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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN EGGLESTON,

Defendant/Petitioner.

REPLY RE: PETITION FOR REVIEW

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I. INTRODUCTION

The state makes three arguments in opposition to review. The state argues that the double jeopardy/collateral estoppel issue was not raised in the trial court below and, hence, cannot be raised now on this appeal. We respond to that argument in Section II, explaining that – under an unbroken line of controlling case law and the applicable court rule – double jeopardy is a constitutional issue and, hence, that it can be raised and decided for the first time on appeal.

The state also argues that, essentially, any double jeopardy error was harmless – because evidence that was inadmissible with respect to the murder conviction was admissible with respect to the assault conviction. Actually, the rule is just the opposite: admissibility on one count does *not* make evidence cross-admissible on another count and, unless care is taken (with severance or cautionary instructions, for example) to segregate proof on one count from proof on another count, a serious contamination problem arises. The state's assumption – that all evidence on one count in this case should have been considered on the other count, also, is telling – it reveals that if counsel made such an error, the jury likely did too. This proves that any double jeopardy error was necessarily harmful, not harmless. Section III.

The state then argues, on the merits, that we have failed to prove

“that the decision of the Court of Appeals conflicts with current Washington case law.” Response to Petition for Review, p. 2. But it cites no cases and responds to none of our arguments, and we reiterate the specific cases with which conflict exists, in Section IV.

II. THE STATE ARGUES THAT COLLATERAL ESTOPPEL/ DOUBLE JEOPARDY ISSUES CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL. BUT RAP 2.5(a)(3) PERMITS JUST THAT.

The state argues that Mr. Eggleston cannot raise the collateral estoppel and double jeopardy issues for the first time on appeal, despite the fact that appellate court said he could, or on this petition for review.

But under RAP 2.5(a)(3), an appellant is entitled¹ to raise manifest errors affecting constitutional rights for the first time on appeal.

Collateral estoppel is a component of the double jeopardy clause. Even the state contends that the U.S. Supreme Court’s final and most authoritative statement on the issue of collateral estoppel is Dowling v.

¹ The language of RAP 2.5(a)(3) indicates such an entitlement. It provides, “...The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.” The structure of this rule shows that there is an exception to the appellate court’s discretion to deny review of errors raised for the first time on appeal – in the clause beginning with “However,” – for those issues of “manifest error affecting a constitutional right.” The absence of any phrase granting the appellate court discretion to refuse to consider claims of error falling within this exception (especially when contrasted with the comparable federal rule, Fed.R.Crim.P. 52(b), which has been held conclusively to vest discretion in the reviewing court to consider or refuse such claims of plain error raised for the first time on appeal) shows, textually, a conclusion that such errors *shall* be recognized on appeal.

United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). In that case, the Court specifically ruled that, “In Ashe v. Swenson, 397 U.S. 436 ... (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel.” Id., 493 U.S. at 347. Thus, the very case upon which the state places primary reliance holds that when collateral estoppel is raised in a criminal case, it is part of the “Double Jeopardy Clause.”

RAP 2.5(a)(3) therefore permits this issue to be raised for the first time on appeal. Indeed, controlling authority in this state permits constitutional errors of all sorts to be raised for the first time on appeal.²

Specifically, this Court permits double jeopardy claims to be raised for the first time on appeal, as shown by the following cases: State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); State v. Adel, 136 Wn.2d 629,

² State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) (criminal defendant may always challenge the sufficiency of the evidence to convict on appeal, even if not raised earlier); State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980) (in an alternative means case where the charge was aggravated murder in the first degree, and the error was failure to instruct the jury as to unanimity on whether the death occurred in furtherance of rape or kidnapping, the court held that the error may be raised for the first time on appeal because “the giving or failure to give an instruction invades a fundamental right of the accused, such as the right to a jury trial. Constitution Article I, Section 21.”); State v. Stark, 48 Wn. App. 245, 251 n.4, 738 P.2d 684 (1987) (“in a multiple acts case where the issue is raised for the first time on appeal, the court held ‘a defective verdict which deprives the defendant of his fundamental constitutional right to a jury trial may be raised for the first time on appeal’”); State v. Gitchel, 41 Wn. App. 820, 821-22, 706 P.2d 1091 (1985) (in a multiple incidents case in which the defendant failed to raise the issue of a jury unanimity at trial, the court held “the right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury, and the issue may be raised for the first time on appeal”); State v. Kerry, 34 Wn. App. 674, 677, 663 P.2d 500 (1983).

