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NO. 55745-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,  
Appellant,  
v.  
OLIVER WRIGHT,  
Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE RONALD KESSLER

**REPLY BRIEF OF APPELLANT**

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**A. ISSUE PRESENTED**

Whether the defendant has identified any basis to affirm the trial court's dismissal of second-degree murder.

**B. STATEMENT OF THE CASE**

The relevant facts of this case are set forth in the Brief of Appellant, and will not be repeated here except as necessary for argument. See Brief of Appellant, at 3-5.

**C. ARGUMENT**

**1. THE DEFENDANT HAS FAILED TO IDENTIFY ANY BASIS UPON WHICH TO AFFIRM THE TRIAL COURT'S RULING.**

In response to the State's arguments in the Brief of Appellant, Wright argues that Judge Kessler's decision to dismiss the second-degree murder charge may be affirmed on the basis of double jeopardy, mandatory joinder, abandonment, and speedy trial. See Brief of Respondent, at 3-29. Each of these arguments should be rejected.

- a. DOUBLE JEOPARDY DOES NOT APPLY BECAUSE THE CONVICTION WAS NOT REVERSED DUE TO INSUFFICIENT EVIDENCE AND BECAUSE THERE HAS BEEN NO IMPLIED ACQUITTAL.

As discussed at length in the Brief of Appellant, Judge Kessler erred in ruling that double jeopardy bars Wright's prosecution for second-degree intentional murder. Brief of Appellant, at 6-13. Nonetheless, Wright argues that double jeopardy applies for two reasons. First, Wright argues that his original felony murder conviction was vacated because "[t]he Washington Supreme Court has found the State's evidence of an assault as a predicate crime for felony murder legally insufficient," and thus any reversal under the Andress<sup>1</sup> and Hinton<sup>2</sup> decisions is tantamount to an acquittal. Brief of Respondent, at 9. Second, Wright argues that he was impliedly acquitted of intentional murder, citing primarily State v. Hescoc<sup>3</sup> and authority from other jurisdictions. Brief of Respondent, at 11-16. These arguments are without merit.

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<sup>1</sup> In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

<sup>2</sup> In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

<sup>3</sup> State v. Hescoc, 98 Wn. App. 600, 989 P.2d 1251 (1999).

First, while reversal on appeal due to insufficient evidence bars further prosecution of the insufficient charge on double jeopardy grounds,<sup>4</sup> the Andress decision is not grounded in evidentiary insufficiency. Rather, the Andress decision vacated a second-degree murder conviction on the basis that the crime of conviction – felony murder predicated on assault – did not exist as a matter of law. In re Andress, 147 Wn.2d at 605 (holding that the felony murder statute “does not encompass assault as a predicate felony”). The Hinton decision then vacated every felony murder conviction predicated upon assault dating back to 1976 on the same legal grounds. In re Hinton, 152 Wn.2d at 857 (holding that a felony murder conviction “resting on assault as the underlying felony is not a conviction of a crime at all”).

Furthermore, neither Andress nor Hinton – nor indeed any decision in the wake of Andress and Hinton – has held that any defendant was immune from further prosecution on grounds of double jeopardy stemming from the judicial invalidation of felony

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<sup>4</sup> See United States v. Scott, 437 U.S. 82, 90-91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978); State v. Anderson, 96 Wn.2d 742, 638 P.2d 1205 (1982); State v. Markle, 118 Wn.2d 424, 824 P.2d 1101 (1992); State v. Corrado, 81 Wn. App. 640, 647-48, 915 P.2d 1121 (1996) (all holding that when a conviction is reversed on any basis *other than insufficiency of the evidence*, the defendant may be retried for the convicted offense and any lesser offenses).

murder based on assault. Rather, both Andress and Hinton remanded the affected cases to the trial court for further lawful proceedings. In re Andress, 147 Wn.2d at 616; In re Hinton, 152 Wn.2d at 861. In fact, while unfortunately failing to address the merits of any potential remedy, the Andress court specifically recognized that the State would be pursuing additional charges on remand and did not preclude the State from doing so. Andress, 147 Wn.2d at 616 n.5. Moreover, the Hinton court rejected two petitioners' requests to dismiss their petitions in the event that the court did not remand their cases specifically for the entry of judgment on second-degree assault. Hinton, 152 Wn.2d at 861 n.3. Thus, the court rejected any express limitations as to the remedies available on remand.

