

NO. 77310-6
KING COUNTY NO. 00-1-11382-6A KNT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL SCOTT, Petitioner.

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

The Honorable Brian Gain, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
A. ISSUES ON REVIEW.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	5
1. TRIAL ON CHARGES OF FIRST OR SECOND DEGREE MANSLAUGHTER AFTER AN IMPLIED ACQUITTAL ON THOSE CHARGES VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.....	5
2. THE STATE WAIVED ANY OBJECTION TO THE RELEASE OF THE JURY AND THE TERMINATION OF JEOPARDY ON THE MANSLAUGHTER CHARGES.....	13
D. CONCLUSION.....	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

<u>Degroot v. Berkley Constr., Inc.</u> , 83 Wn.App 125, 131, 920 P.2d 619 (1996).....	12
<u>In Re Personal Restraint Petition of Andress</u> , 147 Wn.2d 602, 604, 56 P.3d 981 (2002).....	4
<u>In Re Personal Restraint of Hinton</u> , 152 Wn.2d 853, 100 P.3d 801 (200).....	4
<u>State v. Adel</u> , 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).....	13
<u>State v. Corrado</u> , 81 Wn.App. 640, 645, 915 P.2d 1121, <u>reviewed denied</u> , 138 Wn.2d 1011 (1996)	6, 13
<u>State v. Daniels</u> , 124 Wn.App. 830, 103 P.3d 249 (2004).....	7, 9, 10
<u>State v. Davis</u> , 190 Wash. 164, 67 P.2d 894 (1937).....	7, 8-10, 15
<u>State v. Gocken</u> , 127 Wn.2d 95, 97, 896 P.2d 1267 (1995).....	5
<u>State v. HescocK</u> , 98 Wn.App. 600, 89 P.2d 1251 (1999).....	7, 8-10, 15
<u>State v. Lord</u> , 117 829, 861, 822 P.2d 177 (1991), <u>cert. denied</u> , 506 U.S. 856 (1992).....	12
<u>State v. Stein</u> , 144 Wn.2d 236, 247, 27 P.3d 184 (2001).....	12

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

<u>Green v. United States</u> , 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199, 61 A.L. R. 2d 1119 (1957).....	6, 7, 11, 13
<u>Justices of Boston Mun. Court v. Lydon</u> , 466 U.S. 294, 306-07, 104 S.Ct. 1805, 80 L.Ed.2d 311 91984).....	5
<u>Price v. Georgia</u> , 398 U.S. 323. 90 S. T. 1757, 26 L. Ed. 2d 300 (1970).....	7

CASES FROM OTHER JURISDICTIONS:

<u>State v. McCormick</u> , 48 S.W.3d 549 (2001)	14
--	----

STATUTES, RULES AND OTHER:

U.S. Const., Amend. V.	5
Wash. Const. Article I, Sec. 9.	5
RCW 9A.32.050(1)(b).....	3
RCW 9A.60.020(1) (a) and (b).....	9

A. ISSUES ON REVIEW

1. If a jury is (a) instructed that it can find the defendant guilty of both Second Degree Felony Murder and Second Degree Intentional Murder, (b) further instructed that it can convict the defendant of Manslaughter in the First or Second Degree as a lesser included offense of Intentional Murder, and (c) given verdict forms for Manslaughter in the First and Second degree, does it violate the state and federal double jeopardy clauses to retry the defendant on a charge of Manslaughter if the jury leaves the verdict forms for Intentional Murder and Manslaughter in the First and Second Degree blank?
2. By not seeking clarification before the jury was discharged, does the state waive any claim that the jury did not acquit the defendant of Manslaughter where the jury left the verdict forms for Manslaughter in the First and Second Degree blank?

B. STATEMENT OF THE CASE

By amended information, the King County Prosecutor's Office charged Michael Scott with Second Degree Felony Murder based on the underlying crime of Second Degree Assault and, alternatively, with Intentional Murder in the Second Degree. Consistent with the amended information, the jury was instructed that Mr. Scott could be convicted of Murder in the Second Degree under either or both of the two alternative means. Specifically, the jury was instructed:

A person commits the crime of Murder in the Second Degree (intentional murder) when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

A person also commits the crime of Murder in the Second Degree (felony murder) when he or she commits or attempts to commit Assault in the Second Degree and in the course of and in furtherance of such crime or in immediate flight from such crime he or she causes the death of a person.

The jury was also instructed that it could find Mr. Scott guilty of Manslaughter in the First and Second Degree as a lesser included offense of intentional murder.

