

NO. 36325-9-II

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

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2008 MAR 17 PM 4:27

STATE OF WASHINGTON,

Respondent,

v.

FAULOLUA FAAGATA,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 MAR 19 AM 11:30
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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

The Honorable Ronald Culpepper, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. DOUBLE JEOPARDY IS VIOLATED WHERE THE COURT HOLDS A CONVICTION IN ABEYANCE EVEN THOUGH IT DOES NOT ENTER THE CONVICTION IN THE JUDGMENT AND SENTENCE.

The State argues Faagata is not entitled to an order vacating his felony murder conviction because the “judgment and sentence is silent” on that conviction. Brief of Respondent (BOR) at 20-21. In support of that argument, the State cites Division One’s decision in State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005) for the legal proposition that where the judgment and sentence does not mention the conviction, double jeopardy is not violated.

The State further argues Faagata’s reliance on State v. Womac, 160 Wn. 2d 643, 160 P.3d 40 (2007), is misplaced because the Womac court distinguished Ward on the grounds that in Womac the trial court entered judgment on all the convictions where in Ward the court did not enter judgment on the other conviction. Therefore, the State contends, because the court did not mention the felony murder conviction in Faagata’s judgment and sentence, Ward controls. BOR at 19. The State’s argument fails to properly analyze either the reasoning in Ward and the holding in Womac.

In Ward, the defendant was charged with second degree murder committed by the alternative means of intentional murder and felony murder. Ward, 125 Wn. App. at 141. A jury convicted Ward of the felony murder alternative, acquitted him of the intentional murder alternative, and convicted him of first degree manslaughter, a lesser included crime of the intentional murder alternative. The trial court sentenced Ward on the felony murder charge only and did not enter judgment on the manslaughter charge. The Ward court vacated the felony murder conviction under In re Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and remanded to the trial court for entry of judgment and sentence on the manslaughter conviction. The court reasoned that outcome did not violate double jeopardy because Ward was charged with alternative means: thus, there could be only one conviction. Ward, 125 Wn. App. at 144-45. Furthermore, since the trial court did not enter judgment on the manslaughter alternative, Ward was "not convicted and sentenced" to both felony murder and manslaughter. Id. at 144.

In Womac, the Court distinguished Ward on two grounds. The first, as the State points out, unlike in Ward, Womac's judgment included all the convictions. The second ground, which the State unsurprisingly fails to mention, is because Womac was charged with separate offenses, unlike Ward who was charged in the alternative.

Ward is distinguishable from the present case. Here, there was a double jeopardy violation because Womac's judgment included all three convictions; therefore, vacation of the convictions for Counts II and III is required. Also, Womac was never charged in the alternative; instead, he was charged with three separate offenses in a single proceeding. Womac correctly argues, a court has no authority to "take a verdict on another charge ..., find that it violates double jeopardy ..., not sentence the defendant ... on it [,] and just ... hold it in abeyance for a later time." (citations omitted and emphasis added).

State v. Womac, 160 Wn. 2d at 659.

The Womac Court further emphasized it agreed with Womac's attorney that it is unjust, "to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the homicide by abuse gets reversed ... then they can sort of rise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated double jeopardy." Womac, 160 Wn. 2d at 651. The Womac court, citing Ball v. United States, 470 U.S. 856, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985), State v. Gohl, 109 Wn. App. 817, 37 P.3d 293 (2001), and State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995), confirmed a conviction is punishment for double jeopardy purposes. Womac, 160 Wn. 2d at 656-58. The court concluded:

As this court noted in Calle, "[i]t is important to distinguish between charges and convictions-the State may properly file an information charging multiple counts under various

statutory provisions where evidence supports the charges, even though convictions may not stand for all offenses where double jeopardy protections are violated." Calle, 125 Wn.2d at 777 n. 3, 888 P.2d 155 (emphasis added) (citing Ball, 470 U.S. at 860, 105 S. Ct. 1668). See also [State v. Johnson, 92 Wn.2d 671, 679, 600 P.2d 1249 (1979)] (" Conviction in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect....").

Womac, 160 Wn. 2d at 657-58.

What is clear from the holdings in Womac, Gohl, and Ball is that a conviction is punishment under double jeopardy jurisprudence. And a conviction remains a conviction regardless of a trial court's clerical decision not to "enter judgment" on it but instead hold it in abeyance.