Although Andress and Hinton did not expressly address the remedies available on remand, the United States Supreme Court has held that the reversal of a conviction for a nonexistent crime does not trigger double jeopardy. Montana v. Hall, 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987). In Hall, the defendant was originally convicted of incest under a statute that did not exist on the date that the crime was committed. The Montana Supreme Court vacated the conviction, and further held that the defendant

could not be retried for the applicable crime of sexual assault because such a retrial was barred by double jeopardy. Hall, 481 U.S. at 402. The Supreme Court reversed on two grounds: 1) the defendant's original conviction had never become final because the defendant had successfully appealed his conviction; and 2) the defendant's conviction for a nonexistent crime constituted a defect in the charging instrument, not a failure of proof. Id. at 403-04. As in Hall, the Andress and Hinton decisions found the charge of felony murder to be defective, not the State's proof of guilt. As in Hall, double jeopardy does not apply here. See also Parker v. Norris, 64 F.3d 1178 (8th Cir. 1995) (double jeopardy did not bar further prosecution on remand where a felony-murder conviction had been vacated on grounds nearly identical to the reasoning of Andress and Hinton). Wright's arguments are without merit.

Nonetheless, Wright also cites the recent decision in State v. Gamble, \_\_\_ Wn.2d \_\_\_ (2005 WL 1475847) for the proposition that the court in Andress "found the State's evidence . . . legally insufficient." Brief of Respondent, at 9 (citing Gamble). But nothing in Gamble supports such an argument. Rather, Gamble simply reiterates the long-standing rule that manslaughter is not a lesser-included offense of felony murder. Further, Wright cites this court's

decision in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), for the proposition that double jeopardy bars retrial for intentional murder when a conviction is vacated under Andress. Brief of Respondent, at 9-10. While this was part of the holding in Ramos, the Ramos court reached this conclusion for very specific reasons: the jury in Ramos had impliedly acquitted the defendants of first-degree murder as charged by deliberating on that crime and returning a verdict only on a lesser crime, and the jury had actually acquitted the defendants of intentional second-degree murder because the jury “expressly found that the State failed to prove they acted with intent to cause [the victim’s] death.” Ramos, 124 Wn. App. 342-43. Such dispositive findings by a jury are not present in this case, and thus Wright’s argument fails.

In sum, Andress and Hinton did not reverse nearly three decades’ worth of felony murder convictions due to evidentiary insufficiency. Rather, Andress and Hinton held that these convictions were obtained based on a crime that did not exist as a matter of law. Furthermore, there is nothing in either decision suggesting that further prosecution would be barred on double jeopardy grounds, and authority from the Supreme Court holds to the contrary. Wright’s arguments should be rejected.

Secondly, this court should also reject Wright's arguments that he was impliedly acquitted of intentional second-degree murder. Wright has failed to identify any case in which implied acquittal has been applied where the charge at issue was not actually submitted to the factfinder for deliberation. This court should reverse and remand for reinstatement of the second-degree murder charge.<sup>5</sup>

Wright first cites State v. Hescock, 98 Wn. App. 600, 989 P.2d 1251 (1999), as controlling the result in this case. Brief of Respondent, at 13. As already discussed at some length in the Brief of Appellant, Hescock is indeed the only Washington case applying the implied acquittal doctrine to an alternative means rather than a greater charge. Nonetheless, Hescock shares the common feature that triggers implied acquittal in every case where the doctrine has been found to apply, i.e., an opportunity for the factfinder to actually consider the charge at issue. Hescock, 98 Wn. App. at 603 (juvenile charged with alternative means, but the

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<sup>5</sup> The implied acquittal doctrine already has been addressed in the Brief of Appellant, and Wright cites many of the same cases that the State has already discussed. See Brief of Appellant, at 9-13. Therefore, this brief address only the additional arguments raised by Wright in the Brief of Respondent.

trial judge returned a guilty finding as to only one means following a bench trial). Moreover, as noted in the Brief of Appellant, the lynchpin of Hescock was the appellate court's reversal of the means found by the trial court on grounds of insufficient evidence. Id. at 611. As explained above, a finding of evidentiary insufficiency on appeal triggers double jeopardy as to the crime of conviction in any case. See Corrado, 81 Wn. App. at 647-48. Hescock is thus both legally and factually distinguishable from this case, and Wright's arguments to the contrary should be rejected.

