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NO. 55745-9-1

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

STATE OF WASHINGTON,
Appellant,
v.
OLIVER WRIGHT,
Respondent.

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

The Honorable Ronald Kessler

BRIEF OF RESPONDENT



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A. SUMMARY OF ARGUMENT.

Oliver Wright was charged with second degree murder in violation of RCW 9A.32.050(1) under the alternatives of (a) intentional murder or (b) felony murder based on the predicate crime of assault. He was convicted following a jury trial of second degree felony murder, which was reversed by this Court in a personal restraint petition following *In re Personal Restraint of Andress*.¹

On remand, the State sought re prosecution for second degree intentional murder under RCW 9A.32.050(1)(a). Judge Kessler denied the State's request on double jeopardy grounds, precluding the State with all its resources and power to make a repeated attempt to convict Mr. Wright of second degree murder, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Mr. Wright requested the trial court impose a second degree assault conviction as a lesser

¹ 147 Wn.2d 602, 604, 56 P.3d 981 (2002) (holding second degree assault may not serve as the predicate crime to convict a defendant of second degree felony murder).

included offense of second degree felony murder. The trial court denied Mr. Wright's request and ruled the State could file charges of manslaughter.

The State appealed.

B. ISSUES.

1. After the *Andress* decision, this Court held double jeopardy prohibits retrial on the original charges on remand. In the instant case, on remand following an *Andress* reversal, the State sought to refile second degree intentional murder charges even though the State filed second degree intentional murder charges at the first trial. Did the trial court properly bar the State from proceeding on remand with second degree murder charges as barred on double jeopardy grounds?

2. Criminal Rule 4.3.1 requires the State to consolidate all related charges against a defendant in a single trial. Here, the State charged Mr. Wright with a single count of second degree murder under alternative means and proceeded to a single trial. Did Mr. Wright have an obligation to move for consolidation, charges that were already consolidated under CrR 4.3.1?

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY PRECLUDED THE STATE FROM REFILEING SECOND DEGREE MURDER CHARGES ON REMAND

In the instant case, Judge Kessler ruled,

Okay, I am still persuaded that the decision of the Court was correct with respect to the jeopardy issue. I don't see a constitutional distinction between modes and – separate modes and separate crimes. I also have a hard time distinguishing this from what occurred in *Hiscock* (phonetic) and so I will not permit the State to proceed with murder in the second – intentional murder in the second degree.

2/17/05RP at 16. Judge Kessler found that this Court's decision in *State v. Ramos*, 124 Wn.App. 334, 101 P.3d 872 (2004) allowed the State to refile charges of manslaughter and ruled the State could do so. 2/17/05RP at 17-18.

1 DOUBLE JEOPARDY PROHIBITS THE STATE FROM REFILEING SECOND DEGREE MURDER CHARGES ON REMAND

a. Double jeopardy prohibits the State from trying a person twice for the same offense. The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. 5; Wash. Const., art. 1, § 9. The Double Jeopardy Clause protects accused individuals from three distinct types of abuse by government:

- 1) a second prosecution for the same offense after acquittal;
- (2) a second prosecution for the same offense after conviction; and
- (3) multiple punishments for the same offense.

State v. Hescoek, 98 Wn.App. 600, 603-04, 989 P.2d 1251 (1999);

North Carolina v. Pearce, 295 U.S. 711, 717, 89 S.Ct. 2072, 23

L.Ed.2d 656 (1969).

Jeopardy attaches when the jury has been empanelled and sworn:

A basic tenet of our constitutional freedoms is the prohibition against a second trial for the same offense: No person shall be "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend V. Mirroring the federal constitution, article I, section 9 of the Washington Constitution provides: "No person shall ... be twice put in jeopardy for the same offense."

Once a jury has been empanelled and sworn, jeopardy attaches.

State v. Sheets, ___ Wn.App. ___, ___ P.3d ___, WL 1432503, at 2 -3

(Wash.App. Div. 3, June 21, 2005); *State v. Smith*, 15 Wn. App.

