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COURT OF APPEALS

NO. 28610-6

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT/CROSS APPELLANT

v.

CARISSA DANIELS, APPELLANT/CROSS RESPONDENT

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

No. 00-1-05286-5

SUPPLEMENTAL BRIEF OF RESPONDENT/CROSS APPELLANT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is remand for new trial the appropriate remedy when: 1) the jury found defendant committed felony murder in the second degree under instructions that effectively created alternative means of committing the offense; 2) a Supreme Court decision has invalidated one of these means as providing a legal basis for felony murder; and, 3) it is impossible to discern from the record whether the jury based its decision as to guilt on the remaining valid means?
2. May defendant be retried on both the charge of homicide by abuse, on which the jury was unable to agree as to defendant's guilt, and murder in the second degree, which defendant is challenging on appeal, as defendant is under continuing jeopardy as to both crimes?

B. STATEMENT OF THE CASE.

The court is referred to the State's response brief for a statement of the procedural and substantive facts of the case. Additional facts necessary to address the issues in the supplemental brief will be presented in the relevant argument section below.

C. ARGUMENT.

1. BECAUSE THE COURT CANNOT DETERMINE THAT THE JURY UNANIMOUSLY FOUND DEFENDANT GUILTY OF FELONY MURDER PREDICATED ON CRIMINAL MISTREATMENT REMAND FOR NEW TRIAL IS THE APPROPRIATE REMEDY.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means {“alternative means cases”}, State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976), or when the State presents evidence of several acts that could form the basis of one count charged (“multiple acts cases”). State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). Alternative means cases derive from criminal statutes defining a single crime that can be committed various ways. State v. Arndt, supra at 252. To determine whether the Legislature intended to define a single crime that may be committed by different means or whether it intended to define two crimes, a court should consider the following factors: (1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; and (4) whether the acts may inhere in the same transaction. Id. at 379.

In an alternative means case¹ the threshold test is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987).

Definition statutes do not create additional alternative means of committing an offense ("definitional cases"). State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002); State v. Laico, 97 Wn. App. 759, 763, 987 P.2d 638 (1999). See also State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001) (the definitions of "threat" do not create alternative elements to the crime of intimidating a witness); State v. Garvin, 28 Wn. App. 82, 86, 621 P.2d 215 (1980) (the definitions of "threat," for purposes of the extortion statute, do not create alternative elements to the crime but merely define an element of the crime), review denied, 95 Wn.2d 1017 (1981).

Thus a threshold question for the court is whether the alternative means analysis is applicable to the situation presented in a particular case.

¹ In contrast, in a multiple acts case, either the State must tell the jury upon which act to rely in its deliberations or the court must instruct the jury to agree on a specific criminal act. State v. Petrich, 101 Wn.2d at 570-572.

State v. Al-Hamdani, 109 Wn. App. 599, 604, 36 P.3d 1103 (2001). In an alternative means case where there is insufficient evidence supporting one of the means, the conviction cannot be upheld and remand for new trial is appropriate. State v. Ortega-Martinez, 124 Wn.2d at 708; State v. Kinchen, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998) (remedy for failure of proof as to both alternative means is reversal of conviction and remand for a new trial); State v. Fernandez, 89 Wn. App. 292; 948 P.2d 872 (1997).

Homicide by abuse is defined by RCW 9A.32.055 and murder in the second degree is defined by RCW 9A.32.050. These crimes are defined by separate statutes and are not alternative means of committing the same offense. Murder in the second degree is a crime where there are alternative means of committing the offense: intentional murder and felony murder. State v. Berlin, 133 Wn.2d 541, 553, 947 P.2d 700 (1997); RCW 9A.32.050.

In this case, defendant was charged with the *alternative crimes* of homicide by abuse and murder in the second degree. CP 86-87. The jury was instructed to give the homicide by abuse charge “full and careful consideration” before proceeding to consider the murder in the second degree charge. Instruction No. 23, CP 33-57. Defendant was charged only with the felony murder *means* of committing murder in the second degree. CP 86-87. But within that means, the State alleged two predicate felonies, assault in the second degree and criminal mistreatment, as a basis

for the felony murder. Id. The jury was unable to agree on the charge of homicide by abuse but convicted defendant of murder in the second degree. CP 107-108; RP 1380-1385. The jury was not given a special interrogatory to indicate the basis underlying the felony murder conviction. This court must decide whether the listing of more than one predicate felony creates an alternative means case.

The situation presented does not fall clearly into the alternative means line of cases because only one means of committing murder in the second degree –felony murder- was alleged. However, this case does not fit cleanly into the definitional line of cases either. There was not a single term in the “to convict” instruction for the murder in the second degree that was defined by a single definitional instruction elsewhere in the court’s instructions. Instruction No. 13, CP 33-57. Rather, the “to convict” instruction indicated two predicate felonies could support the charge and each of these felonies was defined in separate instructions. Instruction Nos. 13, 14, 15, CP 33-57.