Verdict Form A directed the jury to determine whether Mr. Scott was guilty or not guilty of Murder in the Second Degree; and, if the jury concluded that Mr. Scott was guilty, the jury was directed to answer a special interrogatory as to the means:

We, the jury, find the defendant MICHAEL ADRIAN SCOTT guilty of the crime of Murder in the Second Degree as charged in Count I, state that we unanimously agreed that the defendant committed (mark neither, one, or both as applicable):

_____ Intentional Murder

_____ Felony Murder

The jury was also provided with Verdict Form B (Manslaughter in the First Degree), and Verdict Form C (Manslaughter in the Second Degree).

Jury Instruction No. 24 directed the jury – based on its decision – as to what verdict form to use. Jury Instruction No. 24 specifically stated:

When completing the verdict forms, you will first consider the crime of Murder in the Second Degree (intentional) and Murder in the Second Degree (felony) 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 find the defendant guilty on verdict form A you must fill in the blanks set forth on that form as special interrogatories. If you cannot agree on a verdict, do not fill in the blanks provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B and C. If you find the defendant not guilty of the crime of Murder in the Second Degree (intentional), or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree.

The jury found Mr. Scott guilty of second degree murder and in so doing checked only the Felony Murder alternative means. The intentional murder interrogatory was left blank, as were both Manslaughter verdicts.

On June 10, 2002, Mr. Scott was sentenced to Felony Murder in the Second Degree. The Judgment and Sentence unambiguously indicated that Mr. Scott was found guilty on April 29, 2002, by jury verdict of Murder in the Second Degree pursuant to RCW 9A.32.050(1)(b) - the Felony Murder prong.

On March 15, 2005, pursuant to this Court's decision in In Re Personal Restraint Petition of Andress, 147 Wn.2d 602, 604, 56 P.3d 981 (2002) and In Re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d

801 (2004), the court vacated Scott's conviction of Felony Assault Murder in the Second Degree.

The State, on May 2, 2005, filed an amended information charging Mr. Scott, again, with the charge of Intentional Murder in the Second Degree. The defense objected and moved to dismiss the amended information. At the hearing on the motion, the State conceded that the Double Jeopardy Clause prohibited it from re-filing a charge of Intentional Murder in the Second Degree since there was an implied acquittal on that charge, but moved to file a second amended information charging Mr. Scott with one Count of Manslaughter in the First Degree. The defense objected, but the court granted the motion. Mr. Scott moved for discretionary review and, on September 6, 2006, this Court granted review.

C. ARGUMENT

1. TRIAL ON CHARGES OF FIRST OR SECOND DEGREE MANSLAUGHTER AFTER AN IMPLIED ACQUITTAL ON THOSE CHARGES VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

The Double Jeopardy Clause of the United States Constitution guarantees that no “person [shall] be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const., Amend. V. The Washington State Constitution has a similar provision, stating that “[n]o person shall be . . . twice put in jeopardy for the same offense.” Wash. Const. Article I, Sec. 9.

The Double Jeopardy Clause protects against three abuses by the government: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-07, 104 S.Ct. 1805, 80 L.Ed.2d 311 91984); See also State v. Gocken, 127 Wn.2d 95, 97, 896 P.2d 1267 (1995). “The primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant.” Lydon, 466 U.S. at 307.

The Double Jeopardy Clause bars a second prosecution for the same offense when three elements are satisfied: (1) jeopardy previously attached; (b) jeopardy previously terminated; and (3) the defendant is again in jeopardy of the same offense. State v. Corrado, 81 Wn.App. 640, 645, 915 P.2d 1121 (1996), reviewed denied, 138 Wn.2d 1011, 989 P.2d 1138 (1996). Generally, jeopardy attaches in a jury trial when the jury is sworn. Corrado, 81 Wn.App. at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final. Corrado, 81 Wn.App at 646.

The State, by filing the amended information of Manslaughter in the First Degree is seeking to place Mr. Scott – again – in jeopardy for a crime which the State has already charged and a jury rejected. In Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199, 61 A.L. R. 2d 1119 (1957), the United States Supreme Court considered a case in which both a greater and a lesser-included offense were presented to the jury; the jury convicted on the lesser, but left the verdict form on the greater blank. The Green court held that the verdict on the lesser offense was an “implicit acquittal” on the greater. More broadly, the Court held that Green’s jeopardy on the greater charge ended when the jury “was given a full opportunity to return a verdict” of that greater charge and did not. Green, 355 U.S. at 190-191. Specifically, the Court held that “it is not . .

essential that a verdict of guilt or innocence be returned,” because “the original jury had refused to find [the defendant] guilty,” “jeopardy ended on that charge with the discharge of the jury.” Green, 355 U.S. at 188, 190-191. The jury had “a full and fair opportunity” to convict, and therefore the failure to convict was equivalent to a verdict of not guilty. Green, at 190-191.