725, 727, 551 P.2d 765 (1976) (since jury was not sworn in

jeopardy did not attach).

A reversal on appeal based on the State's failure to present sufficient evidence to convict a defendant of a charged crime acts as an acquittal and bars the State from refileing the same charges:

Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.

Burks v. United States, 437 U.S. 1, 17-18, 98 S.Ct. 2141, 57

L.Ed.2d 1 (1978). Accordingly, once a conviction is reversed because the reviewing court found the State's evidence legally insufficient to affirm a conviction, re prosecution is barred.

The United States Supreme Court explained the rationale behind the Double Jeopardy Clause — the prevention of repeated prosecutions by the State until a conviction is obtained:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense...

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2

L.Ed.2d 199 (1957).

The Washington Supreme Court has taken a similar view of Double Jeopardy, ruling,

. . . [O]f what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? . . .
. . . [W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for

the same offence as from being twice tried for it. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168, 21 L.Ed. 872 (1873) .
See also Davis v. Catron, 22 Wash. 183, 60 P. 131 (1900).

City of Seattle v. Bittner, 81 Wn.2d 747, 755, 505 P.2d 126 (1973).

In *State v. Vermillion*, this Court examined the Double Jeopardy Clause bar against a second prosecution under the federal and state constitutions:

Fear and abhorrence of governmental power to try people twice for the same conduct has deep historical roots. *Bartkus v. Illinois*, 359 U.S. 121, 151, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) (Black, J., dissenting). The double jeopardy clause of the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Likewise, Washington State's constitution, which is given the same interpretation as the U.S. Supreme Court gives to its federal counterpart, states, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9; *State v. Gocken*, 127 Wn.2d 95, 109, 896 P.2d 1267 (1995).

112 Wn. App. 844, 858-59, 51 P.3d 188 (2002). In addition,

Former Justice Philip A. Talmadge stated,

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to "be brought into Danger for the same Offense more than once." Few

principles have been more deeply "rooted in the traditions and conscience of our people."

Phillip Talmadge, Double Jeopardy: The Civil Forfeiture Debate, 19 Seattle Univ. L. R. 209, 209-210 (1996). Furthermore, Black's Law Dictionary defines the prohibition against double jeopardy as "[t]he evil sought to be avoided is double trial and double conviction, not necessarily double punishment." Accordingly, Mr. Wright has a constitutional right to not be retried repeatedly for the same offense.

b. Retrial of Mr. Wright for second degree murder would violate his protection against double jeopardy. "The Double Jeopardy Clause clearly bars the re prosecution of a criminal defendant on the same charges after a judgment of conviction or acquittal." *Venson v. Georgia*, 74 F.3d 1140, 1145 (C.A.11, 1996), citing *United States v. Wilson*, 420 U.S. 332, 342-43, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). Retrial may also be barred after a trial that is terminated prior to final judgment, although the Supreme Court has repeatedly rejected a categorical approach to deciding when, under such

circumstances, retrial is barred. *United States v. Jorn*, 400 U.S.

470, 480, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971).

At a minimum, the criminal proceeding must have reached a point when the policies underlying the Double Jeopardy Clause are implicated, at which time jeopardy "attaches." *Id.* at 480, 91 S.Ct. at 555; *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975). In cases tried to a jury, jeopardy attaches when the jury is empanelled and sworn. *Serfass*, 420 U.S. at 388, 95 S.Ct. at 1062.

Venson, 74 F.3d at 1145.

In the instant case, the State charged Mr. Wright with second degree murder under both second degree intentional murder and second degree felony murder, as follows:

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse OLIVER MENARD WRIGHT of the crime of Murder in the Second Degree, committed as follows:

That the defendant OLIVER MENARD WRIGHT in King County, Washington on or about April 6, 1993, while committing and attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with the intent to cause the death of another person, did cause the death of Jeff Oscar Evans, Jr., aka, Aisa Cameron, a human being, who was not a participant in said crime, and who died on or about April 6, 1993;

Contrary to RCW 9A.32.050(1)(a) and (b). . .

