

TABLE OF CONTENTS

	Page
A. IDENTITY OF PETITIONER.....	1
B. DECISION	1
C. ISSUES PRESENTED FOR REVIEW.....	1
(1) Jacob Gamble’s case was remanded after his second degree felony murder conviction (predicate offense second degree assault) was reversed under In re Per. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). Did the trial court violate federal and state double jeopardy and CrR 4.3.1, the mandatory joinder rule, by allowing the State to file a first degree manslaughter charge?	1
(2) Jacob Gamble proposed a lesser included instruction of second degree manslaughter. Did the trial court err by not giving the instruction when Gamble’s recorded statement demonstrated that he failed to be aware of the risk that his actions created?.....	2
D. STATEMENT OF THE CASE	2
(1) Factual history.	2
(2) Procedure history.	3
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	5
Double jeopardy and mandatory joinder	5
Second degree manslaughter lesser instruction.....	6
F. CONCLUSION.....	9
G. APPENDIX	11

TABLE OF AUTHORITIES

Page

Cases

<u>Beck v. Alabama</u> , 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).....	7
<u>In re Pers. Restraint of Address</u> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	i, 1, 2, 4
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289 (1993)	8
<u>State v. Berlin</u> , 133 Wn. 2d 541, 947 P.2d 700 (1997)	7
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	7
<u>State v. Gamble</u> , 116 Wn. App. 1016, 2003 Wash. App. LEXIS 1047 (2003).....	4
<u>State v. Gamble</u> , 118 Wn. App. 332, 72 P.3d (2003).....	3, 4
<u>State v. Gamble</u> , 154 Wn.2d 457, 114 P.3d 646 (2005)	5
<u>State v. Gamble</u> , 2007 Wash. App. LEXIS 665 (Wash. Ct. App. Apr. 10, 2007)	9
<u>State v. Gostol</u> , 92 Wn. App. 832, 965 P.2d 1121 (1998)	7
<u>State v. Harris</u> , 121 Wn.2d 317, 849 P.2d 1216 (1993).....	6
<u>State v. Parker</u> , 102 Wn.2d 161, 683 P.2d 189 (1984)	8
<u>State v. Ramos</u> , 124 Wn. App. 334, 101 P.3d 872 (2004)	1, 5
<u>State v. Warden</u> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	6
<u>State v. Workman</u> , 90 Wn. 2d 443, 584 P.2d 382 (1978).....	6

Statutes

RCW 10.61.006 6
RCW 9A.08.010(1)(c), (d) 8
RCW 9A.32.060(1)(a) 8
RCW 9A.32.070 8

Other Authorities

CrR 4.3.1(b)(3) i, 1, 5, 11
Wash. Const. Art. I, Section 22 6

A. IDENTITY OF PETITIONER

Jacob Gamble asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

Jacob Gamble seeks review of that portion of the Court of Appeals decision filed on April 10, 2007, affirming his conviction and holding that the trial court did not err by: (1) following State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), and using the mandatory joinder ends of justice exception under CrR 4.3.1(b)(3) to permit the State to file first degree manslaughter charges against Gamble after his second degree felony murder conviction was reversed under In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002); and (2) refusing to instruct the jury on the lesser included offense of second degree manslaughter.

A copy of the decision of the Court of Appeals is attached.

C. ISSUES PRESENTED FOR REVIEW

(1) Jacob Gamble's case was remanded after his second degree felony murder conviction (predicate offense second degree assault) was reversed under In re Per. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). Did the trial court violate federal and state double jeopardy and CrR 4.3.1, the mandatory joinder rule, by allowing the State to file a first degree manslaughter charge?

(2) Jacob Gamble proposed a lesser included instruction of second degree manslaughter. Did the trial court err by not giving the instruction when Gamble's recorded statement demonstrated that he failed to be aware of the risk that his actions created?

D. STATEMENT OF THE CASE

(1) Factual history.

