jeopardy Clause of the United States and Washington Constitutions in light of the jury's actual acquittal of the two for the greater offense of second-degree intentional murder.

2. Where this Court's decision in *Andress* was not an extraordinary circumstance and the state invited the error in instructing the jury on the uncharged crime of felony-murder, does the mandatory joinder rule require dismissal of the amended information?

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution as well as art. I, § 9 of the Washington Constitution and RCW 10.43.020 bar prosecution following an actual acquittal on the same offense. Mr. Medina and Mr. Ramos were acquitted by jury verdict of intentional second-degree murder. The amended information seeks re-prosecution of Mr. Medina and Mr. Ramos for manslaughter, the same offense as that for which they were acquitted. Is reversal required for a violation of double jeopardy?

2. CrR 4.3, the mandatory joinder rule, requires that all related offenses arising out of the same incident be tried together. Second-degree

intentional murder and first-degree manslaughter are lesser included offenses and related offenses for mandatory joinder purposes where the two offenses arose out of the same incident.

C. STATEMENT OF THE CASE

On September 17, 1997, Mario Medina and Felipe Ramos were charged with one count of first-degree premeditated murder. Supp. CP ____ (Information, Sub. 1, filed 9/17/97). At the close of the evidence, the Court instructed the jury on the elements of premeditated murder as well as second-degree murder. At the State's request, the trial court also gave a combined to-convict instruction for second-degree murder, which included intentional and felony murder, even though felony murder was not included as an alternative charge in the information and it is not a lesser-included offense of first-degree murder.¹

Court's Instructions 14 and 15 read as follows:

To convict the defendant of the crime of Murder in the Second Degree, a lesser degree crime, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of September, 1997, Joe Collins died as a result of the actions of the defendant or an accomplice;

¹ The instructions for each defendant were identical.

- (2) That the defendant or an accomplice acted by one or both of the following means or methods:
- (a) That the defendant or an accomplice acted with the intent to cause the death of Joe Collins;

OR

- (b) That the defendant or an accomplice committed the crime of Assault in the Second Degree; and
- (c) That Joe Collins was not a participant in the crime of Assault in the Second Degree; and
- (d) That the defendant or an accomplice caused the death of Joe Collins in the course of and in furtherance of the crime or in the immediate flight from the crime;
- (4) That the acts occurred in the State of Washington.

Supp. CP ____ (Court's Instructions to the Jury, Sub 45 B filed 6/24/98).

When the jury returned a verdict, it had not entered anything on the verdict form for first-degree murder, but had, however, entered a general verdict of guilty on the second-degree murder verdict form. After the jury was polled on their general verdict, the State asked the Court to submit a special interrogatory to the jury in order to clarify the alternative means under which the jury convicted for "appellate purposes." The interrogatory and answers given were as follows:

If you find the defendant, MARIO MEDINA, guilty of the crime of Murder in the Second Degree on verdict form B, then you must answer this special interrogatory. If you find the defendant not guilty of Murder in the Second

Degree, or did not consider that crime, do not answer this special interrogatory.

We, the jury unanimously agree that element 2(a), described in jury instruction No. 14, has been proved beyond a reasonable doubt.

ANSWER: NO (Yes or No).

We, the jury, unanimously agree that elements 2(b), (c), and (d), described in jury instruction No. 14, have been proved beyond a reasonable doubt.

ANSWER: YES (Yes or No).

CP _____.

Thus, the jury unanimously agreed that the defendants did not intend to kill Joe Collins, but instead concluded that Collins was killed in the course or in furtherance of a second-degree assault.

In 2004, the Court of Appeals reversed Medina's and Ramos' convictions pursuant to this Court's decision in *In Re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and remanded for further proceedings. See *State v. Medina & Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004).

When the matter was returned to Superior Court, the State moved to file an amended information charging Medina and Ramos with first-degree manslaughter. Medina and Ramos moved to dismiss the amendment on the grounds that the amended information violated the double jeopardy clause and offended principles of mandatory joinder and

speedy trial. Further, they asked the trial court to direct a verdict to the charge of second-degree assault. The trial court denied the motions. The Court did not engage in any extended reasoning on the double jeopardy argument. As to the argument that mandatory joinder barred the charge, the trial judge held that:

This Ramos/Medina case is a continuation of almost ten years of bizarre jurisprudence by the State Supreme Court.