CP at 1. Once the jury was empanelled and sworn, jeopardy attached to both statutory prongs of second degree murder.

Following a trial, the jury found Mr. Wright guilty of second degree murder. CP at 63. As such, jeopardy attached when the jury was empanelled and terminated when Mr. Wright was convicted. Since the State already had the opportunity to marshal its evidence and resources, subsequent prosecution for intentional second degree murder is prohibited. The State had its bite at the apple, and Mr. Wright cannot be retried for intentional second degree murder on remand.

Moreover, “[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only “just” remedy available for that court is the direction of a judgment of acquittal.” *Burks*, 437 U.S. at 18. The Washington Supreme Court has found the State’s evidence of an assault as a predicate crime for felony murder legally insufficient. *Gamble*, Slip op. at 3, *Andress*, 147 Wn.2d at 604. Accordingly, because the vacation of Mr. Wright’s conviction acts as an acquittal, the State is barred from refiling charges by the double jeopardy prohibition.

The prosecutor argues double jeopardy does not apply because Mr. Wright’s conviction was vacated and he was never formally acquitted of either charge. AOB at 6-14. But this Court

has already ruled on the identical issue in *State v. Ramos*, holding double jeopardy prohibits refiling second degree murder charges on remand following *Andress*:

The only issue before us is whether the State may institute further proceedings on remand. Double jeopardy prohibits retrial on the original charges.

State v. Ramos, 124 Wn.App. 334.² Accordingly, the trial court in the instant case properly precluded the State from retrying Mr. Wright for second degree intentional murder, which is consistent with *Ramos*.³

² In *Ramos*, defendants Felipe Ramos and Mario Medina were charged with first degree intentional murder. 124 Wn.App. at 335-36. The jury convicted each of felony murder as a lesser included offense. *Id.* at 336. Those convictions were vacated under *Andress*. *Id.*

³ The *Ramos* Court then ruled it was premature to decide whether the State could refile first degree manslaughter charges under the "ends of justice" exception to the mandatory joinder rule, but left that decision to the trial court:

This case therefore presents a "scenario where through no fault on its part the granting of a motion to dismiss under the rule would preclude the State from retrying a defendant or severely hamper it in further prosecution." *State v. Carter*, 56 Wn.App. 217, 223, 783 P.2d 589 (1989).

Other factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the trial court. But we hold the mandatory joinder rule does not require this court to dismiss with prejudice now. We vacate Ramos' and Medina's convictions and remand for further proceedings consistent with this opinion.

Ramos, 124 Wn.App. at 343.

c. Double jeopardy bars the State from retrying a defendant following an implied acquittal. A conviction of one crime generally must be taken as an acquittal of a charged alternative means crime. Wayne R. LaFave, et al, Criminal Procedure, § 25.4(d) Reprosecution After Conviction, at 685 (West 1999), citing *Green*, 355 U.S. 184. In *Green*, the defendant was charged with first degree murder. 355 U.S. at 189-90. The jury was instructed on the lesser-included offense of second degree murder. *Id.* at 190. The jury was silent as to first degree murder but found Mr. Green guilty of second degree murder. *Id.*

The United States Supreme Court held double jeopardy barred a first degree murder conviction following remand:

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implied acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree

murder came to an end when the jury was discharged so that he could not be retried for that offense. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."

Green, 355 U.S. at 190-91 (internal citations omitted). As such, when the jury found Mr. Wright guilty of second degree felony murder, it impliedly acquitted him of second degree intentional murder and the State is now barred from refiling that charge.

Although this area of law is not voluminous, the State attempts to twist logic in the instant case by claiming "jeopardy was never terminated" in the instant case but "is continuing, and hence double jeopardy should not apply." AOB at 7-8. The State contends that because Mr. Wright's conviction was vacated due to *Andress* and *Hinton*, Wright's "conviction never became unconditionally final." AOB at 9. Citing no authority to substantiate this claim, the State reasons,

[Judge Kessler] expanded the implied acquittal doctrine beyond where any appellate court has previously held that it applies. This ruling is erroneous, and should be reversed.