On March 26, 1999, Andrew "Drew" Young hosted a party for his high school friends while his parents were out of town. 11A RP 557. At least 50-60 people attended the party. 11A RP 557.

The focus of the trial testimony was on five persons who attended the party: Kevin Phommahasay, Curtis Esteban, Daniel Carroll, Ryan May, and Jacob Gamble.

Phommahasay perceived that Esteban had slighted him or a family member in some fashion. 10B RP 377. Phommahasay wanted to fight Esteban and made others at the party aware of this. 10A RP 276. Phommahasay confronted Esteban on the front lawn. 10B RP 405, 434. Phommahasay broke a beer bottle on Esteban's head. 10B RP 405, 434. Esteban's friend, Daniel Carroll, ran toward the Phommahasay-Esteban fight and was punched in the face by Gamble. 11A RP 630. Carroll fell backwards and landed on a cement sidewalk. 11A RP 293. Gamble and Ryan May, both friends of Phommahasay, kicked Carroll while he was down and not

responsive. 11A RP 296, 338. Carroll died on April 1. 10A RP 261, 263.

The police arrested Gamble shortly after the incident. Gamble gave a taped statement. 12C RP 1193-1211. The jury heard the taped statement. In the statement, Gamble said that he got caught up in the moment and intentionally punched Carroll, a person he did not know. 12C RP 1193-1211. He also said he kicked Carroll one time on the left side of his head and cussed at Carroll. 12C RP 1193-1211. He did not mean to kill Carroll. 12C RP 1193-1211. Gamble did not testify.

(2) Procedure history.

Gamble was originally charged under a two count information: count I charged first degree felony murder with robbery as the underlying felony; count II charged second degree murder with assault in the second degree as the underlying felony. Gamble was convicted of both charges. Daniel Carroll was the victim for both charges. State v. Gamble, 118 Wn. App. 332, 72 P.3d (2003) (Gamble II). Gamble appealed.

In an unpublished opinion, Division II reversed the first degree felony murder conviction finding insufficient evidence of Gamble's intent to steal from Carroll. State v. Gamble, 116 Wn.

App. 1016, 2003 Wash. App. LEXIS 1047 (2003) (Gamble I). In a published opinion, Division II reversed the second degree felony murder based upon this court's holding in Andress that second degree assault was an invalid predicate offense and could not support a conviction for second degree felony murder. Gamble II, 118 Wn. App. at 335. Division II fashioned a remedy directing that Gamble's case be remanded to the trial court for imposition of a first degree manslaughter conviction. Id. at 340.

This court accepted Gamble's petition for review only on the issue of whether first degree manslaughter should be the remedy on remand. State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) (Gamble III). This court disapproved of the remedy and sent Gamble's case back to the trial court for further proceedings. Id. at 469-70.

On remand, the State charged Gamble with second degree intentional murder (count I) and first degree manslaughter (count II). CP 1, 92-93. Gamble made multiple pre-trial motions including argument that filing those charges was double jeopardy and violated the mandatory joinder rule. CP 2-10, 11-39, 101-04; 1 RP 12-30, 5 RP 140. The trial court denied all of Gamble's motions. CP 160-61.

Gamble was retried on November 7-17, 2005. 3-15 RP.

The court discussed jury instructions at length. 13B RP 1388-1432. Gamble proposed second degree manslaughter as a lesser included offense. See Supp. CP; 13 RP 1404. The State objected to the instruction. The trial court held that the evidence did not support the instruction. 13 RP 1404-07.

The jury acquitted Gamble of second degree intentional murder but convicted him of first degree manslaughter. CP 145-46.

Gamble made a timely appeal. CP 178. On appeal, he challenged the filing of the first degree manslaughter charge as violating federal and state double jeopardy and the mandatory joinder rule, CrR 4.3.1. Gamble also challenged trial court's refusal to give the second degree manslaughter lesser included instruction. Division II affirmed Gamble's conviction.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Double jeopardy and mandatory joinder. This case presents a significant question of constitutional magnitude that should be reviewed under RAP 13.4(b)(3). This court acknowledged its significance when it accepted State v. Ramos and State v. Medina (77347-5 consolidated with 77360-2) for

review. Appellant Gamble's issue is identical. It merits the same level of review.