For example, a conviction may be counted in a future offender score whether or not a sentence is imposed. Offender scores are calculated using a defendant's current and prior "convictions." RCW 9.94A.525. An accused is "convicted" when a jury returns a guilty verdict:

"Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

RCW 9.94A.030(12).

Similarly, the rules of evidence permit impeachment of a witness with evidence the witness has been "convicted of a crime." ER 609(a). The time limit governing the use of such evidence is calculated either from

the witness's release from confinement or from the "date of the conviction." ER 609(b). Entry of judgment on a conviction is not required for impeachment under the rule.

Given the above, it is apparent the holding in Ward is narrow. It only applies to situations where an accused has been charged and convicted of a single count by alternative means. Outside that context, a court's decision not to enter judgment on a conviction is simply a sleight of hand clerical maneuver without constitutional significance. As Womac makes clear, a court has no authority to archive a double jeopardy conviction and "hold it in abeyance for a later time." Womac, 160 Wn. 2d at 659.

Here, the court took the verdict on the felony murder charge but did not sentence Faagata on that charge instead, as in Womac, it entered an order holding it in abeyance for a later time. Under the holding in Womac, the court's failure to dismiss the felony murder charge in order to archive a "fallback position" violated double jeopardy. Thus, this Court should reverse the trial court's order and vacate Faagata's felony murder conviction.

2. THE NUMBER AND LOCATION OF THE SHOTS ESTABLISHED THE ELEMENTS OF THE CRIME OF FIRST DEGREE MURDER THEREFORE THE EVIDENCE DOES NOT SUPPORT A FINDING OF DELIBERATE CRUELTY.

The State concedes remand is required because the court failed to enter findings and conclusions supporting the exceptional sentence. BOR at 11, n. 3. It reasons, however, that because “[t]he cruelty of shooting the victim in the buttocks was not needed to commit first degree murder” the evidence supports the deliberate cruelty finding. BOAR at 15.

The State relies on State v. Franklin, 56 Wn. App. 915, 786 P.2d 795, *review denied*, 114 Wn.2d 1004 (1990), to support its argument. In Franklin, the defendant was convicted of attempted first degree murder for stabbing the employee of the pizza parlor he robbed. Id. at 796.

Franklin required the employee to kneel to make it appear he was going to tie her hands behind her back to facilitate his escape. Instead, Mr. Franklin knifed her in the back. This stab wound was not immediately effective, so he knifed her in the back again. Ms. Clary screamed and ran to get away. Mr. Franklin, with a smile on his face as described by the victim, attempted to prevent her escape.

Id.

The court held the second stab wound was “deliberately cruel” because the crime of attempted first degree murder was established upon the showing of premeditation and the first stabbing. Id. at 797. The court

concluded the second stabbing was gratuitous and therefore aggravating.
Id.

Here, the State relied on the number and location of the gunshots to argue its theory that Faagata committed first degree murder. RP 734-736. Unlike in Franklin, where the crime was established by the first stabbing, the crime here was not established by the first shots. That distinguishes Franklin from this case.

Moreover, the record shows the shots were fired within seconds of each other and after the first shots to the back, Outler was likely paralyzed and did not feel the subsequent shots in his buttocks. The fact Faagata shot Outler in the buttocks does not suggest he gratuitously inflicted pain as an end in itself, as the State argues. BOR at 18.

This case is more like State v. Serrano, 95 Wn. App. 700, 712-13, 977 P.2d 47 (1999), where the court held that shooting the victim in the back five times did not support a finding of deliberate cruelty. Thus, this Court should dismiss the special verdict, reverse Faagata's exceptional sentence and remand for resentencing within the standard range.

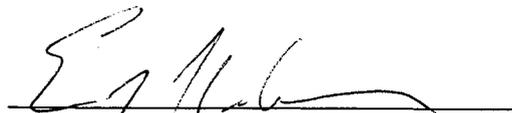
B. CONCLUSION

For the reasons stated above, and in the Brief of Appellant, this Court should vacate the felony murder conviction and reverse Faagata's exceptional sentence.

DATED this 17 day of March, 2008.

Respectfully submitted,

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DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36325-9-II
)	
FAULOLUA FAAGATA,)	
)	
Appellant.)	

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 17TH DAY OF MARCH 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** 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 17TH DAY OF MARCH 2008.

x Patrick Mayovsky

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