6/8/05 RP at 34. The court criticized the decision in *Andress* and stated that that it presented an extraordinary situation such that the interests of justice would permit the State to circumvent the mandatory joinder rule and allow retrial of the defendants for manslaughter. *Id.* at 34-39.

This Court subsequently granted discretionary review.

D. ARGUMENT

1. The State and Federal Double Jeopardy Clauses Bar any Retrial for a Charge on Which Medina and Ramos Were Acquitted

a. Federal Law

The Double Jeopardy Clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment, provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” *Illinois v. Vitale*, 447 U.S. 410, 415, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct.

2056, 23 L.Ed.2d 707 (1969). “The protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.” *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

It is well settled law that where a defendant is acquitted by a jury of an offense he may not thereafter be prosecuted again for the same offense without offending the Double Jeopardy Clause. *Kepner v. United States*, 195 U.S. 100, 125, 24 S.Ct. 797, 49 L.Ed. 114 (1904); *Ball v. United States*, 163 U.S. 662, 671, 16 S.Ct. 1192; 41 L.Ed. 300 (1896). In both of these cases the defendant was acquitted by a jury but the indictment was subsequently reversed and the defendant was retried on the same offense and convicted. In each case, the subsequent prosecution was overturned as it violated the bar against double jeopardy. *Id.*

First-degree manslaughter is a lesser included offense of second degree intentional murder. *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997); *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981). For the purposes of double jeopardy, the same offense includes lesser-included offenses. *See Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (prosecution for auto theft following conviction for joy-riding violated double jeopardy as offenses were the same offense). In

Brown, the Supreme Court made clear: “Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.” *Id.*

Under this analysis, once the jury entered a verdict acquitting Mr. Medina and Mr. Ramos, the State was barred from retrying the defendants on any lesser included offenses of second degree intentional murder, specifically, first degree manslaughter. Under the Fifth Amendment the trial court erred in amending the information to allow the State to proceed on first-degree manslaughter. To allow the State to proceed would violate the defendants’ right against being placed twice in jeopardy.

b. State Law

In the previous trial, the jury specifically found that Medina and Ramos did not intend the death of the victim. Thus, they were actually acquitted of first and second-degree murder because both charges require the State to prove beyond a reasonable doubt that the defendant intended the death of another. See RCW 9A.32.030(a); RCW 9A.32.050(a). This Court recently affirmed that “acquittal terminates jeopardy.” *State v. Ervin*, 158 Wn.2d 746, 753, 147 P.3d 567 (2007).

Moreover, under Washington law, they cannot be retried on any lesser-degree or lesser-included offense of intentional murder. RCW 10.43.020 provides that:

When the defendant has been convicted or *acquitted* upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

(emphasis added). Because first and second-degree manslaughter are lesser degrees or lesser-included offenses of intentional murder, these defendants cannot be retried on the amended information charging manslaughter.

The fact that Medina and Ramos were previously convicted of felony murder does not aid the State. Our Supreme Court has determined that manslaughter is not a lesser-included offense of second-degree felony murder where second-degree assault, RCW 9A.36.021(1)(a), is the predicate felony. *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005).

2. *Even if Medina and Ramos had Not Been Actually Acquitted of Intentional Murder, They Still Could Not Be Retried for Any Lesser-Included Offense*

Even if the jury had left the intentional murder verdict form blank, double jeopardy would bar their retrial on manslaughter. The United States Supreme Court has made it quite clear that retrial is permissible

only when there is a “manifest necessity” to discharge a jury before it has made a finding, such as when the jury is found to be genuinely deadlocked. *United States v. Perez*, 22 U.S. 579, 580, 6 L.Ed. 165 (1824).

For jeopardy to attach, it is not necessary that the jury reach a verdict of conviction or acquittal. “Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant’s valued right to have his trial completed by a particular tribunal.” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (citations and internal quotations omitted). “Even if the first trial is not completed, a second prosecution may be grossly unfair.”

Id. In view of the defendant’s important right to have the trial concluded by a particular tribunal,

the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate “manifest necessity” for any mistrial declared over the objection of the defendant.

Id. at 505. The prosecution meets this burden when the jury is “genuinely deadlocked.” *Id.* at 509.

