

NO. 78465-5 & 78788-3
(consolidated)

RECEIVED
SUPERIOR COURT
STATE OF WASHINGTON
JAN 11 2009

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WRIGHT & DENNIS BRYANT,

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. **ISSUES PRESENTED**

1. Did this Court's decision in In re Andress constitute a finding of evidentiary insufficiency as to second-degree murder where this Court's reasoning in Andress does not rely on the test for evidentiary insufficiency, and where this Court in Andress and its progeny never remanded for dismissal of the charges?

2. Is the implied acquittal doctrine inapplicable where the essential components of implied acquittal – the factfinder's actual consideration of the crime or alternative means at issue, coupled with unexplained silence as to that crime or alternative means – are absent?

3. Is the "mistrial" branch of double jeopardy jurisprudence inapplicable where a prosecutor does nothing improper to prematurely end a trial over a defendant's objection?

B. **STATEMENT OF THE CASE**

Oliver Wright

Oliver Wright was originally charged with second-degree murder for shooting Aisa Cameron to death on April 6, 1993. The information alleged two alternative means: felony murder based on

second-degree assault, and intentional murder.¹ CPW 1-10.²

Wright's trial occurred in July and August 1993 before the Honorable Ricardo Martinez. Although Wright was charged with second-degree murder by alternative means, neither the State nor Wright proposed any jury instructions on intentional murder. Rather, both Wright and the State submitted instructions only as to felony murder. CPW 11-84. In fact, neither the parties nor the trial court even mentioned the intentional murder alternative at any time during trial. Accordingly, the trial court instructed the jury on only the felony murder alternative without exceptions or objections from either party. CPW 85-111; RPW (1993 Vol. III) 716.

The evidence at trial proved that Wright shot Cameron three times, including a fatal contact wound to the torso. RPW (1993 Vol. I) 157-79, 207-10. The jury found Wright guilty of second-degree felony murder, and the trial court imposed a standard-range sentence. CP 112-22; RPW (1993 Vol. III) 797. Wright's conviction was affirmed on direct appeal. State v. Wright, 79 Wn. App. 1065,

¹ Wright was also charged with and convicted of robbery in the first degree and two counts of assault in the first degree. CPW 1-10, 112-13. These convictions are still in effect, and are not at issue in this appeal.

² To avoid confusion, the clerk's papers and verbatim reports for Wright's case will be referenced as "CPW" and "RPW," and the clerk's papers and verbatim reports for Bryant's case will be referenced as "CPB" and "RPB."

1995 WL 944397, rev. denied, 129 Wn.2d 1010 (1996). Years later, this Court vacated Wright's felony murder conviction, and the convictions of nine other petitioners, holding that the decision In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), applied retroactively. In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

On remand, the State filed an amended information recharging Wright with second-degree murder under the intentional murder alternative means. CPW 127-30. Wright moved to dismiss this charge on various grounds, including double jeopardy. CPW 131-204. The Honorable Ronald Kessler granted Wright's motion to dismiss, but denied Wright's motion to enter judgment on second-degree assault, and instead allowed the State to file a charge of first-degree manslaughter in accordance with the Court of Appeals' decision in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004).³ CPW 214, 209-13; RPW (2/17/05) 17-18.

The State moved successfully for discretionary review of Judge Kessler's ruling, and Court of Appeals reversed that ruling in

³ The defendants in Ramos did not petition for review of the Court of Appeals' decision; however, the case is now pending in this Court following a motion for discretionary and direct review that was filed during the proceedings on remand. See State v. Ramos and Medina, Nos. 77347-5 & 77360-2 (consolidated).

a published decision. State v. Wright, 131 Wn. App. 474, 127 P.3d 742 (2006). Wright filed a petition for review, which was later consolidated with the petition of Dennis Bryant.

