

77310-6

NO. ~~77320-8~~

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL SCOTT, Petitioner.

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

The Honorable Brian Gain, Judge

DEFENSE REPLY TO STATE'S ANSWERS TO MOTION
FOR DISCRETIONARY REVIEW

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The State, in its Answers to Motion for Discretionary Review (filed 8/4/05), argues that discretionary review should be denied because RAP 2.3(b)(1) is not satisfied. The State is mistaken.

The State claims that the trial court did not commit “an obvious error which would render further proceedings useless.” This argument is based on the court’s application of the implied acquittal rule under State v. Daniels, 124 Wn.App. 830, 844, 103 P.3d 249. Under Daniels, an implied acquittal exists when: (1) the jury leaves the verdict form blank as to the charge at issue; (2) the record insufficiently shows why the court dismissed the jurors without verdict on all charges; and (3) the jury had ample opportunity to convict the defendant on a charge but failed to do so. All three of these preconditions existed.

First, the jury left blank the verdict form pertaining to Intentional Murder in the Second Degree, Manslaughter in the First Degree, and Manslaughter in the Second Degree. (See Defense Motion for Discretionary Review, Appendix C). Second, the record does not set forth sufficient reasoning why the court dismissed the jurors without a verdict on all charges – not just the Intentional Murder in the Second Degree. Finally, and contrary to the State’s contention, the jury had ample opportunity to convict the defendant on a charge (i.e., Manslaughter in the First and Second Degree), but didn’t.

The State claims that the court was correct to conclude the jury did not have ample opportunity to convict of the lesser included offenses. The State’s contention, and the court’s conclusion, is obvious error. The court, in its oral rulings, stated:

. . . what should have happened basically is that they [jury] should have been instructed, you have to decide under these two theories [intentional and felony murder]. If you find him not guilty of intentional murder, then you have to consider the manslaughter issues. (Transcript of Court's Ruling, page 16).

This is exactly what happened. The jury was specifically directed that if it found the defendant not guilty - or could not agree on the crime - of Intentional Murder, then "you will" consider the lesser crimes of manslaughters. (See Jury Instruction #24, Defense Motion for Discretionary Review, Appendix C). The jury was instructed to consider the lesser included offenses, and presumably did.

The State seeks to place the burden on the defense to establish that the jury had ample opportunity to convict the defendant on the lesser included offenses. This premise is flawed. In addition to specific instructions to consider the lesser included offenses, the jury was ordered to "consider the instructions as a whole and should not place undue emphasis on any particular instruction of part thereof." (Jury Instruction No.1, Motion for Discretionary Review, Appendix C, (emphasis added). And without some evidence to the contrary – which the State has not set forth – courts have routinely and consistently held that juries follow all instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001), *Degroot v. Berkley Constr., Inc.*, 83 Wn.App 125, 131, 920 P.2d 619 (1996), *State v. Lord*, 117 829, 861, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 121 L.Ed.2d 112, 113 S.Ct. 164 (1992). The court's conclusion that the jury did not have ample opportunity to decide the lesser included offenses was obvious error.

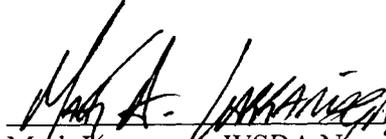
Furthermore, the court's error will substantially alter the status quo. The State argues that Mr. Scott could appeal any order if convicted. However, the possible avoidance of the defendant's ordeal in participating in what may be an unnecessary trial is a compelling consideration; not the least consideration is the possible avoidance of substantial and unnecessary public expense. State v. Knapstad, 107 Wn.2d 346, 355, 729 P.2d 48 (1986). The issue at hand is not merely an evidentiary hearing that may minimally alter the status of the case; instead, it is a dispositive issue on whether Mr. Scott could stand trial, at all, for the charged offense. The trial court's ruling, therefore, significantly and substantially alters the status quo.

Discretionary review should be granted because, contrary to the State's assertion, the order involves a controlling question of law that has substantial grounds of difference of opinions. Judge Gain, acknowledging the difference of opinions, granted a stay of the proceeding for direct review.

However, again, if you request to stay this and to seek direct review to the Supreme Court, I would grant that, because I'm satisfied that in sorting this out, particularly in the Gamble issue, but as I've indicated, I've invited the other case to go up, the Supreme Court is basically going to have to sort out all of the things that they did in deciding Andress and now all the various ramifications of that. (See Transcript of Court's Oral Ruling, Page 17).

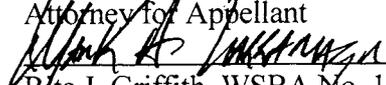
The Motion for Discretionary Review should be granted. The trial court's ruling, one in which the trial judge acknowledged was in need of clarification from the Supreme Court, was obvious error that substantially altered the status quo.

Submitted this 11th day of August, 2005



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CERTIFICATE OF SERVICE

I certify that on the 12th of August 2005, I caused a true and correct copy of the following documents Defense Reply to State's Answers to Motion For Discretionary Review to be served on the following via prepaid first class mail:

Washington Supreme Court Clerk
Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

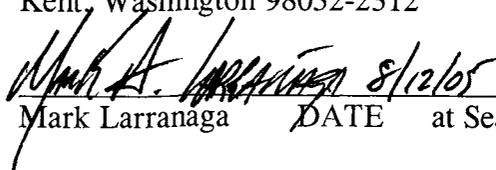
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