Second degree manslaughter lesser instruction.

In keeping with the constitutional requirement of notice under Wash. Const. Art. I, Section 22, the lesser included offense doctrine entitles the prosecution or the defendant to a jury instruction on a crime other than the one charged only if the commission of the lesser offense is necessarily included within the offense for which the defendant is charged in the indictment or information. RCW 10.61.006. The two-pronged Workman test is used to determine whether a lesser offense is included within the charged offense. State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382 (1978). Under the legal prong, each of the elements of the lesser offense must be a necessary element of the offense charged. Id.; State v. Harris, 121 Wn.2d 317, 321-23, 325-26, 849 P.2d 1216 (1993). Second degree manslaughter necessarily and invariably includes the elements of manslaughter in the first degree. State v. Warden, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997). Under the factual prong, the evidence of the case must support an inference that only the lesser included offense was committed to the exclusion of the

charged offense. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In other words, the evidence must affirmatively establish the defendant's theory of the case as it is not enough that the jury might disbelieve the evidence pointing to guilt. Id. at 456. Some evidence must be presented which affirmatively established the defendant's theory on the lesser included offense before an instruction should be given. State v. Berlin, 133 Wn. 2d 541, 546, 947 P.2d 700 (1997). If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense, a lesser included offense instruction should be given. Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Although there must be affirmative evidence from which a jury could find the defendant committed the lesser offense, the evidence can come from the State or the defendant because there is no requirement that the defendant offer the evidence or that the defendant's testimony cannot contradict the evidence. State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998).

In determining if the evidence at trial was sufficient to support the giving of a lesser included instruction the evidence

must be viewed in the light most favorable Gamble. Fernandez-Medina, 141 Wn.2d at 455-56. Error in failing to give a legally and factually supported lesser included instruction is always reversible error. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984).

First degree manslaughter is committed when a person recklessly causes the death of another person. RCW 9A.32.060(1)(a). Second degree manslaughter is committed when a person, with criminal negligence, causes the death of another person. RCW 9A.32.070.

RECKLESSNESS: A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

CRIMINAL NEGLIGENCE: A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1)(c), (d).

Although Gamble did not testify, his failure to be aware of the substantial risk of Carroll's injury was the essence of his case. In the taped statement that Gamble gave to the police, he said he

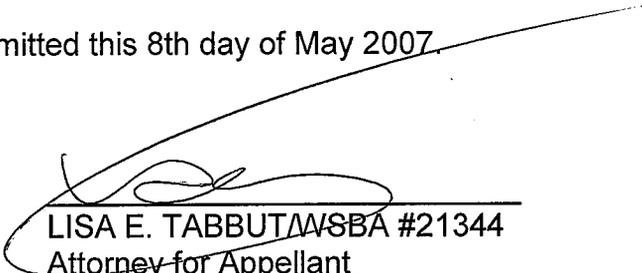
got caught up in the moment when he saw Carroll stagger toward the fray between Phommahasay and Esteban, he intentionally struck Carroll in the face, he knew Carroll landed on the cement sidewalk, and he kicked Carroll once on the side of the head and swore at him. Most importantly, Gamble also said that he did not want to hurt Carroll.

In its opinion, the appellate court maintains that Gamble's statement is not enough as, "There is no evidence in the record from which the jury could conclude that Gamble was unaware of the potentially deadly consequences of his intentional assaults". State v. Gamble, 2007 Wash.App LEXIS 665 (Wash. Ct. App. Apr. 10, 2007) at 14. In reaching this conclusion, the court is wrong. Gamble's statement that he did not want to hurt Carroll coupled with his seemingly contrary actions is clear evidence that Gamble was not aware of the potentially deadly consequences of actions. As this is the standard for negligent conduct, the appellate court erred in affirming the denial of the second degree manslaughter lesser instruction.