AOB at 9. The State has not done its homework.

On the contrary, in *State v. Hescock*, the defendant was charged with forgery alleging two alternative means of committing the crime, RCW 9A.60.020(1)(a) and (b). 98 Wn.App. at 602. The defendant was found guilty of violating only section (1)(a). *Id.* Hescock argued on appeal that the evidence was insufficient to support a conviction under (1)(a). The State agreed, but requested remand for a determination of whether Hescock violated (1)(b). *Id.* at 603. Hescock argued double jeopardy prevented remand for consideration of his culpability under the alternative section, (1)(b). *Id.* at 602.

The *Hescock* Court ruled that an acquittal implied by conviction on a different theory of culpability precludes a second trial. 98 Wn.App. at 604-05. The trial court's written findings and conclusions of law were unambiguous as to the source of Hescock's culpability. 98 Wn. App. at 602. While the Court noted that remand is appropriate where a defect is found in the written findings and is not based on the State's failure to prove its case, a lack of written findings or conclusions of law on an alternative theory of culpability cannot justify remand for prosecution under that theory. *Hescock*, 98 Wn. App. at 607.

State v. Hembd is another case holding double jeopardy prohibits the State from refiling charges after the conviction for a nonexistent crime is reversed on appeal. 197 Mont. 438, 643 P.2d 567 (1982). The defendant was charged with negligent arson, and the jury found the defendant guilty of “attempted misdemeanor negligent arson.” *Id.* at 439. The Montana Supreme Court first found that “attempted misdemeanor negligent arson” and “attempted felony negligent arson” (like felony murder based on assault in Washington) were nonexistent crimes. *Id.* The *Hembd* Court found the jury’s verdict on the nonexistent crime constituted an implied acquittal of the charged crimes of misdemeanor negligent arson and felony negligent arson. *Id.* Importantly, the Court held double jeopardy barred the State from retrying Mr. Hembd of the charged crimes. 197 Mont. at 439-40.

In *People v. Van Broussard*, the defendants were charged with attempted murder. 76 Cal.App.3d 193, 195, 142 Cal.Rptr. 664 (1977). The jury was given the standard jury instructions for attempted murder and manslaughter, but the trial court also provided “attempted voluntary manslaughter” and “attempted involuntary manslaughter” lesser included jury instructions. *Id.* at 196. The jury found the defendants guilty of attempted involuntary

manslaughter. *Id.* The appellate court first concluded “attempted involuntary manslaughter is inherently contradictory and hence not a recognizable crime in California” and reversed the convictions. *Id.* at 197. The Court then found “the jury’s verdict, notwithstanding the fact that it convicted appellants of a nonexistent offense, operated as an implied acquittal of the greater offenses of attempted murder and attempted voluntary manslaughter, and that therefore appellants may not be retried for these offenses.” *Id.* at 198. Accordingly, the Court ruled, “the jury’s implied verdict of acquittal is a bar to further prosecution on these charges.” *Id.*

These cases demonstrate double jeopardy bars the State from refiling charges based on alternative means in a successive prosecution. This Court should follow the Montana Supreme Court and dismiss the action on remand. In *Broussard*, following the Court’s determination that the State was barred from retrying the defendants due to an implied acquittal, the Court determined the defendants could not be tried again.

The People contend that appellants may still be retried for any offense of which they were not impliedly acquitted . . . while appellants maintain that the district attorney’s failure to join such charges in the information precludes further prosecution for any offense arising from the same act. *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827 [48 Cal.Rptr. 366, 409 P.2d 206], clearly and succinctly answers

this question in analyzing applicable Penal Code sections 654 and 954. "[Where] ... the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." . . . The same considerations apply herein. The district attorney's failure to join any such offenses in the information operates as an absolute bar to further prosecution.

