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SUPREME COURT  
STATE OF WASHINGTON

2008 FEB -8 *PL* 27

NO. 76802-1

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SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER

v.

CARISSA DANIELS, RESPONDENT

---

Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 00-1-05286-5

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**SUPPLEMENTAL BRIEF OF PETITIONER ON  
MOTION FOR RECONSIDERATION**

---

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A. ISSUES PRESENTED.

1. Should this court abide by its holding, allowing the State to retry defendant on the charge of homicide by abuse, when the analysis in the original decision, as well as its analysis in State v. Ervin, properly interprets and applies double jeopardy principles regarding the ability to retry a defendant on a greater crime following a hung jury on that offense and an appellate reversal of a conviction found by the same jury on a lesser offense?

2. Should this court abide by its holding, allowing the State to retry defendant on the charge of felony murder, when defendant has failed to demonstrate why she is not in continuing jeopardy for this offense after the successful appeal of her conviction?

B. STATEMENT OF THE CASE.

The victim in this case “DK” was born on July 18, 2000, a full term healthy infant. RP 342-345. On September 14, 2000 he was pronounced dead at Madigan emergency room; hospital staff called the medical examiner’s office to investigate the death. RP 123-125. The autopsy of DK’s body revealed multiple injuries of differing dates indicating that he had been subjected to blunt force trauma on more than one occasion. RP 491-492. DK had a total of ten broken ribs that were approximately 10 days to 2 weeks old. RP 462-467. DK had subdural and

subarachnoid hemorrhages on both sides of his head. RP 472-479. There was evidence of newer injury (bleeding) superimposed over older injury; the newer injury was a day or two old and the older injuries were about two weeks old. RP 472-483. These hemorrhages led to a swelling of the brain causing it to be incapable of performing body function. The injuries were consistent with DK having been shaken violently on more than one occasion. RP 168-169, 177-178, 477-486. Descriptions of DK's injuries are more fully set forth in the briefs filed below. Respondent's brief at pp. 6-9.

DK lived with his mother, the defendant, and her boyfriend, Clarence Weatherspoon, who was not DK's biological father. Except for two occasions, only defendant or Weatherspoon cared for the baby. RP 230-231. Defendant was the primary caregiver to DK. RP 1058-1059. Both defendant and Weatherspoon testified at trial; both denied causing any injury to DK. RP 924-926, 1107-1108. The evidence presented to the jury for it to decide whether defendant was criminally responsible for the death of her son is set forth in a sixteen page fact statement in the brief filed below. Respondent's brief at pp 3-19.

The State charged defendant with homicide by abuse or, in the alternative, with felony murder in the second degree, alleging predicate felonies of assault in the second degree and criminal mistreatment. CP 86-87. At trial, defendant submitted proposed instructions using the unable to agree wording authorized in State v. Labanowski, 117 Wn.2d 405, 816

P.2d 26 (1991). See CP 7-32, Defense Proposed Instruction No. 22 and Proposed Verdict Form B. Defendant did not object to the court's jury instructions which adopted this language. RP 1281-1282. The jury was instructed to consider the crimes as follows:

When completing the verdict forms, you will first consider the crime of homicide by abuse as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of homicide by abuse, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the alternatively charged crime of murder in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in the verdict form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

Instruction 23, CP 33-57. After hearing the evidence, the jury returned its verdicts leaving Verdict Form A blank, and finding defendant guilty of felony murder in the second degree on Verdict Form B. CP 107-108.

When the jury returned with its verdicts, the court read them aloud stating that "Verdict form A is blank" then reading the entirety of Verdict Form B: "We, the jury, having found the defendant Carissa M. Daniels not guilty of the crime of homicide by abuse as charged in Count 1, or

being unable to unanimously agree as to that charge, find the defendant guilty of the alternatively charged crime of felony murder in the second degree. Signed by the presiding juror.” RP 1380-1381. The court then polled the jury and each juror agreed that the verdicts accurately reflected his or her own verdict as well as the verdict of the jury. RP 1381-1385. After verifying that all 12 jurors had agreed as to the correctness of the verdicts, the court excused the jury without any objection from the defendant.