Dennis Bryant

Dennis Bryant and his co-defendant, Cinque Garrett, were originally charged with two counts of first-degree assault for shooting Derek Burfect and Jacque Burns on August 6, 1994. CPB 1-6. Burns later died from his injuries, and the corresponding assault charge was amended to second-degree murder by alternative means: felony murder based on second-degree assault, and intentional murder. CPB 7-10. This charge was later amended again to include first-degree assault as an alternative predicate felony.⁴ CPB 11-13. At the time of the second amendment, the parties acknowledged that the murder count was charged in the alternative, and the State indicated that it was considering dismissing one of the alternative means, although this never

⁴ In addition to second-degree murder and first-degree assault, Bryant and Garrett were also convicted of unlawful possession of a firearm. CPB 107-14, 116-23; RPB (2/23/95) 82-87. Bryant's convictions for crimes other than felony murder are still in effect, and are not at issue in this appeal.

actually occurred.⁵ RPB (2/9/95) 2-6.

Bryant and Garrett were tried together in February 1995 before the Honorable Norma Huggins. The evidence proved that both Bryant and Garrett fired their guns at Derek Burfect, and that Burfect and Jacque Burns were both shot. RPB (2/21/95) 21-24, 81, 83. Bryant fired his gun at least twice, and the bullet that killed Burns came from Bryant's gun. RPB (2/22/95) 66-73, 95-96. Bryant had the murder weapon in his pocket when he was arrested shortly after the shooting. RPB (2/16/95) 81-89.

At the conclusion of the evidence, both Bryant and the State proposed jury instructions on only the felony murder alternative means for second-degree murder.⁶ CPB 15-74. In fact, neither the parties nor the trial court mentioned the intentional murder alternative during their discussion of the jury instructions. RPB (2/23/95) 85-108. Accordingly, the trial court instructed the jury on

⁵ It was also noted that the second-degree murder count was charged in the alternative during argument on the defendants' motion to dismiss at the close of the State's case-in-chief. RPB (2/22/95) 141-42. In fact, the trial court found the evidence sufficient to prove both intentional murder and felony murder. RPB (2/23/95) 15-17. At that point, however, Garrett's counsel erroneously argued that intentional murder had not been alleged in the information, and the trial court agreed. RPB (2/23/05) 17; CPB 11-13. Bryant made no arguments to the contrary.

⁶ Bryant also proposed an instruction on first-degree manslaughter. CPB 75. The trial court ruled that this instruction was inappropriate based on the evidence. RPB (2/23/95) 73-74.

only the felony murder alternative means in accordance with the instructions submitted by the parties. CPB 187-222. The jury found the defendants guilty. CPB 83-86. Bryant received a standard-range sentence. CPB 107-14.

Bryant's and Garrett's convictions were affirmed on direct appeal. State v. Garrett and Bryant, 87 Wn. App. 1067, 1997 WL 583617, rev. denied, 136 Wn.2d 1004 (1998). Years later, the Court of Appeals vacated Bryant's felony murder conviction under this Court's decision in Andress.⁷ CPB 124-30. On remand, the State refiled a charge of second-degree intentional murder for the killing of Jacque Burns. CPB 223-25. The defendants moved to dismiss this charge on grounds including double jeopardy. CPB 133-64, 170-86, 226-43. Judge Kessler granted the motion to dismiss, but allowed the State to file a first-degree assault charge instead. CPB 165-69. The State sought discretionary review of Judge Kessler's ruling. CPB 244-45.

The legal issues presented in this case were the same as those presented in Wright. Accordingly, the State's motion for discretionary review was stayed pending the outcome in Wright.

⁷ Garrett's felony murder conviction was vacated as well. In re PRP of Garrett, No. 48990-9-1.

After the Court of Appeals decided Wright, the court then filed a per curiam decision granting the State's motion for discretionary review, reversing the trial court's ruling, and remanding for further proceedings on second-degree murder. State v. Garrett and Bryant, 132 Wn. App. 1056, 2006 WL 1217129. Bryant filed a petition for review,⁸ which was consolidated with Wright's.

C. ARGUMENT

The arguments raised in the petitions for review were fully briefed by the parties and thoroughly analyzed in Judge Becker's opinion on behalf of the Court of Appeals in Wright. In addition, neither defendant has petitioned this Court for review of any issues pertaining to mandatory joinder under CrR 4.3.1 or the time for trial rule, CrR 3.3, as addressed by the Court of Appeals. Accordingly, those issues are not before this Court.