F. CONCLUSION

For the reasons stated herein, Appellant Gamble respectfully requests that this court accept review and reverse the decision of the Court of Appeals.

Respectfully submitted this 8th day of May 2007.



LISA E. TABBUTT WSBA #21344
Attorney for Appellant

G. APPENDIX

CrR 4.3.1 CONSOLIDATION FOR TRIAL

(a) Consolidation Generally. Offenses or defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.

(b) Failure to Join Related Offenses.

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(4) Entry of a plea of guilty to one offense does not bar the subsequent prosecution of a related offense unless the plea of guilty was entered on the basis of a plea agreement in which the prosecuting attorney agreed to seek or not to oppose dismissal of

other related charges or not to prosecute other potential related charges.

(c) Authority of Court To Act on Own Motion. The court may order consolidation for trial of two or more indictments or informations if the offenses or defendants could have been joined in a single charging document under rule 4.3.



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

April 10, 2007

Michael C. Kinnie
Attorney at Law
1200 Franklin
Po Box 5000
Vancouver, WA, 98666-5000

Lisa Elizabeth Tabbut
Attorney at Law
PO Box 1396
Longview, WA, 98632-7822

CASE #: 34125-5-II
State of Washington, Respondent, v. Jacob Gamble, Appellant

Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a long horizontal flourish extending to the right.

David C. Ponzoha
Court Clerk

DCP:llp
Enclosure

cc: Judge James E. Rulli
Indeterminate Sentence Review Board
Defendant

FILED
COURT OF APPEALS
DIVISION II

07 APR 10 AM 8:45

STATE OF WASHINGTON

BY lp
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JACOB GAMBLE,

Appellant.

No. 34125-5-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — Jacob Gamble and Ryan May killed Daniel Carroll. A jury originally convicted Gamble of second degree felony murder based on the predicate offense of second degree assault of Carroll. We vacated that conviction after our Supreme Court held in *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), that felony murder could not be based on the predicate offense of second degree assault. *State v. Gamble*, 118 Wn. App. 332, 72 P.3d 1139 (2003) (*Gamble II*). The case was remanded and, on November 16, 2005, a second jury found Gamble guilty of first degree manslaughter. Following the new exceptional sentencing procedures established by the legislature in RCW 9.94A.537 (Laws of 2005, ch. 68, § 4), the jury found an aggravating sentencing factor, and the trial court imposed an exceptional sentence above the standard range. Gamble appeals his conviction and his exceptional sentence.

Gamble's central arguments are that the double jeopardy provisions of the federal and state constitutions and procedural rules requiring the joinder of related offenses mandate the

dismissal of the first degree manslaughter charge related to his killing of Carroll. He also argues that (1) the trial court erred when it refused to give his proposed lesser included offense instruction on second degree manslaughter; (2) the facts did not support the aggravating factor the jury found; and (3) the trial court lacked the authority to impose the exceptional sentence. Holding that (1) the new charges did not implicate double jeopardy; (2) the “ends of justice” exception to the mandatory joinder rule applies and allows trial following remand; (3) the trial court did not err in refusing to give Gamble’s proposed lesser included offense instruction; (4) the evidence supported the jury’s aggravating factor finding; and (5) the trial court had the authority to impose the exceptional sentence, we affirm.

FACTS

BACKGROUND

On March 26, 1999, while his parents were out of town, Andrew Young hosted a party for some high school friends including Gamble. By 11:30 P.M., there were over 50 young people at the party; most of them were drinking alcohol or smoking marijuana. *State v. Gamble*, 154 Wn.2d 457, 460, 114 P.3d 646 (2005) (*Gamble III*).

That night, Gamble’s friend, Kevin Phommahasay, was bragging that he was going to fight Curtis Esteban. When Esteban and his friend, Carroll, arrived at the party, Phommahasay immediately confronted Esteban on the front lawn of the house and hit him on the head with a beer bottle. *Gamble III*, 154 Wn.2d at 460. Carroll, who knew that Esteban suffered from seizures, ran toward the fight in an attempt to stop it.