Defendant appealed her conviction of felony murder in the second degree. While her case was pending in the Court of Appeals, this court issued its opinion in In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that a felony murder charge could not be predicated on a felony assault. The Court of Appeals held that as the jury had not been asked to specify the underlying predicate felony on felony murder the case, the conviction must be remanded for new trial on felony murder predicated on criminal mistreatment. State v. Daniels, 124 Wn. App. 830, 103 P.3d 249 (2004). The court also ruled that double jeopardy precluded the State from retrying defendant on the charge of homicide by abuse. The State sought review in this court, acknowledging the need to retry defendant but seeking reversal of the Court of Appeals on whether defendant could be retried for homicide by abuse.

On May 3, 2007, this Court issued a decision reversing the Court of Appeals with respect to the State's ability to retry defendant on the charge of homicide by abuse and affirming the portion allowing retrial on felony murder predicated on criminal mistreatment. This decision relied upon another recent decision of this court in State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006). Defendant filed a motion for reconsideration arguing that the court's decision was in conflict with the decision of the Ninth Circuit in Brazzel v. Washington, 491 F.3d 976 (9<sup>th</sup> Cir. 2007). The matter is now being set for re-argument.

C. ARGUMENT.

1. THIS COURT SHOULD NOT RETREAT FROM ITS HOLDING IN THIS CASE OR THE ONE IN STATE V. ERVIN; BOTH PROPERLY INTERPRET AND APPLY SUPREME COURT PRINCIPLES ON DOUBLE JEOPARDY IN AN AREA WHERE THERE IS NO CLEARLY ESTABLISHED LAW DIRECTLY ON POINT.

The decision below by the Court of Appeals held that a verdict form on a greater charge left blank under "unable to agree" instructions constitutes an implied acquittal of that charge when the jury returns a verdict on a lesser charge. In State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006), this court rejected such an analysis and held that when a jury is instructed using "unable to agree" instructions and leaves a blank verdict form on a greater charge while convicting on a lesser offense, that the

blank jury form is not equivalent to an implied acquittal on the greater offense; the Ervin court went on to hold that the conviction on the lesser offense will bar retrial on the greater offense unless and until that lesser conviction is overturned on appeal. When this case reached this court, the court applied Ervin and reversed the Court of Appeals.

The Ervin analysis begins with a well established principle – well established with the United States Supreme Court as well as in Washington - that a jury is presumed to follow its instructions. Weeks v. Angelone, 528 U.S. 225, 235, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000); Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). The Court in Ervin noted that the jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict for each particular charge. Consequently, it was a logical conclusion that the blank verdict forms A and B in that case meant that the jury could not agree on a verdict for the crimes of aggravated murder in the first degree or attempted murder in the first degree. This Court went on to hold:

The instructions and verdict forms are a part of the record. Both the United States Supreme Court and this court have found that “where a jury ha[s] not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record,” the implied acquittal doctrine does not apply. Therefore, regardless of any inquiry by the trial court, the blank verdict forms indicate on their face that the jury was unable to agree. Because the jurors were unable to agree, we cannot consider them to have acquitted Ervin of the greater charges. Thus, Ervin has no acquittal operating to terminate jeopardy.

State v. Ervin, 158 Wn.2d at 756-757 (citations to authority and the record omitted). Defendant fails to cite any United States Supreme Court precedent which would interfere with the analysis set forth in Ervin. Even the Ninth Circuit acknowledged in the Brazzel decision that “[n]o [United States] Supreme Court case addresses precisely” whether a verdict form left blank under the “unable to agree” form of instructions (such as used in this case and the Brazzel case) constitutes an implied acquittal which would raise a double jeopardy bar to further prosecution. Brazzel, 484 F.3d at 1095..