Therefore, in the interests of brevity and clarity, this supplemental brief will address three discrete points regarding the defendants' double jeopardy claims as set forth in their petitions for

⁸ Garrett also filed a petition for review, but later made a motion to withdraw it. This Court granted that motion. Garrett was subsequently retried and convicted of second-degree intentional murder and first-degree assault in the alternative. State v. Garrett, King County Superior Court No. 94-C-05056-3 SEA.

review: 1) that this Court's decision in Andress is not based on evidentiary insufficiency, and thus Andress has no double jeopardy implications in and of itself; 2) that there has been no prior acquittal by a jury in these cases, either express or implied; and 3) that the "mistrial" branch of double jeopardy jurisprudence also does not apply in these circumstances. The Court of Appeals' reasoning in Wright is sound, and this Court should affirm.

1. THIS COURT'S DECISION IN ANDRESS IS NOT BASED ON EVIDENTIARY INSUFFICIENCY, AND THUS DOES NOT IMPLICATE DOUBLE JEOPARDY IN AND OF ITSELF.

The defendants characterize this Court's decision in Andress as a finding that the evidence was insufficient to support a conviction for second-degree murder. Specifically, they claim that this Court "found the State's evidence of an assault as a predicate crime for felony murder legally insufficient," and that "legal insufficiency is no different than factual insufficiency" for double jeopardy purposes. Petition for Review (Wright), at 12; Petition for Review (Bryant), at 8. But this Court did not hold in Andress or its progeny that the evidence was insufficient to support a conviction. Rather, the Court held that a conviction for felony murder based on assault was not a conviction of a crime at all. Unlike a finding of

evidentiary insufficiency, a legal conclusion that the crime of conviction does not exist does not have double jeopardy implications in and of itself.

In Andress, the Court held that the legislature did not intend for assault to serve as a predicate crime for second-degree felony murder. In reaching this conclusion, the Court examined the language of the felony murder statute and the overall statutory scheme, and decided that illogical and unintended consequences resulted from felony murder based on assault. In re Andress, 147 Wn.2d 608-16. Nowhere in Andress did the Court hold that the evidence was insufficient to support a conviction.⁹ In Hinton, the Court held that Andress was retroactive. In so holding, the Court emphasized that a felony murder conviction "resting on assault as the underlying felony is not a conviction of a crime at all." In re Hinton, 152 Wn.2d at 857. Again, however, the Court did not consider the sufficiency of the evidence in the cases before it. Rather, the Court held that a conviction for a nonexistent crime is invalid on its face and must be vacated. Id. at 858.

⁹ Both defendants cite In re Andress, 147 Wn.2d at 604, for the proposition that this Court found that "the State's evidence of an assault as a predicate crime for felony murder was legally insufficient." Petition for Review (Wright), at 12; Petition for Review (Bryant), at 8. Nothing resembling this proposition appears on page 604 of the Court's opinion or, indeed, anywhere else.

The Court's instructions on remand in Andress and Hinton are telling as well. In Andress, although the Court declined to address the "ends of justice" exception to mandatory joinder under CrR 4.3.1¹⁰ or the propriety of entering judgment on any lesser crime on remand, the Court also expressly declined to limit the remedies potentially available to the State on remand:

We did not intend that the State be more restricted on remand than our rules, statutes, and constitutional principles demand. Accordingly, we clarify our instructions for remand, and direct that the State is not foreclosed from any further, lawful proceedings consistent with our decision in this case.

In re Andress, 147 Wn.2d at 616 n.5. Similarly, in Hinton, the Court remanded the petitioners' cases "for further lawful proceedings," and denied requests from two petitioners "to dismiss their petitions in the event that we do not direct remand for resentencing on second degree assault." In re Hinton, 152 Wn.2d at 861, 861 n.3.

It is axiomatic that a finding of evidentiary insufficiency on appeal is the same as an acquittal for double jeopardy purposes. Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1

¹⁰ As noted above, the issue of whether the "ends of justice" exception to CrR 4.3.1 should apply in cases affected by Andress is presented in another case currently pending in this Court. State v. Ramos and Medina, Nos. 77347-5 & 77360-2 (consolidated).