Also, Penal Code section 1023, and the proscription against double jeopardy precludes further prosecution of either appellant for any lesser included offense. In the ordinary situation where a defendant obtains reversal on appeal of his conviction, the reversal does not bar retrial for the same offense because jeopardy continues as to the offense of which he was convicted. (*United States v. Ball* (1896) 163 U.S. 662 [41 L.Ed. 300, 16 S.Ct. 1192].) In the present case, however, retrial of appellants for the offense of which they were convicted is impossible as no such crime exists. Yet there can be no question that appellants have already been put once in jeopardy for the crime of attempted murder. We must therefore conclude that under the plain terms of section 1023, appellants may not now be prosecuted for a lesser included offense therein.

76 Cal.App. at 198-200. The *Broussard* Court reversed the judgments and gave the trial court instructions to dismiss the action. *Id.* at 199.

d. The State must be precluded from pursuing a charge it abandoned during Mr. Wright's first trial. Lastly, the State is barred from re-prosecuting a defendant on a theory it abandoned at trial. In *Sizemore v. Fletcher*, 921 F.2d 667, 673 (6th Cir.1990),

the court ruled that a second trial may be "barred by double jeopardy" if "the first trial ended without a verdict for reasons of the prosecution's making." Similarly, in *Saylor v. Cornelius*, 845 F.2d 1401, 1403, 1408 (6th Cir.1988), the Court held,

where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing reprosecution.... We believe that the Double Jeopardy Clause forbids a second trial on [an alternative] theory because such a trial would be vexatious, regardless of the outcome of the jury's deliberation on the theory charged to it. It would be vexatious because the defendant underwent the jeopardy of a full trial, which is even more vexatious than the aborted or partial trials usually involved in double jeopardy cases, and the trial failed to terminate in a verdict for reasons that cannot fairly be charged to the defendant.

For reasons known only to the prosecutor, he elected not to pursue its intentional murder theory at trial.⁴ The choice was not Mr. Wright's. The prosecution only proposed jury instructions for second degree felony murder and not intentional second degree murder. CP 21. The prosecution's abandonment of its theory of

⁴ In the instant case, the Certification for Determination of Probable Cause states that Mr. Wright told Evans that he was a Crip gang member and that he was going to shoot Evans. A witness testified that while Evans was telling Wright that he was only there to spend some money, Wright loaded his gun. Moments later, a witness testified that Wright fired three shots in rapid succession. Wright dropped Evans to the ground and drove off with his co-defendant Jones. CP at 1-4.

intentional second degree murder can be viewed as the State's admission insufficient evidence existed to support the alternative of intentional murder. Protection from double jeopardy bars retrial when insufficient evidence supports the charge. *Burks*, 437 U.S. at 10-11. Accordingly, the State is now precluded on double jeopardy grounds from retrying Mr. Wright on a theory it abandoned during trial. *Sizemore v. Fletcher*, 921 F.2d at 673; *Cornelius*, 845 F.2d at 1403, 1408.

In *State v. Davis*, the jury returned a verdict of not guilty on count I (vehicular homicide) and did not return verdicts as to counts II (driving while intoxicated) or count III (reckless driving). 190 Wash. 164, 67 P.2d 894 (1937). The record showed that the jury foreman told the court a "verdict had been reached on count one, but the jurors could not agree upon verdict on counts two and three," and the court discharged the jury without explanation. *Id.* at 165. The defendant then moved to dismiss counts two and three because double jeopardy barred retrial. The court granted the motion to dismiss and the State appealed. *Id.* In affirming the motion to dismiss, the State Supreme Court observed:

[as] a general rule supported by the great weight of authority...where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be tried as to those counts.

Davis, 190 Wash. at 166.