The Eighth Circuit Court of Appeals came to a similar conclusion as the Ervin court. In United States v. Bordeaux, 121 F.3d 1187 (8th Cir. 1997), the trial court submitted the case to the jury with instructions on the greater offense of attempted aggravated sexual abuse as well as on the lesser included offense. The jury was given an “unable to agree” type instruction that read:

If your verdict under these instructions is not guilty, or if, after all reasonable efforts you are unable to reach a verdict, you should record that decision on the verdict form and go on to consider whether defendant is guilty of the crime of abusive sexual contact under this instruction.

United States v. Bordeaux, 121 F.3d 1187, 1190 (8th Cir. 1997). When it could not agree on the greater charge, the jury wrote, as instructed, on the verdict form for that offense that “[a]fter all reasonable efforts, we, the jury, were unable to reach a verdict on the charge ‘Attempted Aggravated

Sexual Abuse.” Id. at 1192. The jury went on to convict Bordeaux of the lesser charge. When Bordeaux obtained a reversal of the conviction on the lesser offense, the issue arose as to whether he could be retried on the greater offense. The Eighth Circuit held that the government could proceed on the greater charge as the record showed that the jury had been unable to agree on the greater charge. Id. at 1193. See also, United States v. Williams, 449 F.3d 635 (5<sup>th</sup> Cir. 2006) (where record shows the jury was unable to reach an agreement, blank jury form does not preclude retrial).

The jury in Bordeaux’s case was instructed to write a note expressing its inability to agree on the verdict form while the jury in Daniels’s case was instructed to leave the verdict form blank. Both cases involve the jury following the given instructions as to how to express an inability to agree on a particular charge. This court in Ervin and the Eighth Circuit in Bordeaux each considered relevant decisions of the United States Supreme Court on double jeopardy and each reached a similar conclusion.

Other jurisdictions have come to similar conclusions. United States v. Allen, 755 A.2d 402, 410 (D.C. 2000), cert. denied, 533 U.S. 932, 121 S. Ct. 2556, 150 L. Ed. 2d 722 (2001); Mauk v. State, 91 Md. App. 456, 605 A.2d 157, 170-71 (Md. App. 1992); State v. Klinger, 698 N.E.2d 1199, 1202 (Ind. App. 1998); see also, People v. Fields, 13 Cal. 4<sup>th</sup> 289, 914 P.2d 832 (Cal. 1996) (concluding that the Fifth Amendment of

the United States Constitution does not compel application of the doctrine of implied acquittal in every case in which the jury returns a verdict of guilty on the lesser included, but determining that independent state grounds prevented retrial on greater offense).

This Court's decisions in this case and in Ervin as well as the Eighth Circuit's decision in Bordeaux, are consistent with principles found in Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

In Sattazahn, the defendant was tried for capital murder. The jury found the defendant guilty of first-degree murder during the guilt phase of the proceedings, but deadlocked in the penalty phase as to whether the aggravating circumstances justified imposition of the death penalty. The trial court discharged the jury, and imposed a life sentence in accord with Pennsylvania law. When the defendant succeeded in challenging his conviction on appeal, the State again tried the Sattazahn for capital murder on remand. At the second trial, the defendant was convicted and sentenced to death because the second jury reached a unanimous verdict in favor of the aggravating circumstances. Sattazahn, 537 U.S. at 103-06.

On appeal to the Supreme Court, the defendant argued that the imposition of a life sentence following his first trial was the functional equivalent of an acquittal as to the aggravating circumstances, and that double jeopardy should have barred any retrial for the greater crime of capital murder. The Court disagreed, and characterized the first jury's

failure to reach agreement on capital murder a “non-result” because the jury had made no findings on the merits with respect to the aggravating circumstances. Sattazahn, 537 U.S. at 109. Moreover, the Court expressly rejected the notion that the state's initial acquiescence to the lesser conviction precluded prosecution for the greater offense on remand.

To the contrary, the Court observed,

Instead we see here a State which, for any number of perfectly understandable reasons, has quite reasonably agreed to accept the default penalty of life imprisonment when the conviction is affirmed and the case is, except for that issue, at an end – but to pursue its not-yet-vindicated interest in one complete opportunity to convict those who have violated its laws where the case must be retried anyway[.]