(1978). Accordingly, only two remedies are possible on remand after a finding of evidentiary insufficiency on appeal: 1) entry of judgment on a necessarily-included offense for which the evidence *is* sufficient;¹¹ or 2) dismissal with prejudice.¹² It would thus be puzzling, to say the least, if this Court in Andress and Hinton had made rulings on the sufficiency of the evidence without actually saying so, and had intended that all Andress-affected cases be remanded for entry of judgment on necessarily-included offenses or for dismissal with prejudice while specifically declining to say so.

Reversing a conviction "based upon the inapplicability of [a] statute" is not a finding of evidentiary insufficiency. State v. Anderson, 96 Wn.2d 739, 744, 638 P.2d 1205 (1982). Moreover, vacating a conviction for a nonexistent crime does not trigger double jeopardy because a conviction for a nonexistent crime constitutes a defect in the charging instrument, not a failure of proof. Montana v. Hall, 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d

¹¹ See, e.g., State v. Scherz, 107 Wn. App. 427, 436-37, 27 P.3d 252 (2001); State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996).

¹² See, e.g., State v. Brown, ___ Wn. App. ___, 2007 WL 824422.

354 (1987).¹³ The Court of Appeals thus correctly concluded that Andress does not implicate double jeopardy in and of itself.¹⁴ Wright, 131 Wn. App. at 479-80.

2. JEOPARDY HAS NOT TERMINATED BECAUSE THERE HAS BEEN NO PRIOR ACQUITTAL BY A JURY, EITHER EXPRESS OR IMPLIED, AND BECAUSE THE ORIGINAL CONVICTIONS HAVE BEEN VACATED.

Wright and Bryant also argue that they were "acquitted" of intentional murder in their original trials. Specifically, they claim that the juries' failure to return a verdict on the intentional murder alternative means constitutes an acquittal for double jeopardy purposes under the doctrine of implied acquittal. Petition for Review (Wright), at 9-11, 15-17; Petition for Review (Bryant), at 6-7, 9. This claim should also be rejected. An implied acquittal requires the jury's actual consideration of the charge or alternative means at issue, coupled with its unexplained failure to return a verdict on that crime or alternative. Neither of these critical

¹³ See also Parker v. Norris, 64 F.3d 1178, 1180-82 (8th Cir. 1995) (holding that double jeopardy posed no bar to prosecution for premeditated murder on remand where the defendant's original felony murder conviction had been vacated on grounds nearly identical to the reasoning of Andress, and holding that a finding on appeal that the defendant was convicted of a nonexistent crime is not the same as a finding of evidentiary insufficiency, citing Montana v. Hall).

¹⁴ For further briefing by the State on this issue, see Reply Brief of Appellant (Wright, No. 55745-9-1), at 3-6.

components is present here, and thus the implied acquittal doctrine does not apply. Further, because the defendants' convictions have been vacated, jeopardy continues and the cases can be retried.

The double jeopardy clauses of the state and federal constitutions¹⁵ prohibit further prosecution for a crime when three essential elements have been satisfied: 1) jeopardy has previously attached; 2) jeopardy has previously terminated; and 3) the defendant is again in jeopardy for the same offense in fact and law. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). For purposes of the second element – the only element at issue here – jeopardy terminates after trial with one of two possible events: 1) a prior conviction that is unconditionally final; or 2) a prior acquittal, whether express or implied. Id. at 646-48. An implied acquittal occurs only when the factfinder considers multiple charges or alternative crimes and, without explanation, fails to render a verdict on one or more of them. State v. Ervin, 158 Wn.2d 746, 753-54, 147 P.3d 567 (2006). In such cases, the factfinder's unexplained silence on a charge or alternative is treated as an

¹⁵ Both constitutions provide the same double jeopardy protections, and are interpreted identically in this regard. State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959).

acquittal for double jeopardy purposes. Id.