631-32, 965 P.2d 1072 (1998) (“Adel did not raise the double jeopardy argument at trial, but the constitutional challenge may be raised for the first time on appeal. State v. O’Connor, 87 Wn. App. 119, 123, 940 P.2d 675 (1997) (citing State v. Lopez, 79 Wn. App. 755, 761 n.2, 904 P.2d 1179 (1995)).”); State v. LeFever, 102 Wn.2d 777, 690 P.2d 574 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) (dissent notes that, “In fairness to the trial court and the Court of Appeals, it must be noted that, although the constitutional double jeopardy argument is properly before this court, it was presented for the first time in defendant’s petition for review filed with this court,” id. at 803).

In fact, it would be especially silly to bar a criminal defendant from raising a double jeopardy issue for the first time on appeal, given that the criminal defendant is permitted to raise a double jeopardy issue for the first time in a PRP, even one filed outside of the one-year time limit. RCW 10.73.100(3). Precluding the defendant from raising it on direct appeal, but permitting him to raise it later, seems like the height of formalism – a move that could only encourage delay.

The state then cites the following cases for the rule that “Collateral estoppel cannot be raised for the first time on appeal. State v. Bryant, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995); In re Marriage of Knutson, 114 Wn. App. 866, 870, 60 P.3d 681 (2003) (see also Cunningham v. State, 61

Wn. App. 562, 566, 811 P.2d 225 (1991)).” Response to Petition for Review, p. 6.

None of those cases support the state’s assertion. In State v. Bryant, 78 Wn. App. 805, for example, the appellate court *did* deal with the constitutional, double jeopardy, issue on appeal. It spent several pages addressing that double jeopardy issue, which in that case was based on Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The court was then asked to address a separate, non-constitutional, collateral estoppel issue. It was that separate, non-constitutional, issue that the appellate court declined to address. And the context in which the court declined to address it was completely different from the context presented here: in Bryant, the defendant had won dismissal in the trial court and the state appealed; the appellate court considered all of the arguments advanced by the appellant (state), and that is all that the appellant in this case asks this Court to do.

In re Marriage of Knutson, 114 Wn. App. 866, 870, also cited by the state, was a civil case. Thus, there was no constitutional component to the collateral estoppel issue – so RAP 2.5(a)(3) did not apply there. It does apply here.

The final case cited by the state is Cunningham v. State, 61 Wn. App. 562. Although that case has the word “state” in the title, it is actually

a civil case. There was no constitutional, double jeopardy, component to the collateral estoppel issue in that case, either.³

III. THE STATE ARGUES THAT ANY ERROR IN ADMISSION OF EVIDENCE ON THE MURDER IS HARMLESS, BECAUSE IT WAS ADMISSIBLE ON THE ASSAULT. BUT THE RULE IS JUST THE OPPOSITE: THERE IS NO AUTOMATIC CROSS-ADMISSIBILITY OF EVIDENCE FROM ONE COUNT TO ANOTHER.

The state also argues that any error in the admission of double jeopardy-barred evidence on the murder was harmless, because the same evidence was admissible on the assault. This argument is made without citation to any authority, in two paragraphs, on pages 11-12 of the state's Opposition.

The reason for the absence of authority is likely that there is no authority to support the state's contention. Even if the state were correct about the intentional-killing-of-a-police-officer evidence being admissible on the assault count, that does not make such evidence admissible on the murder count.

³ Plus, the state errs in claiming that the appellate court declined to review the collateral estoppel issue there. Actually, the appellate court did review the merits of that issue in detail. The only thing that it declined to review for the first time on appeal was a factual matter concerning the collateral estoppel argument, that is, the contention that the *facts* would show that application of the doctrine produced a grave injustice in that case – a matter that is especially clear from the appellate court's citation to RAP 9.12, which governs when the appellate court can consider facts and issues not argued below on summary judgment on appeal. Cunningham, 61 Wn. App. 562, 566. Mr. Eggleston's case is not here on summary judgment.