Id. at 114 (internal page references, quotations, and citations omitted).

Such is the situation here, in a single prosecution the State brought defendant to trial on two alternative charges, homicide by abuse, which is a more serious offense carrying a greater penalty, and felony murder in the second degree with a lesser penalty. The jury could not agree on the greater charge but convicted on the lesser crime. At that point the right for the prosecution to proceed on the greater charge was provisionally final, because the conviction on the lesser barred retrial. However, when the defendant successfully appealed the conviction on the lesser, then the basis for the provisional finality on the greater charge dissipated and the State should be free to proceed on the charge on which the jury could not agree. The majority of the Sattazahn court found none of its prior

decisions on double jeopardy to preclude such a result and commented that the dissent's reliance on United States v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), would be "a thin reed on which to rest a hitherto unknown constitutional prohibition of the entirely rational course of making a hung jury's failure to convict provisionally final, subject to change if the case must be retried anyway." Sattazahn, 537 U.S. at 113-114. It would appear that the majority in Sattazahn would find the rationale of the Ervin and Daniels decisions to be "entirely rational" and not at all inconsistent with its double jeopardy jurisprudence.

In Brazzel v. Washington, 491 F.3d 976 (9<sup>th</sup> Cir. 2007), the Ninth Circuit indicates that it is puzzled by the Ervin decision, but fails to provide any analysis using United States Supreme Court authority to show any real fault with the decision or even a basis for confusion. It should be noted that the cases cited by the Ninth Circuit in Brazzel dealing with a discharge of a hung jury are ones where the jury was discharged over the defendant's objection. Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the "manifest necessity" standard first enunciated in United States v. Perez, 9 Wheat. 579, 580 (1824) in reference to a mistrial following the jury's declaration that it was unable to reach a verdict. While other situations have been recognized by the United States Supreme Court as meeting the "manifest necessity" standard, the hung jury remains the most frequent example. See Arizona v. Washington, 434 U.S. 497,

509, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); Illinois v. Somerville, 410 U.S. 458, 463, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973). The “manifest necessity” standard provides sufficient protection to the defendant’s interests in having his case decided by the jury first selected while at the same time maintaining “the public’s interest in fair trials designed to end in just judgments.” Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949). But when a mistrial is declared at the request or with the approval of the defendant, different principles come into play. Where the defendant has elected to terminate the proceedings against him and the “manifest necessity” standard has no place in the application of the Double Jeopardy Clause. Oregon v. Kennedy, 456 U.S. 667, 672, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982); United States v. Dinitz, 424 U.S. 600, 607-610, 96 S. Ct 1075, 47 L. Ed. 2d 267(1976).

Federal courts, including the Ninth Circuit, have acknowledged that a trial court has two forms of instructing a jury on a lesser charge: the “acquit first” form and the “unable to agree” form, which is also referred to as the “reasonable efforts” form. United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984); United States v. Allen, 755 A.2d at 411. Jackson and Allen give trial courts discretion to choose between the two formulations unless the defendant expresses a choice. Where the defendant expresses preference, the court must defer to the defendant’s selection. Id. The Ninth Circuit noted that either form presents certain advantages and disadvantages for the defendant; it reasoned that since it is

the defendant's liberty at stake, "the court should give the form of instruction which the defendant seasonably elects." Jackson, 726 F.2d at 1469-70, quoting United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978). In Allen, the court noted that where a "defendant elects a reasonable efforts instruction a jury unable to agree on the greater charge is deemed to have 'done its job' because it has acted as instructed," but that "does not necessarily imply that one jury's inability to agree should work to the disadvantage or the government's ability to secure a conviction on that charge by another jury." Allen, 755 A.2d at 411