The implied acquittal doctrine has been applied in a variety of circumstances; however, no appellate decision has found an implied acquittal in a case where the specific crime or alternative means at issue was not actually presented to the factfinder for its consideration. See, e.g., Green v. United States, 355 U.S. 184, 191, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) (jury actually considered first-degree murder and second-degree murder, but returned an express verdict on only the lesser crime); State v. Davis, 190 Wash. 164, 166-67, 67 P.2d 894 (1937) (jury deliberated upon three separate charges, but failed to return a verdict on two of them); Schoel, 54 Wn.2d at 341 (jury was instructed to deliberate upon different degrees of murder, but returned a verdict on only one of them); State v. Hescocock, 98 Wn. App. 600, 611, 989 P.2d 1251 (1999) (offender charged with alternative means of forgery, but judge presiding at bench trial found guilty as to only one alternative and was inexplicably silent as to the other).

The common thread in all implied acquittal cases is the factfinder's actual consideration of the crime or alternative means at issue coupled with an unexplained failure to render a verdict on that crime or alternative means. As the Supreme Court explained in the

seminal case on implied acquittal, a jury's opportunity to actually deliberate upon the crime at issue is critical to the determination that an acquittal should be implied:

[T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. *Yet it was given a full opportunity to return a verdict* and no extraordinary circumstances appeared which prevented it from doing so.

Green, 355 U.S. at 191 (emphasis supplied).

The juries in Wright's and Bryant's cases never had an opportunity to consider the intentional murder alternative means because neither party requested or proposed instructions on that alternative. Therefore, these juries never had the "full opportunity to return a verdict" as required for an implied acquittal. Green, at 191. Moreover, the juries' failure to reach a verdict on the intentional murder alternative is not unexplained, as is also required by Green and its progeny. In short, the critical components necessary for operation of the implied acquittal doctrine are absent here, and the defendants' claims to the contrary are without merit.

Nevertheless, both defendants argue that Hescock supports their position. The defendants' reliance is misplaced. In Hescock,

as noted above, the juvenile offender was charged with forgery by alternative means, but the judge presiding over the bench trial found him guilty of only one of those means and was silent as to the other. Hescock, 98 Wn. App. at 603. On appeal, the means supporting the verdict was reversed due to evidentiary insufficiency. Id. at 611. A finding of insufficient evidence on appeal triggers double jeopardy as to the crime of conviction in any case. See Corrado, 81 Wn. App. at 647-48. Moreover, the Hescock court found an implied acquittal as to the other alternative means because the trial judge, as the factfinder, had a full opportunity to consider it, but remained silent without explanation. Hescock, at 611. Two key features present in Hescock are absent here: 1) evidentiary insufficiency as to one alternative means, which has the same effect as an express acquittal; and 2) actual consideration by the factfinder plus unexplained silence as to the other alternative means, which is clearly an implied acquittal. Thus, Hescock is not on point.

In addition, Wright cites authority from Montana and California in support of his position. State v. Hembd, 197 Mont. 438, 643 P.2d 567 (1982); People v. Broussard, 76 Cal. App. 3d 193, 142 Cal. Rptr. 664 (1977). These cases are readily

distinguishable as well.

In Hembd, the jury was instructed on four alternative crimes. After actual deliberation upon all four charges, the jury returned a guilty verdict only as to the lowest crime and was silent as to the others. Hembd, 197 Mont. at 439. On appeal, the Montana Supreme Court held that the crime of conviction was nonexistent, and that the jury's silence as to the other three crimes was an implied acquittal as to each; therefore, any retrial on those crimes was barred. Id. But as with all other implied acquittal cases, the critical factor was the factfinder's actual consideration of three charges coupled with its silence that triggered double jeopardy, not the fact that the crime of conviction did not exist.

Similarly, in Broussard, the jury was instructed on three attempted homicide crimes and returned a guilty verdict on only the lowest crime: attempted involuntary manslaughter. Broussard, 76 Cal. App. 3d at 196. The California appeals court held that this crime was a "logical impossibility" and thus nonexistent. Id. at 197. The court also held that the jury's actual deliberation and unexplained failure to reach a verdict on the two greater crimes

triggered double jeopardy as to those crimes.¹⁶ Id. at 198. Again, however, double jeopardy was not triggered due to the defendant's conviction for a nonexistent crime. Rather, double jeopardy was triggered because the jury's actual deliberation and unexplained silence on the greater charges constituted an implied acquittal.

