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COURT OF APPEALS

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NO. 28610-6 II  
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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State of Washington - **Respondent,**

vs.

Carrisa Marie Daniels- **Appellant.**

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Additional Briefing of Appellant

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

State of Washington	)	
	)	<b>Respondent,</b>
vs.	)	<b>ADDITIONAL BRIEFING</b>
	)	<b>OF APPELLANT</b>
Carissa Marie Daniels	)	
	)	<b>Appellant.</b>
_____	)	

**ARGUMENT**

THE REMEDY WHERE ALTERNATIVE MEANS ARE CHARGED, BUT ONE OF THE MEANS BECOMES LEGALLY IMPOSSIBLE DUE THE SUPREME COURT'S DECISION IN *IN RE PERSONAL RESTRAINT OF ANDRESS*, 147 WASH.2D 602, 56 P.3D 981 (2002), RECONSIDERATION DENIED MARCH 14, 2003 AND WHERE THERE ARE NO SPECIAL VERDICTS INDICATING WHICH ALTERNATIVE MEANS SUPPORTED THE CONVICTION IS DISMISSAL AS A RETRIAL WOULD VIOLATE DOUBLE JEOPARDY

In the case of *State v. Hutton*, 7 Wash.App. 726, 502 P.2d1038 (1972), this court, Division 2, chose the remedy of dismissal where there was no special verdict to determine which alternative the jury convicted under and one of two alternatives was determined to be lacking sufficient evidence, even though the other alternative clearly had sufficient evidence. In that case, the defendant was charged:

with having committed the crime of second degree assault on January 18, 1970 by assaulting the town marshal of the town of Rainier, Washington 'with a weapon or instrument likely to produce bodily harm, to-wit: a garden rake, and further did prevent and resist the lawful apprehension and detention of himself.' (at 727)

Hence, the defendant, Hutton, was charged with two alternative means of committing assault in the second degree, one of which involved the assaulting a person with something likely to cause bodily harm(i.e. a garden rake), and the other was to assault another with intent to resist his lawful apprehension or detention. The jury was not given an instruction regarding the need to be unanimous in their decision as to which of these two alternative means of committing assault in the second degree they were relying upon. The court found that there was insufficient evidence to support the jury finding that Mr. Hutton's arrest was lawful; and since no instruction was given to them regarding the need to be unanimous in their decision, the court ruled that the proper remedy was to dismiss the charge altogether. In reaching their decision, the court stated:

From the recital and analysis of the testimony set forth above, we are not apprised of one single fact which Miss Slaughterback presented to Mr. Sexton which would assist him in formulating a belief that probable cause existed to arrest this defendant. Certainly, the knowledge that Hutton had previously been subjected to a marijuana charge in the past is insufficient to form the basis for ordering his arrest on

January 17, 1970 for unlawful distribution of a dangerous drug. As a result, the jury was left to speculate entirely as to what information Mr. Sexton had before him on January 17, 1970. The state's burden is more stringent than that. We must conclude that the record reveals an insufficiency of evidence to support an essential element of the crime with which the defendant was charged. In view of this conclusion, and in view of the trial court's failure to instruct the jury that their verdict must be unanimous as to either alternative means of committing the crime of second degree assault, the jury's verdict must be reversed as to count 3 of the information. *State v. Golladay*, Supra.

Reversed and remanded with instructions to dismiss all three counts of the information.(at 735)

Although not discussed, the court only found insufficient evidence as to one of two means of committing the offense; and even though there may have been evidence sufficient to find Mr. Hutton guilty of assault in the second degree for hitting the officer with a garden rake, the failure to provide an instruction on unanimity, was enough to require dismissal of the case.

In terms of the remedy generally used by the courts, remand for a new trial is the most common (see *State v. Klimes*, 117 Wash.App. 758, 73 P.3d 416 (2003); *State v. Kinchen*, 92 Wash.App. 442, 963 P.2d 928, (1998); *State v. Bland*, 71 Wash.App. 345, 860 P.2d 1046 (1993); *State v. Russell*, 101 Wash.2d 349, 678 P.2d 332 (1984); *State v. Bland*, 71 Wash.App. 345, 860 P.2d 1046 (1993); *State v. Vanderburg*, 14 Wash.App. 738, 544 P.2d 1251 (1976), ); however, the above case of *Hutton* is still good law.

The case of *State v. Russell*, 101 Wash.2d 349, 678 P.2d 332 (1984) is interesting because, although it remanded the case for a new trial, the court appeared to do so primarily because it was requested by the defendant. The following statement by the court outlines the case, but what is most intriguing is the last sentence regarding what the court did not consider. The court stated:

As indicated above, petitioner was charged with intentional second degree murder and with second degree felony murder as an alternative means of committing second degree murder. The jury was instructed that to convict petitioner of intentional second degree murder or the "alternative" second degree felony murder, the jury must be unanimous as to the particular alternative chosen. Unfortunately, the verdict form supplied to the jurors did not distinguish between second degree felony murder and intentional second degree murder. The jurors were authorized to vote guilty or not guilty on the ultimate charge of second degree murder. No provision was made for considering each of the alternatives that composed the charge. Petitioner contends this violates *State v. Green*, 94 Wash.2d 216, 616 P.2d 628 (1980). We agree.