In fact, this Court has held that even the jury's announcement of a deadlock, while helpful, is not of itself a sufficient ground for a mistrial. *State v. Taylor*, 109 Wn.2d 438, 443, 745 P.2d 510 (1987), *overruled on*

other grounds in State v. Labanowski, 117 Wn.2d 405, 417, 816 P.2d 26 (1991). The test is whether “extraordinary and striking circumstances” exist such that “the ends of substantial justice cannot be obtained without discontinuing the trial.” *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982) (quoting *State v. Bishop*, 6 Wn. App. 146, 150, 491 P.2d 1359 (1971)). As this Court observed in *Jones*:

On the one hand, if [the trial court] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of [her] “valued right to have [her] trial completed by a particular tribunal.” But if [the court] fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

Jones, 97 Wn.2d at 163-64 (quoting *Washington*, 434 U.S. at 509).

Here, the jury was discharged with no finding by the trial court of a “manifest necessity.” The failure to make such a finding bars retrial of Mr. Medina and Mr. Ramos for any offense arising out of the shooting of Mr. Collins.

3. *The “Ends of Justice” Do Not Support an Exception to the Mandatory Joinder Rules in This Case*

CrR 4.3.1 provides that:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived

as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

The State argued below that the “ends of justice” exception applied here because the *Andress* case was an “extraordinary circumstance,” those circumstances were “extraneous to the action” and because it would be “unjust” not to allow the State to try the defendants for some degree of murder.

The *Andress* case cannot be an “extraordinary circumstance” in this case. The State sought a guilty verdict on second degree murder and the jury plainly rejected that by acquitting Mr. Medina and Mr. Ramos. The State should not have another opportunity to gain what they failed to gain previously. Further, correctly interpreting a statute, as this Court did in *Andress*, does not constitute an extraordinary circumstance. *See State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996) (“Where a statute has been construed by the highest court of the state, the court’s construction is deemed to be what the statute has meant since its enactment.”).

The State could have completely avoided the *Andress* issue had the jury been properly instructed here. The State improperly inserted the

felony-murder issue into this case by requesting second-degree felony murder instructions. Medina and Ramos were never charged with felony murder and it was not a lesser-included offense of intentional murder. Thus, the State invited any error associated with the defendant's previous conviction for felony murder regardless of the *Andress* decision. Because the State invited the error, this Court should not entertain the State's belated complaint that the "ends of justice" should permit an exception to the mandatory joinder rules here.

Moreover, by inserting the felony-murder theory it is clear that the State's trial deputy had some concerns about whether the evidence presented at trial demonstrated that the defendants' "intended" the murder. The State had every right to request manslaughter instructions at that time but failed to do so.

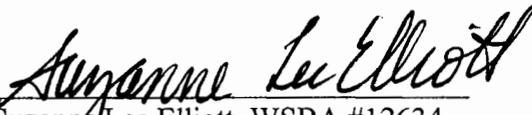
Finally, the defendants' convictions could also have been reversed on the grounds that they were convicted of a crime for which they were never charged. "All essential elements of a crime, statutory or otherwise, must be included in a charging document." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The purpose of this rule is to apprise the defendant of the charges against him or her and to allow the defendant to adequately prepare a defense. The Washington State Constitution, art. 1, §

22 (amendment 10) and the Sixth Amendment to the United States Constitution both confer upon a defendant the right to be informed of the nature and cause of an accusation against him. Based upon these provisions, a general rule has developed that a person can be convicted only of those crimes charged in the information. *State v. Irizarry*, 111 Wn.2d 591, 599, 763 P.2d 432, 437 (1988); *State v. Frazier*, 76 Wn.2d 373, 456 P.2d 352 (1969); *State v. Miller*, 30 Wn. App. 443, 635 P.2d 160 (1981). The State never properly charged these defendants with felony murder. Thus, their convictions would likely have been reversed on that basis even if the *Andress* case had not found the felony-murder statute was unconstitutional.

E. CONCLUSION

This Court should reverse the trial court's amendment of the information and find that the defendants cannot be charged with any degree of intentional murder or any lesser-included offense of intentional murder on retrial.

Respectfully submitted this th 16 day of February, 2007.


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CERTIFICATE OF SERVICE

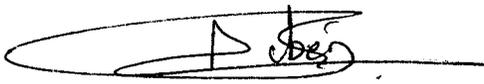
I hereby certify that on the date listed below, I served by United States Mail one copy of this document on the following:

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Date



A handwritten signature in black ink, appearing to read 'F. Ramos', is written over a horizontal line.