In the instant case, the jury was silent on the intentional murder charge and the record does not show the reason for the discharge of the jury on that charge. Therefore, constitutional prohibitions on double jeopardy prevent the State from again placing Mr. Wright in jeopardy for the same charge. *Id.*

e. Any remand for further charges would violate Mr. Wright's right to a speedy trial. Should this Court accept the State's argument that mandatory joinder does not apply to the murder charges filed in this case in 1994, then a 2005 reprosecution would constitute a violation of Mr. Wright's speedy trial rights. In *State v. Erickson*, the Court ruled, "if the State does not charge a defendant with all related offenses arising out of the same conduct or episode as soon as it has probable cause to do so it runs the risk of dismissal for failure to provide a speedy trial." 22 Wn.App. 38, 45, 587 P.2d 613 (1978). The State had every available option to pursue other charges in 1993, including

charging Mr. Wright with alternative means of killing Mr. Evans, such as intentional second-degree murder. The State failed to do so and should not now be permitted to violate Mr. Wright's right to a speedy trial by filing intentional second-degree murder charges 12 years later.

Under CrR 3.3(c)(1), a defendant must be brought to trial within 60 days of arraignment if in custody, and within 90 days of arraignment if out of custody. CrR 3.3 does not address the situation in which multiple charges arise from the same criminal conduct or criminal episode. *State v. Peterson*, 90 Wn.2d 423, 431, 585 P.2d 66 (1978). The speedy trial period "should begin on all crimes 'based on the same conduct or arising from the same criminal incident' from the time the defendant is held to answer any charge with respect to that conduct or episode." *Id.*, quoting ABA, Standards Relating to Speedy Trial, std. 2.2 (Approved Draft, 1968). The speedy trial rule and the joinder rules are interrelated and designed to further the same goals: a prompt trial for the defendant once the prosecution has commenced. *State v. Harris*, 130 Wn.2d at 43-44.

Here, any other charges arising out of the death of Mr. Evans would be barred by the speedy trial period since these charges arose out of the same criminal incident. *See State v. McNeil*, 20 Wn. App. 527, 532-34, 582 P.2d 524 (1978) (dismissal of State's case with prejudice required pursuant to CrR 3.3 for later prosecution of crimes not charged in first instance but which arose from same criminal act or episode.) This Court should dismiss Appellant's claim as they are without merit and would allow the State to again bring charges against Mr. Wright for the same criminal episode for which he was convicted in 1993.

f. This Court must not find Mr. Wright guilty of a lesser included offense of second degree assault. Despite four separate opinions addressing felony murder based on assault, *Andress, Hanson, Hinton*, and now *Gamble*, the Washington Supreme Court has not yet addressed the remedy on remand.⁵

⁵ The United States Supreme Court has noted a decision on remedy is important in order to protect defendants from being reprobated repeatedly:

Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being

In *Gamble*, the Supreme Court noted RCW 10.61.006 allows a defendant to be found guilty of an offense the commission of which was necessarily included within the charge contained in the indictment or information. Slip op. at 3. In the instant case, Mr. Wright was charged with Murder in the Second Degree contrary to RCW 9A.32.050(1)(a) and (b). CP 1. The jury was instructed that "to convict" Mr. Wright of the charge, it had to find on the 6th day of April, 1993, Jeff Oscar Evans, Jr. was killed and that the defendant was committing Second Degree Assault and caused Evans's death in the course of in furtherance of such crime. CP 96. Accordingly, the jury necessarily found second degree assault in convicting Mr. Wright of Second Degree Felony Murder.

Where an appellate court reverses a conviction for lack of sufficient evidence, the court may reform the judgment - order resentencing on a lesser included offense - "only . . . when the jury has been explicitly instructed thereon." *State v. Green*, 94 Wn.2d

subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.

Abney v. United States, 431 U.S. 651, 660-61, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), citing *Ex parte Lange*, 18 Wall. 163, 169, 21 L.Ed. 872 (1874).

216, 234-35, 616 P.2d 628 (1980); *State v. Argueta*, 107 Wn.App. 532, 538, 27 P.3d 242 (2001).