Division I on the Court of Appeals has treated this situation as one where jury unanimity is required if there is some deficiency of proof as to one of the predicate felonies. State v. Brown, 100 Wn. App. 104, 106, 995 P.2d 1278 (2000), reversed in part, 147 Wn.2d 330, 58 P.3d 889 (2002). The Court of Appeals reversed and remanded for new trial Brown's felony murder conviction because there was insufficient evidence to support one of the alternative predicate crimes and because the State failed to elect the

predicate crime or request a unanimity instruction. It found the defendant's right to a unanimous jury verdict was violated under these facts. The State did not seek cross review of this holding when the case went up to the Supreme Court for review. State v. Brown, 147 Wn.2d at 336.

The purpose of the felony murder rule is to "deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." State v. Leech, 114 Wn.2d 700, 708, 790 P.2d 160 (1990). To convict a defendant of felony murder the State is required to prove beyond a reasonable doubt each element of the predicate felony. State v. Gambon, 38 Wn. App. 409, 412, 415, 685 P.2d 643 (1984); State v. Quillin, 49 Wn. App. 155, 164, 741 P.2d 589 (1987). The State submits that in light the harsh consequences of this strict liability crime and the requirement that each element of the predicate felony is subject to proof beyond a reasonable doubt, that alternative means analysis is analogous and appropriate when assessing multiple predicate felonies supporting a charge of felony murder.

In this case, because of the lack of a special interrogatory, it is unknown whether the jury unanimously agreed that both predicate felonies had been committed, only one of the predicate felonies had been committed, or whether some jurors thought one felony had been committed while the rest thought the other felony had been committed. The Supreme Court's decision in In re Personal Restraint of Andress, 147

Wn. 602, 56 P.3d 981 (2002) has invalidated the use of assault as a predicate felony for felony murder and the State cannot show that the jury unanimously found the existence of criminal mistreatment to support the felony murder in the second degree conviction. Absent the Supreme Court reversing or limiting the effect of the Andress decision, defendant's conviction should not be affirmed. Remand for new trial is appropriate however, because the State still has a viable basis for a conviction of murder in the second degree – felony murder predicated on criminal mistreatment.

2. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR RETRIAL ON EITHER HOMICIDE BY ABUSE OR FELONY MURDER IN THE SECOND DEGREE PREDICATED ON CRIMINAL MISTREATMENT AS DEFENDANT REMAINS IN CONTINUING JEOPARDY AS TO BOTH CRIMES.

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. State v. Hescok, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Before a prosecution will be barred under this provision three elements must be met:

(a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for the same offense. The first two elements determine "former" jeopardy, which is a prerequisite to "double" jeopardy. When "former" jeopardy is assumed or established, the third element determines "double" jeopardy.

State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).

Assuming a court has jurisdiction over a case, jeopardy will attach in a jury trial when the jury is sworn and, in a bench trial, when the first witness is sworn. Id. at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final, but not with a conviction that a defendant successfully appeals. Id. at 646-647. A second trial following a successful appeal is generally not barred, however, because the defendant's appeal is part of the initial jeopardy or "continuing jeopardy." Id. at 647. Thus, the successful appeal of a judgment of conviction will not prevent further prosecution on the same charge unless the reversal was based upon insufficiency of the evidence. Id. at 647-648. Similarly, a retrial following a "hung jury" does not normally violate the Double Jeopardy Clause because this is another instance of continuing jeopardy. Richardson v. United States, 468 U.S. 317, 324, 82 L. Ed. 2d 242, 104 S. Ct. 3081 (1984).

The United States Supreme Court applied these principles recently to a defendant that successfully challenged his conviction for first degree murder where the jury had not been able to reach a decision as to whether

aggravating circumstances existed that would make defendant eligible for the death penalty. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L.Ed.2d 588 (2003). The court held that there was no double jeopardy bar to retrying Sattazahn on the capital offense or the lesser charge of murder because jeopardy had never terminated with respect to either offense. Id. 537 U.S. at 112-115.

In the case now before the court, retrial is not precluded because defendant remains in continuing jeopardy from her first trial. The jury left “Verdict Form A” blank. RP 1380. “Verdict Form B” was completed and signed by the foreperson and stated:

We, the jury, having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in count I, or being unable to unanimously agree as to that charge, find the defendant Guilty (Not Guilty or Guilty) of the alternatively charged crime of murder in the second degree.

RP 1380-1381; CP 107-108. Thus the fact that Verdict Form A was left blank shows that the jury was unable to agree as to that charge rather than finding defendant not guilty as to that charge. A hung jury provides a situation where there is continuing jeopardy. Defendant filed a notice of appeal from her conviction of murder in the second degree thereby continuing her jeopardy on that charge. The double jeopardy clause does not bar retrial on the charge of homicide by abuse or of the alternative charge of felony murder in the second degree predicated on criminal

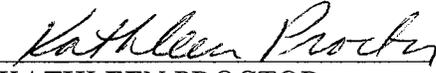
mistreatment because defendant remains in continuing jeopardy as to both crimes.

D. CONCLUSION.

Unless the Supreme Court reverses or limits application of its decision in Andress, the State asks this court to remand this case for a new trial on homicide by abuse or the alternative charge of felony murder in the second degree predicated on criminal mistreatment.

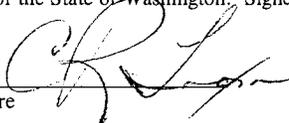
DATED: December 15, 2003.

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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.

12-15-03 
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