Wright also cites authority from other jurisdictions in support of his argument that implied acquittal bars further prosecution for intentional second-degree murder in this case. Specifically, he cites State v. Hembd, 197 Mont. 438, 643 P.2d 567 (1982), and People v. Broussard, 76 Cal. App. 3d 193, 142 Cal. Rptr. 664 (1977). Neither case is helpful to this court's analysis.

In Hembd, the jury was instructed on four crimes at the conclusion of the evidence: felony negligent arson, attempted felony negligent arson, misdemeanor negligent arson, and attempted misdemeanor negligent arson. After actual consideration and deliberation on all four charges, the jury returned a verdict on only attempted misdemeanor negligent arson, the

lowest of the four crimes. Hembd, 197 Mont. at 439. The Montana Supreme Court concluded that “attempted misdemeanor negligent arson” was a nonexistent crime, and that the jury’s failure to return a verdict on the other three charges constituted implied acquittal on those charges; thus, double jeopardy barred further prosecution. Id. But in Hembd, as in every other implied acquittal case, the implied acquittal doctrine was triggered by two factors: 1) the jury’s actual consideration of the greater charges; and 2) the jury’s failure to return a verdict on those charges.

Similarly, in People v. Broussard, the jury was given instructions on three crimes: attempted murder, attempted voluntary manslaughter, and attempted involuntary manslaughter. The jury returned a verdict on only attempted involuntary manslaughter. Broussard, 76 Cal. App. 3d at 196. The appellate court found that attempted involuntary manslaughter was a “logical impossibility” and “hence not a recognizable crime in California.” Id. at 197. Moreover, consistent with every other case applying the implied acquittal doctrine, the court further held that the jury’s deliberation and failure to return a verdict on the two greater crimes constituted implied acquittals as to those crimes. Id. at 198. In addition, the court held that prosecution on any related crimes was

barred under California joinder law known as the “Kellett<sup>6</sup> rule.” Id. at 199.

Wright cites Hembd and Broussard because they are cases involving application of the implied acquittal doctrine in circumstances where the defendants were convicted of nonexistent crimes. However, these cases do not inform the court’s analysis in Wright’s case. Wright has never been acquitted of any charge, impliedly or otherwise, because the jury was given only one homicide charge for its consideration – felony murder – and the jury returned a guilty verdict on that charge. In these respects, this case has far more in common with People v. Kent, 181 Cal. App. 3d 721, 226 Cal. Rptr. 512 (1986), than with the authority cited by Wright.

In Kent, a juvenile was charged with and convicted of attempting to unlawfully cause a fire. The appellate court observed that such a crime would entail the intent to unintentionally cause damage to property, a “logical impossibility[.]” Kent, 181 Cal. App.

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<sup>6</sup> See Kellett v. Superior Court, 63 Cal.2d 822, 48 Cal. Rptr. 366, 409 P.2d 206 (1966). Under this rule, any further prosecution of any related offense is barred without exception “if the initial proceedings culminate in either acquittal or conviction and sentence.” Broussard, 76 Cal. App. at 199.

3d. at 722-24. But after finding that the crime of conviction did not exist, the court also held that neither double jeopardy nor joinder principles barred further prosecution on remand. To the contrary, the court held that the juvenile could be prosecuted for an existing crime on remand:

Unlike *Broussard*, the minor has never been “acquitted” of any offense. This factor eliminates double jeopardy considerations in this case as there is no actual offense, with actual lesser included offenses, of which the minor has been acquitted. Nor does the minor fit within the *Kellett* rule. In *Broussard*, the *Kellett* rule applied not because defendant had been convicted of the nonexistent offense of attempted involuntary manslaughter but because he had been acquitted of attempted murder. The minor herein has never been “acquitted” of an actual offense, he is still liable for prosecution for an actual crime.

Kent, 181 Cal. App. 3d. at 724 (citations omitted).

Wright, like the juvenile in Kent, has never been acquitted of any offense. Rather, like the juvenile in Kent, Wright was convicted of a nonexistent crime. Therefore, as in Kent, Wright should be prosecuted on remand for the “actual crime” of intentional murder. See also Hall, 481 U.S. at 403 n.1 (noting that implied acquittal applies only when the charge at issue was actually submitted to the factfinder for consideration).

In sum, there appear to be no cases that have applied the implied acquittal doctrine in the absence of actual consideration of the charge at issue by the factfinder. Therefore, Judge Kessler erred in dismissing Wright's intentional murder charge on grounds of double jeopardy. This court should reverse and remand for reinstatement of the intentional murder charge.

