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King County Prosecutor
Appellate Unit

787883
Consolidated 78465-5

No.
COA No. 57086-2-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS BRYANT,

Petitioner.

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

The Honorable Ronald Kessler

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Dennis Bryant asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals unpublished decision in *State v. Cinque Garrett and Dennis Bryant*, filed May 8, 2006 (No. 57086-2-1). The decision granted the State's interlocutory motion for discretionary review challenging the trial court's decision denying the State's motion to file an amended information charging intentional second degree murder. A copy of the decision is attached to this Petition as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Bryant was originally charged with second degree murder in violation of RCW 9A.32.050 (1) under both statutory alternatives, (a) second degree intentional murder and (b) second degree felony murder. The jury found Mr. Bryant guilty of second-degree felony murder. Mr. Bryant filed a personal restraint petition, which was granted, and his conviction was vacated. On remand, the trial judge precluded the State from re-filing second degree intentional murder charges, ruling double jeopardy prohibited the

State from a second-degree intentional murder charge. Did the trial court properly bar the State from proceeding on remand with second-degree murder charges as barred on double jeopardy grounds?

2. When the State charges and places the defendant in jeopardy with one crime under two alternative theories and the first trial ends without a verdict on a theory for reasons of the prosecution's making, does double jeopardy bar retrial on that theory following reversal of the jury's verdict?

3. Is the Court of Appeals decision in direct conflict with this Court's decision in *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937)?

4. Is Division One's decision in direct conflict with Division Two's decision in *State v. Hescock*, 98 Wn. App. 600, 989 P.2d 1251 (1999)?

D. STATEMENT OF THE CASE

Dennis Bryant was convicted in 1995 of second-degree felony murder based upon assault in the first and second degree and sentenced accordingly. Subsequent to the conviction, the Washington Supreme Court issued its decision *In re the Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), where the Court ruled felony assault may not serve as a predicate for a second-degree murder conviction. Later, the Court issued its decision in *In re the Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), holding the *Andress* decision was retroactive. The Court of Appeals granted Mr. Bryant's personal restraint petition and vacated his conviction in light of the these decisions. See Order Granting Personal Restraint Petition (attached as appendix B).

Mr. Bryant was originally charged with alternative means of committing second-degree murder, intentional murder or, in the alternative, felony murder. See Second Amended Information (attached to this Petition as appendix C). Prior to trial, the State inexplicably abandoned the intentional murder alternative. On remand, the State attempted to file an information charging Mr. Garrett with the remaining alternative of intentional second-degree

murder. The trial court denied the motion, finding it barred by double jeopardy. The State sought an immediate stay of the trial court's order and moved the Court of Appeals for discretionary review of the court's denial of the motion to file an amended information. Thereafter, the Court of Appeals granted the State's motion to stay its motion for discretionary review pending a decision in *State v. Wright*, 131 Wn. App. 474, 127 P.3d 742 (2006).

Division One issued its decision in *Wright* on January 30, 2006. The State immediately moved in the Court of Appeals to lift the stay on its motion for discretionary review and remand to the trial court for proceedings consistent with *Wright*. On February 9, 2006, a Commissioner of the Court of Appeals granted the State's motion.

Mr. Bryant's co-defendant, Cinque Garrett, filed a motion to modify the Commissioner's ruling. In response, a panel granted the State's motion for discretionary review based on a finding that this matter was identical to *Wright*, and remanded the matter to the trial court in spite of a pending petition for review in *Wright*. See appendix A.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

THE DECISION IN *WRIGHT* IS IN CONFLICT WITH THIS COURT'S DECISIONS AND OTHER DECISIONS OF THE COURT OF APPEALS AND REMAND WOULD VIOLATE DOUBLE JEOPARDY.

1. Double jeopardy prohibits the State from trying Mr. Bryant twice for the same offense.

The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. 5; Wash. Const., art. 1, § 9. The Double Jeopardy Clause protects accused individuals from three distinct types of government abuse:

- 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.

North Carolina v. Pearce, 295 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *State v. Hescoek*, 98 Wn.App. at 603-04.

Double jeopardy “bars retrial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy ‘for the same offense.’” *State v. Corrado*, 81 Wn.App. 640 645, 915 P.2d 1121 (1996), *review denied*, 138 Wn.2d 1011 (1999). As a general rule, jeopardy attaches in a jury trial when the jury is sworn. *Corrado*, 81

Wn.App. at 646. Jeopardy terminates with the verdict of acquittal or with a conviction that becomes unconditionally final. *Id.* In addition, jeopardy terminates when the State fails to produce evidence sufficient to prove the charged offense. *Burks v. United States*, 437 U.S. 1, 10-11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. The decision in *Wright* is directly contrary to this Court's decisions in *State v. Davis*, and the Court of Appeals decision in *Hescock*.

