

No. 77347-5
Consolidated w/77360-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FELIPE RAMOS & MARIO MEDINA,

Appellants.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain

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RULES

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A. REPLY STATEMENT OF THE CASE

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;
- (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 135.

There are two possible interpretations of the answer to the first question on the special verdict form: 1) the jury actually acquitted the defendants of intentional murder, or 2) all twelve

could not agree whether the defendants intended to murder the victim.

The defendants have argued that the only reasonable interpretation is that the jurors actually acquitted Ramos and Medina. The answer “no” means that all twelve jurors found that the State did not prove intent. The State argues that the verdict form, coupled with the jury’s inquiry as to how to treat the form, indicates that the jurors could not agree either to acquit or convict defendants of intentional murder. That is the State argues that the jury was “hung” on this issue.

But, because there is no evidence to support the State’s view, this Court must find that double jeopardy bars retrial of the defendants of intentional murder or any lesser included offense.

B. ARGUMENT

1. THE JURY'S UNEQUIVOCAL ANSWER TO THE SPECIAL INTERROGATORIES ON INTENTIONAL SECOND DEGREE MURDER CONSTITUTED AN ACQUITTAL OF THAT CHARGE

The State appears to concede that if the jury actually acquitted Medina and Ramos, retrial of intentional murder or any lesser included offense would be barred.

2. THERE IS NO THERE IS NO EVIDENCE THAT THE JURY WAS "HUNG" ON THE ISSUE OF INTENT

The State accurately notes that the special interrogatories required the jury to unanimously agree whether the elements of the alternative means of committing second degree murder, felony murder based upon assault and intentional murder, had been proven beyond a reasonable doubt. CP 58-59. The State also accurately notes that the jury asked the court about the special interrogatories. CP 135; Brief of Respondent at 8-9. But the State then concludes from the jury's subsequent "no" answer to the interrogatories that the jury could not agree in reaching its decision. Brief of Respondent at 18-19.

The State's conclusion can be best characterized as a self-serving guess at what the jury actually decided. The jury was not

polled by court following the jury's rendering of the special verdict. In fact, it is just as likely that the opposite conclusion is true; the jury actually acquitted the defendants.

This conclusion is supported by the fact that the jury initially agreed the State had not proven beyond a reasonable doubt that Mr. Ramos and Mr. Medina had acted with premeditation to kill the victim. Then they were specifically instructed to choose between two alternative theories of second-degree murder. The jury chose not to convict under the "intentional" theory of second-degree murder. Instead, the jury chose to find the defendants guilty because they intended to assault the victim and the assault resulted in the victim's death. Thus, the most logical conclusion is that the jury agreed that the defendants did not intend to kill.

3. ASSUMING THE JURY DID NOT ACTUALLY ACQUIT THE DEFENDANTS, THERE WAS AN "IMPLIED" ACQUITTAL IN THIS CASE.

In their opening brief, Ramos and Medina point out that, even if the jury "hung" on the issue of intent, they were "impliedly" acquitted of any theory of intentional murder. The State appears to argue that when a jury is instructed on alternative means of committing second degree murder and the jury convicts the defendant on one of the alternative means but cannot agree on any

other charged means, there is no double jeopardy bar to retrying the defendant on the other means at some later date. The State says that “the defendant’s assertion that double jeopardy can be triggered by a trial court’s failure to declare a mistrial as to an individual alternative means is directly contrary to the jury’s instructions and well-settled law.” Brief of Respondent at 24.

First, the jury instructions in this case did initially tell the jury that they did not have to be unanimous as to the alternative means. CP 41-44. The instructions simply required that all 12 agreed that a second-degree murder had occurred.

However, all that changed when the **State** asked for a special interrogatory to determine whether the jury was unanimous as one or both of the means charged. When the jury’s special verdict was returned, everyone knew that the jury was at least “hung” on the issue of intent. At that point, the principles enunciated in *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2nd 717 (1978) and *Green v. United States*, 355 U.S. 184, 78 S. Ct. 824, 54 L. Ed. 2nd 416 (1982) became fully operational. If the State wanted to preserve the ability to retry Ramos and Medina on intentional second degree murder, it should have asked the Court to find a “manifest necessity” regarding that alternative

means and should have asked the Court to determine if the jury was “genuinely deadlocked” on that issue. If they were not genuinely deadlocked, the judge could have returned them to the jury room for further deliberations.