Later, in Price v. Georgia, 398 U.S. 323, 90 S. T. 1757, 26 L. Ed. 2d 300 (1970), the court held that under Green, retrial on the charge of murder after conviction for the lesser-included charge of voluntary manslaughter was barred by double jeopardy, even though the jury verdict made no reference to the murder charge. The Court, in Price, emphasized that the Double Jeopardy Clause protects defendants from the “risk of conviction.” Price, 398 U.S. at 326-329.

Washington authority is consistent with federal authority of the United States Supreme Court. State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937); State v. Hescoek, 98 Wn.App. 600, 89 P.2d 1251 (1999); State v. Daniels, 124 Wn.App. 830, 103 P.3d 249 (2004).

In Davis, the defendant was charged with three counts: vehicular homicide, driving while intoxicated, and reckless driving. The jury returned a not guilty verdict as to count I (vehicular homicide) and did not return a verdict as to the other counts (DWI and reckless driving). The jury

foreman indicated to the court that a “verdict had been reached on count one, but that the jurors could not agree upon a verdict on counts two and three.” Davis, 190 Wash. at 165. The judge proceeded to discharge the jury without explanation. The trial court granted the defense motion to dismiss counts two and three. The State appealed. Davis, 190 Wash. at 165 – 166. The Washington Supreme Court, in affirming the trial court’s ruling to dismiss the counts, noted:

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.

Similarly, here the jury was directed to indicate which prong it found applicable in convicting Mr. Scott of Murder in the Second Degree. The verdict form is clear: the jury checked “Felony Murder” (assault) and left the “intentional” prong silent and the Manslaughter verdict forms blank as well. Since the jury was silent as to an alternative means and the lesser included offenses, and the jury was discharged, Mr. Scott cannot again be tried for the same offense.

In State v. Hescok, 98 Wn.App. 600, the defendant was charged with one count of forgery by two alternative means: RCW 9A.60.202(1)(a) and

RCW 9A.60.020(1)(b). The court concluded that Mr. Hescock, a juvenile, was guilty of both means of forgery. The court's written finding, however, found Mr. Hescock guilty of only one means, and was silent as to the other. Hescock, 98 Wn. App at 604. On appeal, Hescock argued, and the State conceded, there was insufficient evidence to support the conviction. The State, however, urged the appellate court to remand the case for the trial court to determine whether Hescock violated the alternative means. Hescock countered that such a remand would violate double jeopardy. The Court of Appeals sided with Hescock, concluding that the trier of fact had a full opportunity to convict Hescock but failed to do so, and thus the judge's silence as to the alternative means constituted an implicit acquittal, invoking double jeopardy protections. Hescock, 98 Wn.App at 602.

In State v. Daniels, 124 Wn.App 830, 103 P.3d 249 (2004), the defendant was charged with one count of homicide by abuse and one count of second degree murder – domestic violence (felony murder) based on the alternative predicate offenses of second degree assault or first degree criminal mistreatment. After trial, the court provided the jury with two verdict forms: Verdict Form A and Verdict Form B. Verdict Form A, which the jury left blank, stated, “We, the jury, find the defendant _____ (Not Guilty or Guilty), of the crime of homicide by abuse as charged in

Count I.” Daniels, 124 Wn. App at 836-837. Verdict Form B, which the presiding juror filled out and signed, 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 of the alternatively charged crime of murder in the Second Degree. Daniels. at 837.

On appeal, the defense argued that by leaving the verdict form blank, the jury implicitly acquitted her on the homicide by abuse charge, and thus double jeopardy barred the State from retrial on that charge. Daniels, 124 Wn. App. at 842. After reviewing State v. Davis and State v. Hescoek, the Court of Appeals concluded:

The jury had ample opportunity to convict Daniels but it left the corresponding verdict form blank. Moreover, the record insufficiently shows why the court dismissed the jury without reaching a decision on homicide by abuse. Under these facts, the jury’s silence constitutes an implicit acquittal.

Daniels, 124 Wn.App. at 844.

In Mr. Scott’s case the State conceded, and the court agreed, that the Double Jeopardy Clause prohibits it from re-filing a charge of Intentional Murder in the Second Degree. The State, however, moved to file an amended information re-charging Mr. Scott on one count of Manslaughter in the First Degree. The court concluded that although the jury was given

instructions and verdict forms of Manslaughter charges, the jury never reached a verdict and therefore there was no implied acquittal for double jeopardy purposes. This is in error. As Green made clear, it was not necessary that a verdict be reached; what matters is that the jury had a full opportunity to reach a verdict and that the defendant ran the risk of being convicted of the crime. Green, 355 U. S. at 188, 190-191.