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 vehicular homicide and failed to return a verdict as to the remaining counts. The jury foreman indicated to the court that a "verdict had been reached on count one, but that the jurors could not agree upon verdicts on counts two and three." *Davis*, 190 Wash. at 165. The court discharged the jury without explanation and granted the defense motion to dismiss the remaining counts. *Id.* at 165-66. In affirming the trial court's dismissal of the counts for which the jury had not reached a verdict, this Court 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 on trial as to those counts . . . “Doubtless, where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused . . . the effect of such discharge is ‘EQUIVALENT TO ACQUITTAL’ BECAUSE . . . any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent.”

Davis, 190 Wash. at 166-67 (emphasis in original), *quoting Selvester v. United States*, 170 U.S. 262, 18 S.Ct. 580, 42 L.Ed. 1029 (1898).

Similarly, in *Hescock*, the State charged the defendant in juvenile court with one count of forgery by two alternative means; by falsely making, completing or altering a written instrument, or in the alternative, by possessing or putting off as true a written instrument he knew to be forged. The juvenile court found the defendant guilty of the first alternative but it was silent as to the second alternative. *Hescock*, 98 Wn. App. at 602. On appeal, the State conceded there was insufficient evidence to support the conviction on the first alternative but sought to retry the defendant on the second alternative. The Court of Appeals reversed the juvenile court’s refusal to dismiss the prosecution on double jeopardy grounds, finding the court’s silence on the second

alternative in the first trial constituted an implied acquittal, thus barring retrial. *Hescock*, 98 Wn.App. at 602; see also *State v. Linton*, ___ Wn.2d ___, 132 P.3d 127 (2005) (retrial on first degree assault barred on double jeopardy grounds under theory of implied acquittal where defendant convicted of lesser degree of second degree assault after jury unable to agree on a verdict on first-degree assault).

Mr. Bryant's conviction, like Mr. Wright's conviction, on second-degree felony murder was reversed pursuant to *Andress*. The Court of Appeals' reliance in *Wright* on the fact that this did not amount to a reversal for insufficient evidence is wholly unsupported. This Court has previously found the State's evidence of an assault as a predicate crime for felony murder legally insufficient. As a matter of law, the State's evidence of assault as a predicate offense to felony murder was legally insufficient. *Andress*, 147 Wn.2d at 604. For purposes of double jeopardy, legal insufficiency is no different than factual insufficiency and when a reviewing court reverses a conviction based on insufficiency of the evidence, it is deemed to be an acquittal because it "means that the government's case was so lacking that it should not have even been submitted to the jury." *Burks*, 437 U.S. at 16.

Mr. Bryant was charged with second-degree murder by means of intentional murder, or in the alternative, with felony murder by first or second degree assault. The State never proceeded to trial on the intentional murder, never moved to dismiss the intentional murder count, and gave no reason for doing so. The State's decision not to pursue the intentional murder alternative and the jury's subsequent silence on that alternative must be construed as an implied acquittal on that alternative. The Court or Appeals failure to so rule is in direct conflict with *Davis* and *Hescock*. This Court should grant review and find the State's attempt to retry the intentional murder alternative barred by double jeopardy.

F. CONCLUSION

For the reasons stated above, this Court should grant review and reverse the Court of Appeals' decision remanding Mr. Bryant's case for retrial on an alternative means for which he has been acquitted.

DATED this 1st day of June, 2006.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David B. Koch", is written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 57086-2-1
Petitioner,)	(consolidated with 57087-1-1)
)	
v.)	UNPUBLISHED OPINION
)	
CINQUE GARRETT and)	
DENNIS BRYANT,)	
)	
Respondents.)	FILED: May 8, 2006
_____)	

Per curiam. Cinque Garrett was charged in 1994 with murder in the second degree by two alternative means: intentional murder and felony murder predicated upon second degree assault. At his trial, the jury was instructed only on felony murder; the trial apparently proceeded as if intentional murder had not been charged. He was found guilty of second degree murder. His conviction was vacated by In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

On remand, the State filed an amended information charging him again with intentional second degree murder. Garrett and his co-defendant moved to dismiss the amended information on grounds of mandatory joinder and double jeopardy. The trial court granted the motion to dismiss. The State's motion for discretionary review in this court was stayed pending resolution of State v. Wright, 131 Wn. App. 474, 127 P.3d 742 (2006). Garrett objects to lifting the stay because a petition for review has been filed in Wright and therefore Wright is

not final. A commissioner referred the motion to lift the stay and the motion for discretionary review to a panel.