Instead, the State has waited seven years to argue that there was a “mistrial” on this prong and that there was a “manifest necessity” that supported the trial judge’s discharge of the jury after the special verdicts were returned. Allowing the State to retry Ramos and Medina on the theory the State abandoned after the special verdicts were returned would be unfair to the defendants. As this Court observed in *State v. Jones*, 97 Wn.2d 159, 163-64, 641 P.2d 708 (1982), “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.’” (quoting *Washington*, 434 U.S. at 509). Because the state did not ask the trial judge to inquire as to a genuine deadlock or otherwise seek a finding of “manifest injustice” when the verdicts were returned, this Court should find that Ramos

and Medina were “impliedly acquitted” of intentional second degree murder.¹

4. THIS COURT’S DECISIONS IN *STATE v. ERVIN* AND *STATE v. DANIELS* DO NOT APPLY IN THIS CASE

In Washington, most juries are instructed using the Washington Pattern Jury Instructions. The standard concluding instruction regarding jury unanimity for cases involving lesser included offenses, WPIC 155, and the instruction used with the special interrogatories in this case, CP 40-45, tells the jury that it must fill out the verdict form with a “yes” or “no” answer only if it is unanimous as to either guilt or acquittal. If the jury is “unable to agree” as to a particular count, it must leave the verdict form blank and proceed to the remaining theories of liability. These instructions appear to be the basis for the trial judge’s answer to the jury inquiry in this case.

Based upon the “unable to agree” language in the instruction and this Court’s recent decision in *State v. Daniels*, ___ Wn.2d ___, 156 P.3d 905 (2007), the State appears to take the position that

¹ This result is also supported by cases discussing “ambiguous” jury verdicts. Where a verdict is “ambiguous” in a criminal case, the court must interpret the verdict most favorable to the defendant. See *State v. Deryke*, 110 Wn.App 815, 824, 41 P.3d 1225 (2002), *aff’d*, 149 Wn.2d 906, 73 P.3d 1000 (2003) and the cases cited therein.

whenever a jury is given the standard instruction and leaves a verdict form blank or, as in this case, indicates in some way that they may not be unanimous and the jury is later discharged, there is an implied hung jury and mistrial on the counts for which the forms were left blank. The State also appears to be asserting that in that situation, the trial court need not make any inquiry into whether the jury could reach a verdict or whether the jury is genuinely deadlocked. The State would replace the doctrine of implied acquittal with the doctrine of implied mistrial. The State's position is contrary to the United States Supreme Court cases discussing the federal constitutional double jeopardy bar. Under federal law, a true hung jury or mistrial is needed to escape the state and federal double jeopardy bar. A simple inability to agree with the option of compromise on a lesser alternate offense does *not* satisfy the high threshold of disagreement required for a hung jury and mistrial to be declared. See *Washington*, 434 U.S. at 509.

This Court should further limit or disavow its statements to the contrary in *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006) and *Daniels*. In *Ervin*, this Court appeared to hold that where an unable to agree instruction is given "the blank verdict forms [on the greater offense] indicate ... that the jury was unable to agree" the

State is permitted retrial for the greater offense. *Id.*, 158 Wn.2d at

757. Yet, in a puzzling footnote, the court stated:

This is not to decide, however, that the jury's inability to agree on the greater charges is the equivalent of a mistrial on those charges. Unable to agree instructions instruct the jury to end deliberations on a greater charge and move on to a lesser charge once disagreement on the greater has been established. Comparatively, state and federal jurisprudence establishes that a jury must be "genuinely deadlocked" before a mistrial can be declared.

Ervin, 158 Wn.2d at 757 n.10.

The Ninth Circuit recently pointed out that read literally, *Ervin* would not comport with federal law because the court never expressly declared a mistrial on the "silent" verdict forms. *Brazzel v. State of Washington*, 484 F.3d 1087 (9th Cir. 2007). But the Court also went on to note the record in *Ervin* demonstrated a genuine deadlock. *Id.* at 1095-96. The jury deliberated for five weeks, reporting repeatedly in notes to the court that it was unable to reach a unanimous verdict:

The jury has continued to deliberate according to the court's direction. We are still unable to reach a unanimous verdict on any of the three charges.... Since our last inquiry to the court, there has been no movement toward a unanimous verdict on any of the counts. We believe that additional deliberation would not result in a unanimous verdict on any of the

three counts. We have stopped deliberations and asked for the court's direction.

Id. Ultimately, the jury in *Ervin* left two verdict forms blank pursuant to the “unable to agree” instructions and the Washington Supreme Court held that the blank verdict forms did not prohibit retrial. See *Id.* at 1096.

This case, like *Brazzel* is easily distinguishable from *Ervin*. The jury here simply indicated that it could not unanimously find intent. No inquiry was made as to whether the jury was acquitting the defendants of intent or whether they were genuinely deadlocked on that issue. And, in this case, as in *Brazzel*, the State did not immediately construe the jury’s silence as “hanging” or immediately seek a retrial as to that alternative means. Only now, after the defendants convictions for felony murder were reversed, does the State conveniently argue that the answer “no” should be construed as hopeless deadlock. See *Brazzell*, 484 F.3d at 1095.

