

SUPREME COURT NO. 856532

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition Of:

MANSOUR HEIDARI,

Petitioner

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Appellate Unit

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

The Honorable Robert H. Alsdorf, Judge

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. ISSUES PRESENTED IN ANSWER

The State's motion should be denied because there is no conflict warranting this Court's review. The Court of Appeals decision is fully consistent with the rule announced in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Should review be granted, however, this Court should also decide:

1. Whether the constitutional rights to jury trial and due process prohibit remand for imposition of judgment on a lesser included offense for which the jury was never instructed.

2. Whether double jeopardy protections also prevent such a remand.

B. STATEMENT OF THE CASE

The pertinent facts are set forth in the Court of Appeals opinion. The State conceded its evidence was insufficient to support Heidari's conviction in count IV for child molestation in the second degree. Although Heidari's jury was never asked to consider the crime of attempted child molestation in the second degree, the State asked the Court of Appeals to remand for entry of a judgment indicating he had been found guilty of that crime. Slip op., at 1, 4.

In accordance with this Court's opinion in State v. Green, the Court of Appeals denied the State's request, holding that unless a jury is instructed on a lesser included offense, appellate courts have no authority to remand for judgment on that offense where the evidence was insufficient on the offense tried. Slip op., at 4-5.

The State seeks review, claiming the opinion in Heidari's case conflicts with prior decisions from this Court and the Court of Appeals.

C. ARGUMENT

1. REVIEW IS NOT WARRANTED.

In State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), this Court reversed the defendant's conviction for Aggravated Murder in the First Degree due to insufficient evidence on one of the aggravating factors (kidnapping). The State argued that remand for a new trial was unnecessary because this Court could simply remand for sentencing on "the lesser included offense of murder in the first degree[.]" Id. at 234.

In rejecting the argument, this Court held:

In the case at hand the jury was not instructed on the subject of a "lesser included offense". In general, a remand for simple resentencing on a "lesser included offense" is only permissible when the jury has been explicitly instructed thereon. Based upon the giving of such an instruction it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense. . . . In addition, it is clear a case may be remanded for resentencing on a "lesser included offense" only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense.

Id. (citations omitted); see also State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993) ("To find an accused guilty of a lesser included offense, the jury must, of course, be instructed on its elements.").

In Heidari's case, the Court of Appeals simply followed the rule in Green. Because Heidari's jury had not been instructed on the lesser included offense of attempted child molestation, the Court of Appeals had no authority to remand for conviction on that crime.

Not only is the decision in Heidari's case fully consistent with Green, it is fully consistent with this Court's practice concerning attempted offenses. Where the trial evidence arguably could establish an attempt, but jurors did not consider that crime, this Court has simply vacated the defendant's conviction for the

completed crime. There is no remand for conviction on an attempt. See State v. Charley, 48 Wn.2d 126, 291 P.2d 673 (1955) (evidence of Sodomy insufficient where State failed to prove penetration; where crime committed was merely an Attempted Sodomy, conviction reversed and dismissed); State v. Swane, 21 Wn.2d 772, 153 P.2d 311 (1944) (trial evidence of Carnal Knowledge revealed only an attempt to commit that crime; conviction reversed and dismissed).

The Court of Appeals decision is also consistent with statutes on the subject. The Legislature has defined the circumstances in which a defendant, tried by jury for a completed crime, may be found guilty of attempt:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003. Similarly:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify

the degree or attempt of which the accused is guilty.

RCW 10.61.009.

Notably, when a defendant has been charged solely with a completed crime and tried by a jury, both statutes contemplate a jury determination on an attempt to commit that crime. RCW 10.61.003 (“the jury may find” the defendant guilty of an attempt); RCW 10.61.009 (“[w]henver the jury shall find” the defendant guilty, it shall specify when the defendant is guilty of an attempt). There is no statutory authority permitting an appellate court to make a finding on an attempted crime, or order the trial court to make such a finding, where the defendant exercised his right to jury trial and jurors were never asked to consider attempt.