Hembd and Broussard are not on point, but further illustrate why the implied acquittal doctrine does not apply in these cases. Here, the defendants have never been acquitted of any charge, impliedly or otherwise, because their juries considered only one crime – felony murder – and found them guilty of that crime. In these respects, these cases are far more analogous to In re Kent W., 181 Cal. App. 3d, 721, 226 Cal. Rptr. 512 (1986). In Kent W., a juvenile was charged with and convicted of a crime found on appeal to be nonexistent. Kent W., 181 Cal. App. 3d at 722-24. But after holding that the crime of conviction did not exist, the court also held

¹⁶ In addition, the court held that prosecution for any related offense on remand was barred under California's strict joinder principle known as the "Kellett rule." See Kellett v. Superior Court, 63 Cal.2d 822, 48 Cal. Rptr. 366, 409 P.2d 206 (1966). Under this rule, further prosecution for 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. The "Kellett rule" is not the law in Washington. Rather, joinder of related offenses is governed by CrR 4.3.1, which the defendants have not raised in their petitions for review. Accordingly, this Court should disregard the large block quotation from Broussard regarding the "Kellett rule" set forth in Wright's petition insofar as it suggests that California joinder law provides a basis to dismiss these cases under Washington law. See Petition for Review (Wright), at 16-17.

that double jeopardy posed no bar to prosecution for an existing crime on remand. The court distinguished Broussard, holding that because "[t]he minor herein has never been 'acquitted' of an actual offense, he is still liable for prosecution for an actual crime." Id. at 724.

Wright and Bryant were not expressly acquitted of any charge; to the contrary, they were convicted of second-degree felony murder. Moreover, their original murder convictions are not final; to the contrary, they were vacated at the defendants' request. See Ervin, 158 Wn.2d at 758 (jeopardy does not terminate, but rather continues, when a conviction is vacated under Andress). Furthermore, the essential components of an implied acquittal – actual consideration by the factfinder and unexplained failure to reach a verdict – are not present here with respect to second-degree intentional murder. Accordingly, the Court of Appeals correctly concluded that jeopardy continues and the defendants can be retried for intentional murder. The Court of Appeals should be affirmed.¹⁷ See Wright, 131 Wn. App. at 480-81.

¹⁷ For further briefing by the State on the implied acquittal doctrine, see Brief of Appellant (Wright, No. 55745-9-I), at 6-13, and Reply Brief of Appellant (Wright, No. 55745-9-I), at 7-12.

3. THE "MISTRIAL" BRANCH OF DOUBLE JEOPARDY JURISPRUDENCE DOES NOT APPLY IN THESE CIRCUMSTANCES.

Finally, Wright contends that double jeopardy bars any retrial on intentional second-degree murder because the State "abandoned" the intentional murder alternative means. Petition for Review (Wright), at 17-20. This claim should also be rejected. In these cases, both the defendants and the State asked that the juries be instructed on only the felony murder alternative. The trials in these cases did not end prematurely due to the State's misconduct, as is required for operation of the "mistrial" branch of double jeopardy. To the contrary, *all* parties proceeded at trial in these cases on the well-founded belief that felony murder was a viable theory of liability.

Double jeopardy may be triggered so as to bar any retrial when, after a trial has commenced, the trial is aborted and the jury is discharged without a verdict, and the proceedings have ended prematurely due to the misconduct or dilatory behavior of the prosecution. Downum v. United States, 372 U.S. 734, 736-37, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). In such circumstances, "[w]here the trial is terminated over the objection of the defendant," double jeopardy generally bars retrial unless there was a "manifest

necessity" to discharge the jury without a verdict. Oregon v. Kennedy, 456 U.S. 667, 672, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).¹⁸ On the other hand, in cases where the defendant requests or agrees to a mistrial, double jeopardy does not apply unless the mistrial is due to a prosecutor's misconduct that is "intended to 'goad' the defendant into moving for a mistrial." Id. at 675; see also United States v. Tateo, 377 U.S. 463, 467, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

In these cases, obviously, none of the parties requested a mistrial as to intentional murder. However, the case upon which Wright principally relied in the Court of Appeals in arguing that the State improperly abandoned the intentional murder alternative means is purportedly based on this "mistrial" branch of double jeopardy jurisprudence. See Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988). However, Saylor's application of double jeopardy is analytically unsound.