Moreover, the State's primary argument, and apparently the court's finding, rests with one sentence in a packet of twenty-four (24) jury instructions. According to the State, the jury never considered the issue of whether Mr. Scott was guilty of the Manslaughter charges because jury instruction number 24 discouraged the jury from further deliberation. A complete reading of jury instruction number 24 does not support this proposition. Jury Instruction Number 24 states:

. . . If you find the defendant guilty on verdict form A, do not use verdict form B and C. If you find the defendant not guilty of the crime of Murder in the Second Degree (intentional), or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree.

...

Thus, Jury Instruction Number 24 directed the jury to consider the Manslaughter verdicts if it found the defendant not guilty of Intentional Murder in the Second Degree. The State has conceded that the jury, by

leaving the “intentional” prong blank, implicitly acquitted Mr. Scott of Intentional Murder in the Second Degree. Thus, after full consideration, the jury did not find Mr. Scott guilty of Intentional Murder in the Second Degree, and were therefore directed to consider the lesser-included offenses of Manslaughter.

The jury was instructed that it should “consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.” Jury Instruction No. 1 (emphasis added). Moreover, Washington courts have consistently held that, without some evidence to the contrary, the courts will presume the 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 State did not present any evidence to overcome this presumption.

The manslaughter charges should be dismissed because conviction on these charges would violate the prohibition against double jeopardy.

2. THE STATE WAIVED ANY OBJECTION TO THE RELEASE OF THE JURY AND THE TERMINATION OF JEOPARDY ON THE MANSLAUGHTER CHARGES.

The verdicts on First Degree Manslaughter and Second Degree Manslaughter became unconditionally final when the jury was discharged. Corrado, 81 Wn. App. at 646. Mr. Scott was at risk for conviction at trial; and the risk terminated with the discharge, without objection, of the jury. Green, *supra*.

The state neither sought to have the jury continue deliberating on the manslaughter charges nor sought to have the judge declare a mistrial as to those charges. If the jury was permitted to find Mr. Scott guilty of both intentional murder and felony murder, they could certainly have found, in the alternative, that he was guilty of manslaughter and felony murder. In either instance the convictions would merge at sentencing. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (principles of double jeopardy prevent more than one conviction for one unit of prosecution). But, just as a conviction on both alternatives of second degree murder would have preserved the conviction if the other were dismissed on appeal, a manslaughter conviction would similarly have preserved a conviction. The state did not seek this insurance. Certainly without having sought to have the jury deliberate further or without having sought a mistrial, the state could not have retried those charges immediately following trial; and

the state should not be permitted to do so after the felony murder charge was dismissed on collateral review.

Although arising in a different context, the case of State v. McCormick, 48 S.W.3d 549 (2001) is instructive here. In McCormick, the Arkansas court considered the question of whether a defendant had preserved for appeal his challenge to the denial of his motion to suppress evidence. To preserve the error, the defendant needed to enter a conditional plea reserving the suppression issue and, to enter the conditional plea, he needed the consent of the prosecutor.¹ The court held that by appearing at the plea hearing and giving a recommendation for a length of sentence, the prosecutor had abandoned any objection to entry of the conditional plea. McCormick, 48 S.W.3d at 354. The Arkansas court analogized to the invited error doctrine which prohibits acquiescing at trial and raising the issue later on appeal. The court noted that unless the prosecutor was held to have abandoned any objection to the conditional plea, the state would be given the benefit of the entry of a plea while being relieved of the obligation to consent to its entry. McCormick, at 354.

¹ In Washington, the defendant would have had to agree to a stipulated trial.

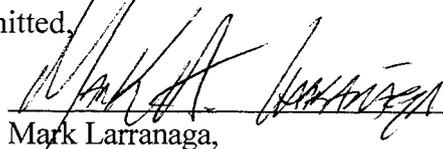
Here, the state seeks to be relieved of the obligation to request a mistrial or object to the discharge of the jury, while seeking to take advantage of the jury's leaving the jury verdict blank. The prosecutor should be held to have abandoned prosecution of the manslaughter charge. As in Davis, supra, and Hescock, supra, the prosecutor made no objections on the record and acquiesced, as in Davis, to the trial court's decision to discharge the jury; and, as in Hescock, to the court's failure to resolve the issue of guilt of the alternative charge. The fact that the second degree felony murder conviction was vacated should not revive the unconditionally final verdict to which the state acquiesced.

D. CONCLUSION

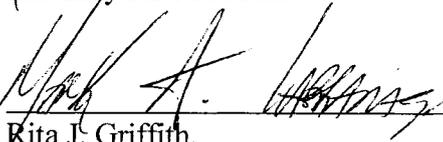
Mr. Scott respectfully submits that the manslaughter charge against him should be dismissed.

DATED this 20th day of September, 2006.

Respectfully submitted,



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