In Heidari’s case, the Court of Appeals properly distinguished jury trials from bench trials. The prohibition against ordering conviction for an offense for which there was no instruction applies only to jury trials. There is no similar prohibition for bench trials. See Slip op., at 9-11, 14-15.

In seeking discretionary review, the State points to past decisions in which – despite the absence of a jury instruction on a lesser offense – the appellate court remanded for conviction on that offense. See Motion for Discretionary Review, at 14-15. But

the Court of Appeals properly distinguished these cases. They either (i) pre-dated Green, (ii) contained no analysis on the subject, and/or (ii) cited only to cases involving remands from bench trials. See Slip op., at 8-16. Ultimately, the Court of Appeals properly concluded, “No Washington case presents a reasoned analysis in support of the proposition that, in a case tried to a jury, the decision in Green should not be followed.” Id. at 16.

In Heidari’s case, the Court of Appeals simply followed Green. There is no conflict warranting this Court’s review.

2. IF REVIEW IS ACCEPTED, THIS COURT SHOULD DECIDE WHETHER THE RULE IN GREEN IS CONSTITUTIONALLY COMPELLED.

a. Right to Jury Trial/Due Process

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). On this same subject, article 1, section 21 of the Washington Constitution provides, “The right of trial by jury shall remain inviolate.” This right includes, as its most important element, the right to have the jury, rather than a judge, reach the requisite finding of guilt. Sullivan, 508 U.S. at 277. In combination

with the Fifth Amendment Due Process Clause, these provisions require the prosecution to prove all essential elements of a criminal offense to a jury beyond a reasonable doubt. Id. at 277-78.

Where a defendant exercises his right to have all elements of an offense proved to a jury beyond a reasonable doubt, “a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors’ independent judgment in a manner contrary to the interests of the accused.” United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) (citations omitted); see also State v. Symes, 17 Wash. 596, 598-599, 50 P. 487 (1897) (where evidence insufficient to support jury’s verdict on Murder in the First Degree, trial court may not enter judgment for Murder in the Second Degree).

In the Court of Appeals, Heidari argued that the rule in Green was fully consistent with, and compelled by, the constitutional rights to jury trial and due process. See Petitioner’s Supplemental Brief, at 3-11. The Court of Appeals was not

required to expressly decide this issue. Should this Court accept review, it should decide whether Heidari is correct.

b. Double Jeopardy.

“The fifth amendment to the United States Constitution and article 1, section 9 of the Washington Constitution prohibit the State from twice putting a person in jeopardy for the same offense.”¹ State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). “Conviction of the crime charged unequivocally terminates jeopardy.” Id. at 757 (citing Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)). Generally, a successful appeal in which a conviction is vacated for trial error continues jeopardy, allowing for retrial of that offense. Id. The double jeopardy clause bars retrial, however, where a court has vacated a conviction due to insufficient evidence. Id. at 758 (citing Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)); see also State v. Hickman, 135 Wn.2d 97, 104 n.4, 954 P.2d 900 (1998) (remedy for insufficient evidence is reversal and dismissal).

¹ The Fifth Amendment provides that no person shall “be subject for the same offense to be put twice in jeopardy of life or limb.” U.S. Const. Amend. V. Article 1, section 9 provides, “No

In the Court of Appeals, Heidari argued that where a conviction is vacated for insufficient evidence, double jeopardy bars conviction for any lesser included offense for which the State failed to seek a jury instruction at trial. See Petitioner's Supplemental Brief, at 11-18. The Court of Appeals was not required to expressly decide this issue. Should this Court accept review, it should decide whether Heidari is correct.

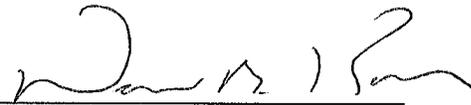
D. CONCLUSION

The State's motion for discretionary review should be denied. In the event review is accepted, this Court also should review the constitutional issues presented in this answer.

DATED this 22nd day of March, 2011.

Respectfully submitted,

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person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