Regrettably, this Court’s most recent double jeopardy decision in *Daniels* was decided before *Brazzell*. This Court’s decision appears to be based upon appellate counsel’s incorrect and improvident concession at oral argument that *Ervin* controlled the resolution of that case:

The Court of Appeals below found Daniels's jury had been silent and applied the rule of lenity to hold that between assuming acquittal or a divided jury, it must presume acquittal. *State v. Daniels*, 124 Wn.App. 830, 844, 103 P.3d 249 (2004). But we had not yet decided *Ervin*, and considering our reasoning there regarding the identical jury instruction, as well as clear precedent from the United States Supreme Court, we hold jeopardy did not terminate on Daniels's homicide by abuse charge and she may be retried.

Daniels, 156 P.3d at 910.

Appellate counsel's concession in *Daniels* was wrong and led this Court astray. Unlike *Ervin*, where evidence of a genuine deadlock was crystal clear from the record, in *Daniels*, as in *Brazzell*, the jury simply left the verdict form for the greater offense blank, no inquiry was made as to whether the jury was genuinely deadlocked and the state did not immediately construe the jury's silence as "hanging" or seek a retrial.

A finding of "manifest injustice" sufficient to support the declaration of a mistrial and the refiling of charges by the state requires considerably more simply some indication by the jury that they are not in agreement. See *Washington*, 434 U.S. at 509. The State had the opportunity to ask the judge inquire as to the whether the jury was "genuinely deadlocked" or not and it failed to do so.

Thus, this Court should reject the State's belated arguments that there was no actual or implied acquittal in this case and expressly limit *Ervin* and *Daniels* to their facts.

5. THE DECISION IN *IN RE ANDRESS* WAS NOT AN EXTRAORDINARY CIRCUMSTANCE SUFFICIENT TO TRIGGER THE "ENDS OF JUSTICE" EXCEPTION TO THE MANDATORY JOINDER RULE

The State's argument that the ends of justice exception to the mandatory joinder rule, CrR 4.3.1, should apply is essentially an argument that it would be unfair to the State to apply the decision in *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and bar it from retrying a defendant after a second degree felony murder conviction had been reversed. But as the State so aptly notes in its response, this Court has never applied the "ends of justice" exception based upon a fairness argument.

The State's argument that the *Andress* decision was completely unexpected and thus an "extraordinary circumstance" should be rejected in light of this Court's decisions regarding this Court's construction of a statute. In those cases, this Court has held that once this Court construed the statute, that meaning is deemed to be what the statute had meant since its enactment. See *e.g. State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996)

(construing restitution statute regarding the time limit for setting a hearing).

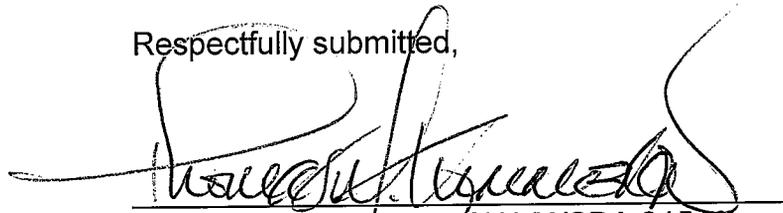
Further, despite its protestations to the contrary, in deciding to charge first degree and the lesser degree offense of second degree murder, the State was concerned about obtaining a conviction against Mr. Ramos and Mr. Medina. Given this uncertainty, the State could have, but chose not to, charge the additional lesser degree offense of first degree manslaughter. The State's choice not to so charge should bar it from proceeding here on the amended information. This Court should reject the State's arguments regarding the "ends of justice" exception to CrR 4.3.1 and reverse the trial court's order allowing the filing of the amended information.

C. CONCLUSION

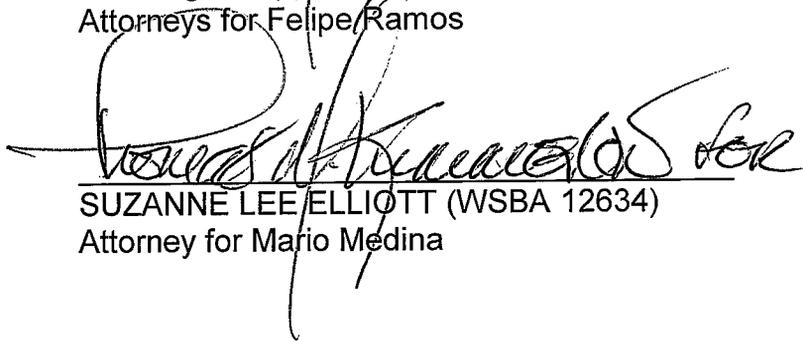
For the reasons stated in the previously filed Brief of Appellant as well as this reply brief, Mr. Ramos and Mr. Medina submit this Court must reverse the trial court and order all charges against them dismissed.

DATED this 29th day of June 2007.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	SUPREME CT. NO. 77347-5
)	
FELIPE RAMOS,)	
MARIO MEDINA,)	
)	
PETITIONERS.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 29TH DAY OF NOVEMBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE SERVED ON THE PARTY/PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JUNE, 2007.

x _____ *grl*