Garrett does not contend that his case is distinguishable from Wright. In Wright, the jury was instructed only on felony murder and the intentional murder charge was left undecided. This court held that because Wright had not been acquitted of murder and had obtained a reversal of his conviction on grounds other than insufficient evidence, he remained in the same jeopardy that attached during the first trial. Wright reversed a dismissal of a second degree murder charge identical to Garrett's. Wright controls.

The motion to lift the stay is granted. Discretionary review is granted. The dismissal of the second degree murder charge is reversed and the case is remanded to the trial court for further proceedings.

FOR THE COURT:

Demp, J.

Becker, J.

Grosse, J.

APPENDIX B

matching the caliber of bullet used in the handgun found in Bryant's possession were found at the crime scene. The bullet that injured the surviving assault victim is an unknown caliber, as treating physicians decided not to remove it from the assault victim's body. At the jury trial, witnesses testified that Bryant and his codefendant fired multiple shots at the victims. The jury found both defendants guilty.

Citing Andress, Bryant argues that his second degree felony murder conviction should be vacated because second degree assault was the predicate felony. In that case, our Supreme Court held that, under former RCW 9A.32.050 (1976), second degree assault may not serve as the predicate crime to convict a defendant of second degree felony murder. In In re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), the Supreme Court clarified that Andress applies to anyone convicted of second degree felony murder under former RCW 9A.32.050, if assault was the predicate felony. The court reasoned that, because the "construction of former RCW 9A.32.050 in Andress determined what the statute meant since 1976," the former felony murder statute did not establish a crime based upon second degree assault. The State concedes Andress and Hinton apply in this case. We accept the concession of error.

Given the holdings in Andress and Hinton, Bryant was convicted of a nonexistent crime. Since we are bound by the decisions of the Washington Supreme Court, State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997);

State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984), Bryant's second degree felony murder conviction must be vacated.

Citing State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000), Bryant also contends that the trial court erred when it instructed the jury on accomplice liability and that the defective accomplice liability instruction entitles him to a new trial. We disagree.

In finding the instruction erroneous, the Court in Cronin concluded "that the fact that a purported accomplice knows that the principal intends to commit "a crime'" does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal." 142 Wn.2d at 579 (citing Roberts, 142 Wn.2d at 513). While there is no requirement that an accomplice have specific knowledge of every element of the principal's crime, he or she must have general knowledge of that crime. Roberts, 142 Wn.2d at 512-13.

Here, the court instructed the jury that an accomplice must have knowledge that his actions will promote the commission of "a" crime rather than the statutory language of "the" crime. The State concedes that this accomplice liability instruction contained the error identified in Roberts and Cronin. Despite this defect, the State asserts the issue is time-barred under the one-year limitations period in RCW 10.73.090. The identical contention was, however, rejected in In re Smith, 117 Wn. App. 846, 73 P.3d 386 (2003), when this court stated that the clarification of the law in Roberts and Cronin "was so significant as to amount to a material change in the case law governing accomplice liability." Smith, 117 Wn. App. at

857. Here, as in Smith, the petition filed by Bryant is timely under RCW 10.73.100(6).¹

Contrary to Bryant's argument, instructional error is subject to a harmless error analysis. In State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2002), the Washington Supreme Court concluded that an erroneous instruction on accomplice liability may be harmless error "if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." In deciding whether the error contributed to the verdict, the record must be examined as to each defendant. Brown, 147 Wn.2d at 341. Therefore, we must determine whether the error in the accomplice liability instruction given in this case prejudiced Bryant. To meet that standard where an erroneous liability instruction has been given to the jury, the petitioner must establish that the error had a substantial and prejudicial influence on the jury's verdict. Smith, 117 Wn. App. at 860.

Here, Bryant and his co-defendant both fired their handguns in the direction of the assault victim. In order to conclude that Bryant was only a participant or accomplice to the assault, not a principal, the jury would have had to disregard virtually all the evidence presented at the trial. Moreover, Bryant has not alleged, much less established, that the prosecutor encouraged the jury during closing argument to find Garrett guilty based on the commission of an uncharged crime.

¹ We note that our Supreme Court, in In re Personal Restraint of Domingo, No. 75920-1, is currently considering whether Roberts and Cronin so changed the law of accomplice liability that personal restraint petitions based on those decision are exempt from the one-year time limit for collateral attack.