In Saylor, the defendant was charged with murder as an accomplice, and with conspiracy to commit murder. At trial, the

¹⁸ See also Sizemore v. Fletcher, 921 F.2d 667, 673 (6th Cir. 1990) (analyzing whether double jeopardy bars retrial where mistrial was declared due to prosecutor's egregious misconduct during closing argument).

prosecutor agreed – over the defendant's objection – that the jury should be instructed only as to the conspiracy charge, even though there was no evidence to support it. Saylor, 845 F.2d at 1402. Not surprisingly, this conspiracy conviction was reversed on appeal due to insufficient evidence. Id. Moreover, the Sixth Circuit held that any retrial on murder as an accomplice was barred by double jeopardy because "the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making[.]" Id. at 1403. In so holding, the court expressly recognized that the defendant "neither was convicted nor was acquitted" of murder as an accomplice in these circumstances.¹⁹ Id. Nonetheless, the court found that double jeopardy was triggered, analogizing Saylor's case to those applying the "mistrial" branch of double jeopardy. Saylor, 845 F.2d at 1405-09.

Wright and Bryant will likely contend that their cases are identical to Saylor, and urge the same result here. But, as the Court of Appeals correctly recognized, Saylor rests largely on Downum and its progeny while at the same time dispensing with an essential aspect of the mistrial cases: misconduct, overreaching, or

¹⁹ Although Wright relies upon Saylor to support his position that double jeopardy bars retrial on a quasi-mistrial theory, he fails to acknowledge that Saylor directly undercuts his position regarding the implied acquittal doctrine.

malfeasance on the part of the prosecutor that forces the trial to end prematurely over the defendant's objection.²⁰ Wright, 131 Wn. App. at 484-85. Thus, Saylor "is not solidly tethered to the precedents it cites."²¹ Id. at 483.

Furthermore, Saylor is readily distinguishable from these cases in at least two crucial respects. First, Wright and Bryant, unlike the defendant in Saylor, did not *object* to the omission of the intentional murder alternative means from the jury instructions; to the contrary, they also proposed to instruct the juries only on felony murder.²² Second, unlike Saylor, these juries were not instructed on a crime for which there was no evidence because the "prosecutor was asleep at the switch"²³; rather, these juries were instructed on a crime supported by ample evidence, and which all parties believed in good faith to be viable, but that was later found

²⁰ The Saylor court expressly acknowledged that the prosecutor's actions were "not affirmatively illegitimate[.]" Saylor, 845 F.2d at 1408.

²¹ Saylor also cites traditional double jeopardy cases as supporting its result, while simultaneously acknowledging that traditional double jeopardy analysis is inapplicable in these circumstances. Saylor, 845 F.2d at 1406-07.

²² A critical consideration for the Saylor court was "the fact that the defense implicitly pointed out the prosecution's instructional error by objecting to the proposed conspiracy instructions." Saylor, 845 F.2d at 1407.

²³ United States v. Davis, 873 F.2d 900, 905 (6th Cir. 1989) (discussing, distinguishing, and retreating from Saylor).

to be nonexistent.

Saylor appears to be an anomaly in double jeopardy jurisprudence. Thus, it is not surprising that the Sixth Circuit has retreated from it in at least one subsequent case. In United States v. Davis, 873 F.2d 900 (6th Cir. 1989), the court held that where the defendant was convicted of a crime later found on appeal to be invalid, double jeopardy did not bar a second trial for an existing crime on remand. The court further observed that "[i]f Saylor were correctly decided," its reasoning should be applied only in circumstances like Saylor where there was "no logical nexus" between the theory of liability submitted to the jury and the theory that was withheld.²⁴ Id. at 904-05.