As in *Green*, petitioner failed to assign error to the defective verdict form. Nevertheless, as in *Green*, petitioner has standing to raise the issue for the first time on appeal because the failure to separate the alternative issues dealt with in the verdict invades the fundamental constitutional right to trial by jury. *State v. Green, supra* at 231, 616 P.2d 628.

As in *Green*, the resultant verdict makes it impossible to know whether the jury returned a guilty verdict on intentional second degree murder or the "alternative" charge

of second degree felony murder. This creates an insoluble problem since we have ruled that, under the attendant circumstances, it was error to have charged petitioner with second degree felony murder. CrR 4.3(c). As in *Green*, it is impossible to know whether the jury determined unanimously that the crime of intentional second degree murder had been committed or whether they determined unanimously that the "alternative" crime, improperly charged, had been proven. Accordingly, as in *Green*, we cannot say what the jury determined as to the second degree murder charge. Consequently, we grant petitioner's prayer that the cause be remanded for new trial on the singular charge of intentional second degree murder. RCW 9A.32.050(1)(a).

We do not reach the question of whether under some theory of estoppel or issue preclusion the intentional second degree murder charge should be dismissed outright rather than be tried a third time. Petitioner's prayer does not bring that issue before us. (at 353-355)

Because the defendant did not raise the issue of whether or not there was an estoppel or issue preclusion requiring the case to be dismissed outright, the court was remanding for a new trial. Basically, it appears that the Supreme Court was leaving the door open for the issue of double jeopardy as will be discussed below.

In the case of *State v. Hescok*, 98 Wash.App. 600, 989 P.2d 1251 (1999), this court, Division 2, indeed, Judge Armstrong who sits on the panel hearing this case, writing for a panel that also included Judge Houghton, ruled that dismissal was the remedy when a judge hearing a case that is

presented based upon two alternatives, findings in his written findings of fact that the defendant is guilty of an alternative that is found to be factually insufficient, even though there may have been sufficient evidence for the other alternative. The court ruled that a new trial under these facts violated Double Jeopardy.

In that case, the defendant was charged with forgery. He was charged under two alternatives. The first was "by means of falsely making, completing or altering a written instrument in violation of RCW 9A.60.020(1)(a)"(at 603). The second was "by possessing or putting off as true a written instrument he knew to be forged in violation of RCW 9A.60.020(1)(b)."(at 603) The evidence was that the defendant cashed a payroll check belonging to another person by writing on the back of it "Pay the order of: Ryan Hescoock" and then signed his name to it. In the Judge's oral decision, he indicated that the defendant was guilty based upon both alternatives, but the written findings of fact only stated the first alternative. This Court found that the evidence was insufficient to support the first alternative. Because the trial judge had entered unambiguous written findings of fact only finding the defendant guilty of the first alternative, this court found it unnecessary to consider the oral ruling, but proceeded in its analysis

as follows:

Here, unlike *Alvarez* and *Souza*, there are no written findings or conclusions on alternative (1)(b) that would demonstrate that the trial court was convinced of Hescoek's guilt. Although the trial court stated that Hescoek was guilty of forgery beyond a reasonable doubt, it referred only to the elements of alternative (1)(a). The question then is whether the trial court's failure to enter findings and conclusions as to alternative (1)(b) bars, under double jeopardy principles, a remand for further prosecution under (1)(b). This precise issue has not been addressed in Washington or by any authority that is binding on Washington courts.

In *State v. Davis*, 190 Wash. 164, 166-67, 67 P.2d 894 (1937), the State Supreme Court held that the jury's silence as to multiple counts of the indictment barred retrial on those counts. *Davis* was charged with vehicular homicide, driving while intoxicated, and reckless driving. The jury acquitted him of vehicular homicide, but did not return a verdict on the other two counts. *Davis*, 190 Wash. at 164-65, 67 P.2d 894. The Court said:

It is a general rule, supported by the great weight of authority, that, 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 put upon trial as to those counts.

*Davis*, 190 Wash. at 166, 67 P.2d 894.

The United States Supreme Court has also considered jury silence tantamount to an acquittal for double jeopardy purposes. For example, in *Green*, 355 U.S. at 189-90, 78 S.Ct.

221, the jury found the defendant guilty of second degree murder, rather than first degree murder. After the verdict was set aside on appeal, Green was again tried for first degree murder, even though the original jury had refused to find him guilty of that charge. The Supreme Court concluded that the second trial for first degree murder placed Green in jeopardy twice for the same offense. *Green*, 355 U.S. at 190, 78 S.Ct. 221. The court gave two reasons for its conclusion. First, the jury's guilty verdict for second degree murder was an implicit acquittal on the charge of first degree murder. *Green*, 355 U.S. at 190, 78 S.Ct. 221. Second, even if the verdict is not considered an implicit acquittal, when the jury was discharged after a "full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so[.]" Green's jeopardy for first degree murder ended. *Green*, 355 U.S. at 191, 78 S.Ct. 221.(at 607-608)

Although this analysis was that in the context of a bench trial, it is clear from the foregoing that its application also applies in the context of a jury trial.