- b. MANDATORY JOINDER DOES NOT APPLY BECAUSE THE DEFENDANT FAILED TO MOVE FOR CONSOLIDATION DURING THE FIRST TRIAL, AND BECAUSE APPLICATION OF THE RULE WOULD DEFEAT THE ENDS OF JUSTICE.

Wright also argues that further prosecution on any charge potentially arising from the killing of Aisa Cameron is barred by CrR 4.3.1, Washington's so-called "mandatory joinder" rule. Brief of Respondent, at 24-29. Although Judge Kessler did not dismiss the second-degree murder charge on these grounds, this court should nonetheless reject Wright's arguments.<sup>7</sup>

As discussed at some length in the Brief of Appellant, CrR 4.3.1(b)(2) dicatates that related charges based on the same

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<sup>7</sup> Wright states that further prosecution for any homicide charge is barred by mandatory joinder. Brief of Respondent, at 21. Wright did not cross-appeal Judge Kessler's ruling that the State could prosecute a first-degree manslaughter charge, and this court should reject Wright's claim on this basis alone.

conduct should be consolidated for trial. If such related charges are not consolidated for trial, any subsequent charges should be dismissed with prejudice unless “the right of consolidation was waived” by the defendant or “the ends of justice would be defeated if the motion were granted.” CrR 4.3.1(b)(3). A defendant’s failure to make a timely motion for consolidation “as to related offenses with which the defendant knew he or she was charged” constitutes waiver under the rule. CrR 4.3.1(b)(2). Furthermore, as this court has held, the Andress decision constitutes “extraordinary circumstances outside the State’s control,” and accordingly trial courts may apply the “ends of justice” exception to CrR 4.3.1 to allow re-prosecution of Andress-affected cases. State v. Ramos, 124 Wn. App. 334, 342, 101 P.3d 872 (2004).

Nevertheless, Wright asserts that he was not required to move for consolidation because the intentional murder and felony murder alternative means were charged in a single information. Brief of Respondent, at 25-27. Thus, he argues that the mandatory joinder rule prohibits further prosecution on the intentional murder alternative means because the mandatory joinder rule was not violated in the first instance. In other words, Wright argues that the State simultaneously violated and complied with the mandatory

joinder rule. Furthermore, Wright fails to address or cite to this court's analysis of the "ends of justice" exception to CrR 4.3.1 in Ramos in his discussion of mandatory joinder. Wright's arguments are without merit, and should be rejected.

Mandatory joinder does not provide a basis to affirm Judge Kessler's ruling. This court should reverse and remand this case for trial.

c. THE DEFENDANT'S "ABANDONMENT"  
THEORY SHOULD BE REJECTED.

Wright also argues that further prosecution is barred because the State "abandoned" the intentional murder charge during the first trial. Brief of Respondent, at 16-19. This argument should be rejected. First, as discussed above, the failure to instruct the jury on intentional murder during the first trial is attributable to waiver of consolidation by the defendant to the same or greater degree as any alleged "abandonment" by the State, as the mandatory joinder rule places the burden of moving for consolidation on the defendant. CrR 4.3.1(b)(2). Moreover, the cases cited by Wright do not assist this court's analysis.

Wright first cites Sizemore v. Fletcher, 921 F.2d 667, 673 (6th Cir. 1990), for the proposition that further prosecution is barred

if a trial ends without a verdict “for reasons of the prosecution’s making.” However, the issue in Sizemore was whether the defendant could be retried when the court declared a mistrial due to the prosecutor’s egregious misconduct during closing argument. Sizemore is thus inapplicable.

Wright also cites Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988), a case more analogous to this case. However, the key to the holding in Saylor was not simply that the trial court had failed to submit one of the charged crimes to the jury. Rather, it was this fact along with the prosecutor’s incompetence, the defendant’s objections to the instructions given, and the appellate court’s reversal of the conviction on grounds of evidentiary insufficiency that led the court to conclude that further prosecution was barred. Saylor, 845 F.2d at 1402. Moreover, the wisdom of the Saylor decision was questioned by the 6th Circuit the very next year. See United States v. Davis, 873 F.2d 900, 905 (6th Cir. 1989) (observing that Davis’s argument had “superficial appeal” only “[i]f Saylor was decided correctly”). Moreover, the 6th Circuit recognized that the Saylor analysis should not apply where an otherwise valid conviction is later vacated due to an unanticipated appellate decision that invalidates the crime of conviction. Id. at

905 (a prosecutor is not expected to have the “prescience” to anticipate the repudiation of a previously valid theory of liability). Therefore, the Saylor analysis should not apply here, either.