Under the circumstances, Bryant has failed to show that the erroneous accomplice instruction had any practical, prejudicial effect on the verdict of guilty. See State v. Borrero, 147 Wn.2d 353, 315, 58 P.3d 245 (2002).

The personal restraint petition is granted on the limited issue of whether assault served as the predicate felony for second degree felony murder under former RCW 9A.32.050 (1976). We vacate the sentence imposed on Bryant's felony murder conviction and remand this matter to King County Superior Court for further lawful proceedings required in the interests of justice and consistent with Andress, Hinton, and State v. Ramos, 124 Wn. App. 334, 342-43, 101 P.3d 872 (2004) (defendant whose conviction was vacated under Andress may be prosecuted for new, related charges under the "ends of justice" exception to the mandatory joinder rule).

Done this 22nd day of June, 2005.

George ACS

Appelwick J

Baker J

FILED
COURT OF APPEALS DIV. #1
STATE OF WASH.
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APPENDIX C

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SUPERIOR COURT CLERK
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 94-C-05056-3 ✓
)	94-C-05057-1
v.)	
CINQUE RICHARD GARRETT,)	SECOND AMENDED INFORMATION
and)	
DENNIS LAMAR BRYANT)	
and each of them,)	
)	
Defendants.)	

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse CINQUE RICHARD GARRETT and DENNIS LAMAR BRYANT, and each of them, of the crime of Murder in the Second Degree, committed as follows:

That the defendants CINQUE RICHARD GARRETT and DENNIS LAMAR BRYANT, and each of them, in King County, Washington on or about August 6, 1994, while committing and attempting to commit the crime(s) of Assault in the First Degree and Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Jacque Burns, a human being who was not a participant in said crime, and who died on or about August 12, 1994;

Contrary to RCW 9A.32.050(1)(a) and (b), and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CINQUE RICHARD GARRETT and DENNIS LAMAR BRYANT, and each of them, of the crime of Assault in the First Degree, based on the same conduct as another crime charged herein, which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:



Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

1 That the defendants CINQUE RICHARD GARRETT and DENNIS LAMAR
2 BRYANT, and each of them, in King County, Washington on or about
3 August 6, 1994, with intent to inflict great bodily harm, did
4 assault Derek Burfect with a firearm and a deadly weapon and force
and means likely to produce great bodily harm or death, to-wit: a
handgun, and did inflict great bodily harm upon Derek Burfect;

5 Contrary to RCW 9A.36.011(1)(a)(c), and against the peace and
6 dignity of the State of Washington.

7 And I, Norm Maleng, Prosecuting Attorney for King County in the
8 name and by the authority of the State of Washington further do
9 accuse the defendants CINQUE RICHARD GARRETT and DENNIS LAMAR
10 BRYANT, and each of them, at said time of being armed with a deadly
11 weapon, to-wit: a handgun, under the authority of RCW 9.94A.125.

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COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do
accuse CINQUE RICHARD GARRETT of the crime of Unlawful Possession of
a Firearm, based on the same conduct as another crime charged
herein, which crimes were so closely connected in respect to time,
place and occasion that it would be difficult to separate proof of
one charge from proof of the other, committed as follows:

That the defendant CINQUE RICHARD GARRETT in King County,
Washington on or about August 6, 1994, having previously been
convicted in Washington State of a felony violation of the uniform
controlled substances act, Chapter 69.50, RCW (1992), did unlawfully
and feloniously own, or have in his/her possession, or have in
his/her control, a firearm;

Contrary to RCW 9.41.040(1), and against the peace and dignity
of the State of Washington.

COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid further do
accuse DENNIS LAMAR BRYANT of the crime of Unlawful Possession of a
Firearm, based on the same conduct as another crime charged herein,
which crimes were so closely connected in respect to time, place and
occasion that it would be difficult to separate proof of one charge
from proof of the other, committed as follows:

That the defendant DENNIS LAMAR BRYANT in King County,
Washington on or about August 6, 1994, having previously been
convicted in Washington State of a serious offense, to-wit: Assault
in the First Degree (1993) and a felony violation of the uniform
controlled substances act, Chapter 69.50, RCW (1992), did unlawfully

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1 and feloniously own, or have in his possession, or have in his
2 control, a firearm;

3 Contrary to RCW 9.41.040(1), and against the peace and dignity
4 of the State of Washington.

5 NORM MALENG
6 Prosecuting Attorney

7 By: Kerry J. Keefe
8 Kerry Keefe, WSBA #91002
9 Senior Deputy Prosecuting Attorney

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