In the case of Ms. Daniels, although she was found guilty by the jury of felony murder in the second-degree, it is not clear that she was convicted of that based upon the predicate offense of assault in the second-degree or criminal mistreatment. If the jury acquitted her on the felony murder by criminal mistreatment and convicted her on the felony murder by assault in the second degree, then the retrial would violate double jeopardy by placing her in jeopardy twice for an offense for which she had actually been acquitted by the prior jury. In the absence of a special verdict, it is unknown which alternative the jury relied upon to return a verdict of guilty. In this sense, the

jury silence is an implicit acquittal. It would clearly violate double jeopardy under these circumstances to remand this case for new trial and the only appropriate remedy in this case is a dismissal.

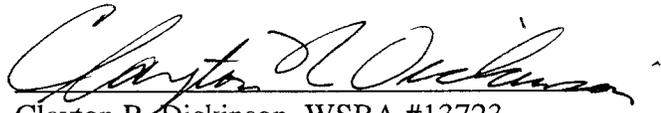
The case of *State v. Gamble*, 118 Wash.App. 332, 72 P.3d 1139 (2003) held that where the defendant had been convicted of felony murder with assault in the second-degree as the predicate offense, which felony murder conviction was essentially reversed by the *Andress* case; the Court of Appeals could remand that or imposition of sentence for assault in the second-degree because the injury necessarily found all of the elements of that offense. However, that is not an appropriate remedy in this case because of the fact that without a special jury verdict revealing whether the jury found Ms. Daniels guilty of the predicate offense of assault in the second-degree or criminal mistreatment, it is unknown whether the jury in fact found all of the elements of assault in the second-degree. If the jury was relying upon the criminal mistreatment and actually found the evidence to be insufficient for assault in the second-degree, the case cannot be remanded for a conviction of assault in the second-degree, because the jury did not find all of the elements of assault in the second-degree to have been committed. Therefore, because it is unknown whether or not the jury actually found Ms. Daniels to have

committed assault on the second-degree, the remedy of remanding this case for resentencing to the crime of assault on the second-degree is not to an available remedy. Once again, the only appropriate remedy is dismissal.

**CONCLUSION**

For above-stated reasons, it is clear that this case must be reversed and dismissed. A new trial would violate double jeopardy because it is unknown whether the jury relied upon the assault in the second-degree or criminal mistreatment as the predicate offense for felony murder and for that reason, because the jury could have acquitted her of the criminal mistreatment, a new trial for felony murder based upon criminal mistreatment would violate double jeopardy. Likewise, this case also cannot be remanded for resentencing to the charge of assault in the second-degree because it is unknown whether the jury in fact found that Ms. Daniels to have committed that offense. Therefore, this case must be reversed and dismissed.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of December, 2003.

  
Clayton R. Dickinson, WSBA #13723  
Attorney for Appellant

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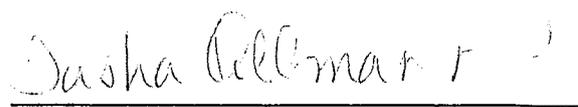
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

8	State of Washington	)	NO. 28610-6 II
		)	
9	<b>Respondent,</b>	)	<b>DECLARATION OF SERVICE</b>
	<b>vs.</b>	)	
		)	
10	Carissa Marie Daniels,	)	
		)	
11	<b>Appellant.</b>	)	
		)	

I, Tasha Ollmann, legal secretary for Clayton R. Dickinson, attorney for appellant, declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct:

On December 15, 2003, that I delivered to US Postal Service the Additional Briefing of Appellant to cause delivery of the same to the Appellant, Carissa Marie Daniels, at WCCW, PO Box 17 MS: WP-04, 9601Bujacich Rd NW, Gig Harbor, Washington 98335-0017.

SIGNED at Fircrest, Washington, this the 15<sup>th</sup> day of December, 2003.

  
\_\_\_\_\_  
Tasha Ollmann

DECLARATION OF SERVICE

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

State of Washington ) NO. 28610-6 II  
Respondent, )  
vs. ) DECLARATION OF SERVICE  
)  
Carissa Marie Daniels, )  
Appellant. )

I, Barbara Ollmann, paralegal for Clayton R. Dickinson, attorney for appellant, declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct:

On December 15, 2003, that I delivered to ABC Legal Messenger copies of the Additional Briefing of Appellant and both Declarations of Service to cause delivery of the same to the office of the Pierce County Prosecutor.

SIGNED at Fircrest, Washington, this the 15<sup>th</sup> day of December, 2003.

[Signature]  
Barbara Ollmann

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DECLARATION OF SERVICE