Furthermore, at least one court has rejected the Saylor analysis as applied to alternative means of committing a single crime. People v. Daniels, 187 Ill.2d 301, 718 N.E.2d 149, 240 Ill. Dec. 668 (1999). In Daniels, the defendant was charged with numerous crimes including first-degree murder based on alternative means: intentional murder, and felony murder predicated on sexual assault. Daniels, 187 Ill.2d at 304. At trial, the jury was instructed on intentional murder, but not on felony murder, and the jury returned a guilty verdict. Id. at 305. Following reversal on appeal, the defendant argued that the State had abandoned the felony murder charge by failing to submit instructions on that theory of liability in the first trial, and that double jeopardy prevented prosecution of felony murder on remand. Id. at 308.

In rejecting this argument, the Illinois Supreme Court first observed that the defendant had never been expressly or impliedly acquitted of first-degree murder and therefore traditional double jeopardy analysis did not apply. Daniels, 187 Ill.2d at 310-11. Moreover, the court distinguished Saylor, and held that because

intentional murder and felony murder are not separate crimes, but alternative methods of committing a single crime,<sup>8</sup> the failure to submit instructions on one alternative in the first trial had no effect on the State's ability to proceed on that alternative in a subsequent trial. Id. at 313-117.

Daniels is analogous to this case. As in Daniels, Wright was charged with second-degree murder by alternative means, but the felony murder alternative was not submitted to the jury in the original trial by either party. Also as in Daniels, the jury found Wright guilty of the means submitted, yet the conviction was reversed on appeal for reasons other than evidentiary insufficiency. As in Daniels, this court should reject Wright's abandonment claim, and the State should be allowed to submit the charge of second-degree murder to the jury in Wright's trial on remand.

d. THE DEFENDANT'S SPEEDY TRIAL CLAIM SHOULD BE REJECTED.

Wright also claims that prosecution of any charge potentially arising from the killing of Aisa Cameron is barred by the time for trial rule, CrR 3.3. Brief of Respondent, at 19-21. This claim

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<sup>8</sup> This is also the law in Washington, and one of the arguments the State presented to Judge Kessler in response to Wright's motion to dismiss the amended information. CP 191-204.

should be rejected, as the time for trial rule specifically provides for retrial following reversal or vacation on appeal or collateral attack.

Wright correctly notes that the rule generally requires that the trial of an in-custody defendant commence within 60 days of arraignment. CrR3.3(b)(1) and (c)(1). However, he is incorrect when he asserts that “CrR 3.3 does not address the situation in which multiple charges arise from the same criminal conduct or criminal episode.” Brief of Respondent, at 20 (citing State v. Peterson, 90 Wn.2d 423, 431, 585 P.2d 66 (1978), a case predating the current version of CrR 3.3). Rather, the rule expressly provides that “[t]he computation of the allowable time for trial of a pending charge shall apply equally to all related charges.”<sup>9</sup> CrR 3.3(a)(5). Furthermore, the rule also expressly provides that the time for trial calculation begins anew when an appellate court issues a mandate or an order terminating a collateral proceeding. CrR 3.3(c)(2)(iv) and (v). In such cases, the defendant’s first appearance on remand becomes the new “commencement date” for purposes of the rule. Id.

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<sup>9</sup> A “related charge” is “a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.” CrR 3.3(a)(3)(ii).

In addition, the rule unambiguously provides that a charge “shall not be dismissed” due to any delay attributable to “circumstances not addressed in this rule” unless the defendant’s constitutional speedy trial rights have been violated. CrR 3.3(a)(4). The constitutional right to a speedy trial is violated only when an unreasonable delay has occurred, taking into account the following four factors: 1) the length of the delay, 2) the reason for the delay, 3) whether and when the defendant asserted the right to a speedy trial, and 4) whether the defendant has been prejudiced. State v. Higley, 78 Wn. App. 172, 185, 902 P.2d 659, review denied, 128 Wn.2d 1003 (1995).

In this case, Wright’s conviction was vacated – at his request – as the result of the Hinton decision. The fact that the Washington Supreme Court waited until 2004 to vacate nearly three decades’ worth of murder convictions is an extraordinary circumstance beyond the State’s control. See Ramos, 124 Wn. App. at 342. The extraordinary reason for the delay in this case, coupled with a lack of prejudice to the defendant, defeats any constitutional speedy trial argument. Furthermore, the plain language of CrR 3.3, which provides for the re-commencement of the time for trial calculation following remand from an appellate court, defeats Wright’s rule-

based argument. Wright's claim is without merit, and it should be rejected.