By that same reasoning, the Illinois Supreme Court has rejected Saylor's analysis as applied to a case virtually identical to Wright's and Bryant's. In People v. Daniels, 187 Ill.2d 301, 718 N.E.2d 149, 240 Ill. Dec. 668 (1999), the defendant was charged with murder by alternative means (felony murder and intentional murder), but only one alternative (intentional murder) was submitted to the jury. After the resulting conviction was reversed

²⁴ For a thorough and scathing analysis of Saylor's analytical flaws, see United States v. Davis, 714 F. Supp. 853, 859-61 (S.D. Ohio 1988).

on appeal, the defendant argued that the State had abandoned the felony murder alternative and that double jeopardy barred any further prosecution of that alternative, citing Saylor. Daniels, 187 Ill.2d 304-08.

In rejecting this argument, the court first observed that the defendant had never been expressly or impliedly acquitted of murder under either alternative, and thus traditional double jeopardy analysis did not apply.²⁵ Id. at 310-11. Moreover, the court distinguished Saylor because, unlike murder and conspiracy, intentional murder and felony murder are not separate crimes, but alternative methods of committing a single crime.²⁶ Therefore, the failure to submit instructions on one alternative means in the first trial had no effect on the State's ability to proceed on that alternative means in a subsequent trial because the defendant was being prosecuted for the same crime throughout the proceedings. Daniels, at 313-117.

In sum, the "mistrial" branch of double jeopardy does not apply in these cases. The trials in these cases were not ended

²⁵ Again, this undercuts the defendants' claim that they were impliedly acquitted.

²⁶ This is also the law in Washington. State v. Berlin, 133 Wn.2d 541, 552-53, 947 P.2d 700 (1997) (intentional murder and felony murder are alternative means of committing a single offense).

prematurely due to the misconduct, overreaching, or dilatory behavior of the State. Furthermore, the defendants did not object to the instructions submitted to the juries; to the contrary, the defendants proposed the very same instructions on only felony murder. Accordingly, these cases do not present a situation like Downum where the proceedings were aborted over the defendants' objections due to the misconduct of the State. The Court of Appeals correctly concluded that there is no double jeopardy bar to further prosecution for intentional second-degree murder under an abandonment or mistrial theory.²⁷ Wright, 131 Wn. App. at 481-87.

D. CONCLUSION

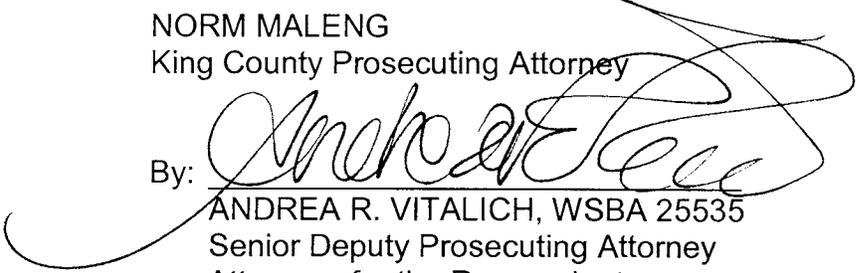
For the foregoing reasons, for the reasons stated in the State's Brief of Appellant and Reply Brief of Appellant in State v. Oliver Wright, COA No. 55745-9-I, and for the reasons stated in State v. Wright, 131 Wn. App. 474, 127 P.3d 742 (2006), this Court should affirm the Court of Appeals and remand these cases for trial on the charge of murder in the second degree.

²⁷ For further briefing by the State on the "abandonment" issue, see Reply Brief of Appellant (Wright, No. 55745-9-I), at 14-17.

DATED this 6th day of April, 2007.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

By: 
ANDREA R. VITALICH, WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

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 petitioner Oliver Wright, at Washington Appellate Project, 1511 3rd Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. OLIVER WRIGHT & DENNIS BRYANT, Cause No. 78465-5 & 78788-3 (consolidated), in the Supreme Court, 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.

W Brame

Name

Done in Seattle, Washington

4/6/07

Date

Certificate of Service by Mail

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BY RICHARD H. SALPANTELLI

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for petitioner Dennis Bryant, at Nielson Broman & Koch PLLC, 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of Respondent, in STATE V. OLIVER WRIGHT & DENNIS BRYANT, Cause No. 78465-5 & 78788-3 (consolidated), in the Supreme Court, 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.

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