Here the jury was never instructed on any lesser included offenses of second degree felony murder because none exist. *Andress*, 147 Wn.2d at 613-14. The jury was instructed on second degree assault but only in the context of defining the predicate crime for felony murder. CP 52-54. The jury was never instructed that to convict Mr. Wright of second degree assault, it would have to find each of the elements of second degree assault beyond a reasonable doubt. As a consequence, since the jury was never instructed on a lesser included offense of felony murder, this Court cannot merely remand for resentencing on second degree assault.⁶ Should this Court decide not to dismiss the action against Mr. Wright, at most it may allow the State to re prosecute Mr. Wright for second degree assault.

⁶ But see *State v. Hughes*, 118 Wn.App. 713, 733-34, 77 P.3d 681 (2003). In *Hughes*, the Court of Appeals faced with the same scenario presented by Mr. Wright's case: reversal of the second degree felony murder conviction was mandated by *Andress* since the jury necessarily found second degree assault to convict Hughes as charged. *Id.* at 731-33. Despite no jury finding of second degree assault beyond a reasonable doubt, the *Hughes* Court entered judgment of second degree assault as a lesser included offense. *Id.* at 733-34.

2. MR. WRIGHT DID NOT WAIVE ANY RIGHTS UNDER THE MANDATORY JOINDER RULE BECAUSE THE OFFENSES WERE ALREADY CONSOLIDATED DURING THE FIRST TRIAL

On appeal, the State argues for the first time Mr. Wright “waived his rights under the mandatory joinder rule by failing to move for consolidation during the first trial.” AOB at 13, citing CrR 4.3.1. The State’s argument is incoherent and bizarre. The record shows the State charged Mr. Wright with one count of second degree murder in violation of RCW 9A.32.050(1)(a) and (b) (intentional and felony murder, respectively). CP 1. The State brought these related charges before the same court in the same count, under cause number 93-C-02683-4.

The State suggests that although it filed these charges in the same count and same court, Mr. Wright had a duty to “move for consolidation” or otherwise waived any objection to the intentional murder charge. AOB 15, citing CrR 4.3.1(b)(2) and (3). The State’s argument is meritless.

CrR 4.3.1(a), entitled “Consolidation For Trial,” is a criminal rule directing the State to file related offenses in one trial:

Consolidation Generally. Offenses . . . properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.

Here, the State filed an information charging alternative means of committing second degree murder. CP 1. Because these two charges were consolidated for trial as contemplated under CrR 4.3.1(a), Mr. Wright had no obligation to move for consolidation of the offenses.

Mr. Wright did not waive an objection to the consolidated intentional murder charge. CrR 4.3.1(b) only applies to related offenses the State fails to bring forth in a single information. Under CrR 4.3.1(b)(2),

When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted . . . A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

The purpose behind the rule is to ensure that when a defendant is charged with related charges in a single cause number and wants those charges all decided by one court and jury, he or she must move to have them consolidated or has waived the right of consolidation of related offenses with which he knew he was charged. As Tegland explains, the provision "failure to join" "is in effect a consolidation rule as it grants the defendant certain rights to have all charges heard in a single trial." 4A Karl B. Tegland,

Wash. Prac.: Rules Practice, CrR 4.3.1, Author's Comments, at 312 (6th ed. 2002) (emphasis added).

If the State fulfills its obligation to consolidate offenses, the rules of consolidation and joinder prevent successive prosecutions. In *State v. Russell*, this Court noted the purpose of CrR 4.3(c)(3), now CrR 4.3.1(b)(3), is to protect a defendant from successive prosecutions for the same offense:

is to protect defendants against successive prosecutions, for essentially the same conduct, employed by a prosecutor to hedge against an unsympathetic jury in the first trial, to place a "hold" on a person sentenced to imprisonment, or to harass defendants by a multiplicity of trials. *State v. Dailey*, 18 Wn.App. 525, 527 n.2d 569 P.2d 1215 (1977). The rule's protections extend to defendants who have formerly been "tried" for a related offense. If a defendant's jury is discharged in the interests of justice, that defendant has not been "tried" for purposes of CrR 4.3(c)(3) as to the charges left unresolved by the jury. When discharge of the jury cannot be attributed to those prosecutorial tactics against which CrR 4.3(c)(3) is aimed, the purpose of the rule has not been frustrated.