2. **THE DEFENDANT IS NOT ENTITLED TO DISMISSAL OF THE ENTIRE ACTION UNDER EVEN THE STRICTEST APPLICATION OF ANDRESS AND HINTON.**

Wright argues that Judge Kessler properly dismissed the intentional second-degree murder charge, and that he is entitled to dismissal of the entire action against him. Indeed, Wright asserts that even the entry of judgment on second-degree assault is not available as a remedy in this case, and he argues in the alternative that at most, the State could proceed to trial on a charge of second-degree assault. Brief of Respondent, at 21-22, 27-29. This claim should be rejected for three reasons.

First, as discussed at length above, Judge Kessler erred in dismissing the second-degree murder charge, and Wright is not entitled to dismissal of that charge or any related charge on grounds of double jeopardy, mandatory joinder, abandonment, or speedy trial. Second, Wright did not cross-appeal Judge Kessler's ruling that the State could proceed to trial on first-degree manslaughter under this court's decision in Ramos. Indeed, as noted above, Wright fails to even cite Ramos in his discussion of

mandatory joinder. See Brief of Respondent, at 24-29. Therefore, this court should reject Wright's attempt to seek relief from that ruling at this time under RAP 2.4(a). Third, Wright's argument that a court could not enter judgment on second-degree assault is without merit because Wright's original jury necessarily found all of the elements of that crime beyond a reasonable doubt in finding him guilty of felony murder.

When a conviction is reversed on appeal, the trial court may enter judgment on a lesser crime on remand if the factfinder necessarily found the elements of the lesser crime beyond a reasonable doubt. See State v. Hughes, 118 Wn. App. 713, 733-34, 77 P.3d 681 (2003) (felony murder vacated due to Address, and case remanded for entry of judgment on predicate felony of second-degree assault); State v. Scherz, 107 Wn. App. 427, 436-37, 27 P.3d 252 (2001) (first-degree robbery conviction reversed due to insufficient evidence, and case remanded for entry of judgment on second-degree robbery); State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (trial court improperly aggregated thefts in finding defendant guilty of first-degree theft, but case remanded for entry of judgment on second-degree theft). Moreover, as the Washington Supreme Court very recently

observed, “[i]n proving [felony murder], the State must also necessarily prove the defendant committed the predicate felony.” State v. Gamble, \_\_\_ Wn.2d \_\_\_ (2005 WL 1475847).

In this case, in finding Wright guilty of felony murder predicated on second-degree assault, the jury necessarily found that Wright committed that predicate felony. See id. Therefore, although the State is seeking to try Wright for intentional second-degree murder, this court should reject Wright’s argument that entry of judgment on the predicate felony is not an available remedy in this case. Even under the strictest application of Andress, outright dismissal as Wright urges is improper.

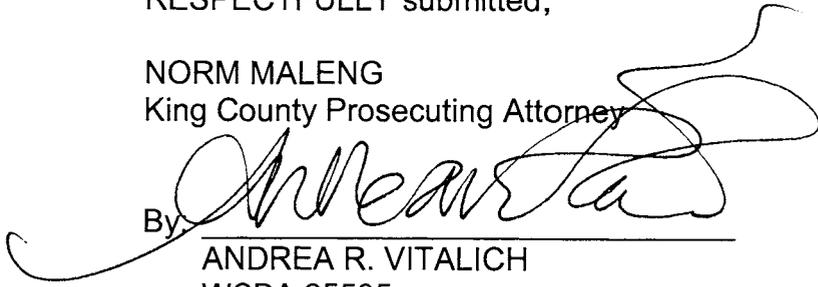
**D. CONCLUSION**

The defendant has failed to identify a basis to affirm the trial court’s dismissal of the amended information. For the foregoing reasons, and the reasons stated in the Brief of Appellant, this court should reverse, reinstate the amended information, and remand for trial.

DATED this 4<sup>th</sup> day of August, 2005.

RESPECTFULLY submitted,

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Attorneys for the Appellant

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jason Saunders, the attorney for the respondent, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Reply Brief of Appellant, in STATE V. OLIVER WRIGHT, Cause No. 55745-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

uBrame

Name

Done in Seattle, Washington

8/4/05

Date

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