Here, the trial court gave the form of instruction that Daniels proposed and to which she consented. See CP 7-32, Defense Proposed Instruction No. 22 and Proposed Verdict Form B; RP 1281-1282. When the jury after a "full and careful consideration of the evidence" was unable to reach a unanimous agreement on the charge of homicide by abuse it returned Verdict form A with an empty blank rather than filling it with the words "not guilty" or "guilty." The jury expressed its inability to agree on that charge in accordance with the instructions. After the court announced the verdicts and polled the jury, defendant did not request that the jury continue to deliberate on the greater charge and raised no objection to the discharge of the jury after the court accepted the verdicts. RP 1380-1385. The first jury had completed all of the deliberations that Daniels had requested of it. Daniels must face the consequence of her choice; one of the disadvantages of the "unable to agree" form of instructions is that it

leaves the defendant in continuing jeopardy on the greater offense when the conviction on the lesser offense is overturned on appeal. The “manifest necessity” standard regarding a declaration of a mistrial over the defendant’s objection is not applicable to Daniels’s situation.

There is nothing about the Ninth Circuit’s decision in Brazzel v. Washington that should cause this court to reconsider its decision. The United States Supreme Court had the opportunity to take the Brazzel case on direct review but denied the petition for certiorari finding no double jeopardy issue that it needed to correct. State v. Brazzel, 118 Wn. App. 1054 (2003), review denied, 151 Wn.2d 1025, 94 P.3d 959 (2004), pet. cert. denied by Brazzel v. Washington, 543 U.S. 1004, 125 S. Ct. 608, 160 L. Ed. 2d 465 (2004). This court’s analysis in Daniels and in Ervin is a proper application of federal constitutional double jeopardy principles and is consistent with decisions reached by other jurisdictions in similar situations. This Court should not alter its earlier decision.

2. DEFENDANT HAS FAILED TO PRESENT ANY NEW AUTHORITY AS TO WHY THE STATE SHOULD BE PRECLUDED FROM RETRYING HER ON FELONY MURDER IN THE SECOND DEGREE.

Defendant argues in her reconsideration motion that the jury’s silence as to which alternative means of felony murder in the second degree it was finding guilt upon constitutes “implicit acquittal” of that crime. Motion for reconsideration at p. 9. This was an argument raised in

a motion for reconsideration at the Court of Appeals level as well as in the cross petition for review. This argument has been rejected by this court and the court below; defendant offered no new arguments or authority in the motion for reconsideration. Defendant's argument that a jury's verdict of guilty is really equivalent to an implicit acquittal is unsupported by any authority.

The jury was instructed that it could find defendant guilty of second degree felony murder on either, or both, of two alternative means (predicate crimes). CP 33-57. There was no request for any special interrogatories delineating on which theory or theories the jury found guilt. It is unknown whether the jury: 1) unanimously found that both means of committing felony murder had been proved beyond a reasonable doubt; 2) unanimously found that only one of the means had been proven; or, 3) unanimously agreed that felony murder had been proved but were not unanimous as to the means. All that is known is that the jury found defendant guilty of the crime of felony murder in the second degree. Said conversely, the jury did not acquit defendant of the crime of felony murder in the second degree.

Defendant has successfully challenged her conviction on appeal, but remains in continuing jeopardy for the crime of felony murder in the second degree. The Court of Appeals determined that there was sufficient evidence to support a determination of guilt for felony murder in the second degree based upon criminal mistreatment while invalidating the

alternative means based upon the crime of assault on the basis of In re  
Andress. Defendant remains in continuing jeopardy for the crime of  
felony murder in the second degree predicated upon criminal  
mistreatment, and the double jeopardy clause does not bar retrial on that  
offense.

D. CONCLUSION.

For the foregoing reasons the State asks this court to deny the  
motion for reconsideration and affirm the decision issued on May 3, 2007.

DATED: February 8, 2008,

GERALD A. HORNE  
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Prosecuting Attorney



KATHLEEN PROCTOR  
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WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or  
ABC-LMI delivery to the attorney of record for the appellant and appellant  
c/o his attorney true and correct copies of the document to which this certificate  
is attached. This statement is certified to be true and correct under penalty of  
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,  
on the date below.

2/8/08 Johnson  
Date Signature

**FILED AS ATTACHMENT  
TO E-MAIL**