33 Wn.App. 579, 586-87, 657 P.2d 338 (1983), *aff'd in part, rev. in part*, 101 Wn.2d 349, 678 P.2d 332 (1994).

Here, the State already charged second degree felony murder and second degree intentional murder in a single count in the same court. The charges were already consolidated under the

rule. Mr. Wright did not waive an objection to “consolidation” of the second degree intentional murder charge.

The State attempts to redefine the criminal rule, arguing

In this case, Wright had actual knowledge of the intentional murder charge when the original information was filed. CP 1-10. Nevertheless, he did not move for consolidation. To the contrary, Wright, the State, and the original trial court proceeded solely on the alternative means of felony murder. Therefore, under the plain language of the mandatory joinder rule, Wright has waived any objection to the intentional murder charge on these grounds. Accordingly, CrR 4.3.1 does not provide an alternative basis to uphold Judge Kessler’s ruling, and this court should reverse.

AOB at 15. The State faults Mr. Wright for not moving for consolidation, arguing “Wright, the State, and the original trial court proceeded solely on the alternative means of felony murder.” But the fact that the State consolidated the two charges and then elected during trial not to pursue the intentional murder charge is the State’s error. Mr. Wright had no obligation to insist the jury consider intentional murder by presenting witnesses, offering jury instructions or by arguing in closing arguments that he was not guilty of felony murder but only intentional murder. The State’s argument must fail.

In fact, the State, after consolidating the related offenses, elected not to pursue intentional murder and failed to propose a jury instruction for intentional murder. The State's abandonment of the alternative means of committing second degree murder bars reprosecution on that charge. In *Sizemore v. Fletcher*, 921 F.2d at 673, the court ruled that a second trial may be "barred by double jeopardy" if "the first trial ended without a verdict for reasons of the prosecution's making." Similarly, in *Saylor v. Cornelius*, 845 F.2d 1401, 1403, 1408 (6th Cir.1988), the Court held,

where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing reprosecution. . . . We believe that the Double Jeopardy Clause forbids a second trial on [an alternative] theory because such a trial would be vexatious, regardless of the outcome of the jury's deliberation on the theory charged to it. It would be vexatious because the defendant underwent the jeopardy of a full trial, which is even more vexatious than the aborted or partial trials usually involved in double jeopardy cases, and the trial failed to terminate in a verdict for reasons that cannot fairly be charged to the defendant.

In the instant case, "the first trial ended without a [second degree intentional murder] verdict for reasons of the prosecution's making". The prosecutor charged Mr. Wright with second degree intentional murder but failed to propose jury instructions for the offense,

instead opting to only instruct the jury on second degree felony murder.

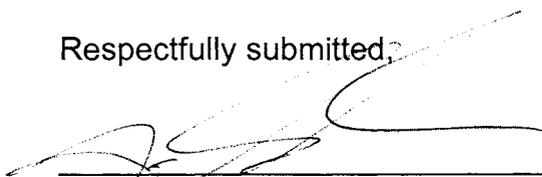
The prosecution's abandonment of its theory of intentional second degree murder must be viewed as the State's admission that insufficient evidence existed to support the alternative of intentional murder. Protection from double jeopardy bars retrial when insufficient evidence supports the charge. *Burks*, 437 U.S. at 10-11. Accordingly, the State is now precluded on double jeopardy grounds from retrying Mr. Wright on a theory it abandoned during trial. *Sizemore v. Fletcher*, 921 F.2d at 673.

D. CONCLUSION.

Mr. Wright requests this Court affirm the trial court's order dismissing the State's reprosecution as barred on double jeopardy grounds.

DATED this 1st day of August, 2005.

Respectfully submitted,



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