Instead, the rule is that just because evidence is admissible on one count, does not automatically make it cross-admissible on any other count. In fact, the rule is that it remains completely inadmissible on the other count – and the judge is tasked with the job of making sure that the jury can “compartmentalize” the evidence to the count to which it pertains. If not, then severance is necessary. State v. Bythrow, 114 Wn.2d 713, 720-21, 790 P.2d 154 (1990) (“When evidence concerning the other crime is limited or not admissible, our primary concern is whether the jury can reasonably be expected to ‘compartmentalize the evidence’ so that evidence of one crime does not taint the jury’s consideration of another crime. . . . We must insure that the trial court properly instructed the jury on the limited admissibility of evidence, . . . and will determine whether the jury appeared to have followed the instructions.”) (citation omitted).

Thus, there are several ways to deal with problem of evidence being admissible on one count, or as to one defendant, but not as to others. One way to cure the problem is by severance. CrR 4.4(b). Another way is with curative instructions. E.g., State v. Kalakosky, 121 Wn.2d 525, 538 & nn. 14-15, 852 P.2d 1064 (1993) (discussing limited cross-admissibility of evidence of different counts and use of limiting jury instructions). The state does not just get the benefit of the slop-over of evidence that is not cross-admissible on different counts; there are always curative measures

that are used to minimize such problems.

But the state's argument depends on convincing this Court that evidence which is admissible as to one count, but inadmissible as to another count, can nonetheless slop over and be considered admissible as to both counts. That is flat wrong under the controlling case law cited above, about the lack of such cross-admissibility and the need to ensure that the jury can compartmentalize.

Apparently, even the state cannot so compartmentalize. It is therefore highly unlikely that the jury did so in this case, either.

Thus, if the state's argument is that the evidence was admissible on the assault count but not the murder count, the logical conclusion of that argument is that review should be granted so that the assault conviction should be affirmed but the murder count vacated. That is the only position that is consistent with the rule that evidence that has only limited admissibility, must be considered only with regard to the limited subject matter to which it pertains.

IV. THE CONFLICT

The state then claims that we have not presented a conflict between the appellate court's decision, on the one hand, and current Washington law, on the other. It cites no case law at all, though, in this two-paragraph section of its brief. Response to Petition for Review, pp. 3-4.

Actually, review is appropriate even if the decision of the Court of Appeals conflicts with a decision of the U.S. Supreme Court – not just the Washington Supreme Court. RAP 13.4(b)(1), (3). The first issue we presented for review listed three separate U.S. Supreme Court cases with which the appellate court’s double jeopardy decision conflicts:

(a) Does the appellate court’s view of what was “necessarily decided” by prior juries conflict with controlling authority holding that this must be evaluated in a common sense, not “hypertechnical,” way, and holding that double jeopardy bars relitigation of a variety of facts that are not technical elements of the crime (e.g., Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990); Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971))?

Those three Supreme Court decisions count; the state makes no argument about why they should not.

Review is also appropriate if the decision conflicts with a decision of this Court or a state appellate court. RAP 13.4(b)(1), (2). The second and third issues we presented for review listed decisions of this Court and of the appellate court with which the appellate court’s decision in this case conflicted:

(b) Does this conflict with State v. Funkhouser, 30 Wn. App. 617, 637 P.2d 974 (1981), which held that “collateral estoppel bars any use in a subsequent criminal prosecution of *evidence* necessarily determined in the defendant’s favor by a previous verdict”?

(c) Does the appellate court's decision that the prior jury's "no" answer to the aggravating factor was not binding conflict with Stow v. Murashige, 288 F. Supp.2d 1120 (D. Hawaii 2003), controlling authority cited within, and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)?

The conflict with State v. Goldberg fits squarely within RAP 13.4(b)'s grounds for review. Whether the conflict with State v. Funkhouser fits within RAP 13.4(b)'s criteria is not as clear, because it is a decision of Division II – the same Division that entered the decision in the instant case.

But that leads us to another consideration: review is appropriate if the case involves a "significant [constitutional] question of law." The double jeopardy issue we present falls into precisely this constitutional category. The numerous cases, federal and state, that we cited, from contexts as diverse as limited street crime to aggravated murder death penalty cases, show that this is an important and recurring issue over which all levels of the courts continue to struggle.

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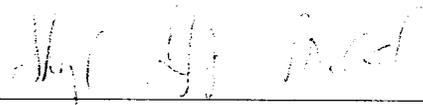
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V. CONCLUSION

For all of the foregoing reasons, the Petition for Review should be granted.

DATED this 8th day of November, 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of November, 2005, a copy of the foregoing Reply Re: Petition for Review was forwarded to the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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