Gamble punched Carroll in the face, knocking him to the ground; Carroll hit his head on the cement sidewalk. As he lay unconscious on the sidewalk, Gamble and May kicked and

No. 34125-5-II

stomped on Carroll. When they finished the attack, May took Carroll's cell phone. Carroll never regained consciousness, and doctors pronounced him dead five days later on April 1, 1999.

The police arrested Gamble soon after the fight.¹ In a taped statement,² Gamble told police that he had become "caught up in the moment" and that he had intentionally punched Carroll. 12C Report of Proceedings at 1193-1211.

PROCEDURAL HISTORY: PRIOR APPEALS

The State charged Gamble with first degree felony murder in the course of a robbery³ and second degree felony murder with the predicate offense of second degree assault.⁴ On February 12, 2000, a jury found him guilty on both counts. *Gamble II*, 118 Wn. App. at 334. In an unpublished opinion, we reversed the first degree felony murder conviction, concluding that the evidence that May took Carroll's cell phone was insufficient to support the predicate crime of robbery necessary to convict Gamble of first degree felony murder as charged. *State v. Gamble*, 116 Wn. App. 1016, 2003 Wash. App. LEXIS 1047 (2003) (*Gamble I*).

While Gamble's first appeal was pending, our Supreme Court issued *Andress*. We ordered additional briefing on the impact of *Andress* on Gamble's case, *Gamble III*, 154 Wn.2d at 460, and concluded that *Andress* required reversal of Gamble's second degree felony murder

¹ May and Phommahasay were charged and tried separately.

² The taped statement was played for the jury at both trials.

³ RCW 9A.32.030(1)(c)(1).

⁴ Former RCW 9A.32.050(1)(b) (1975). In 2003, in response to *Andress*, the legislature amended this statute to specifically include assault as a predicate offense to felony murder. Laws of 2003, ch. 3, § 2. This amendment is not applicable to this case.

conviction.⁵ *Gamble II*, 118 Wn. App. at 335-36. Holding that first degree manslaughter was a lesser included offense of second degree felony murder when the predicate second degree assault was charged under RCW 9A.36.021(1)(a),⁶ we remanded the case back to the trial court with directions that it enter a guilty verdict on the lesser included offense of first degree manslaughter under RCW 9A.32.060(1)(a).⁷ *Gamble II*, 118 Wn. App. at 340.

Gamble petitioned our Supreme Court for review. The court accepted the petition for review on the sole issue of whether first degree manslaughter is a lesser included offense of second degree felony murder where assault is the predicate felony. *Gamble III*, 154 Wn.2d at 462. Relying in part on cases in which the predicate assault had been charged under a different section of the second degree assault statute, RCW 9A.36.021(1)(c), which required an assault with a deadly weapon, *State v. Davis*, 121 Wn.2d 1, 4, 846 P.2d 527 (1993), and *State v. McJimpson*, 79 Wn. App. 164, 171-72, 901 P.2d 354 (1995), *review denied*, 129 Wn.2d 1013

⁵ In *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), our Supreme Court clarified that *Andress* applies to anyone convicted of second degree felony murder under former RCW 9A.32.050 (1976) 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 had meant since 1976,” the former felony murder statute did not establish a crime based on second degree assault. *Hinton*, 152 Wn.2d at 859.

⁶ RCW 9A.36.021(1)(a) currently defines second degree assault when a defendant “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm,” which is identical to the definition in the instruction given in this case. In 1976, a defendant was guilty of second degree assault when he or she “[s]hall knowingly inflict grievous bodily harm upon another with or without a weapon.” Former RCW 9A.36.020(1)(b) (1975) (repealed by Laws of 1986, ch. 257, § 9). In 1987, the legislature changed this definition and a defendant was guilty of second degree assault when he “[i]ntentionally assaults another and thereby inflicts substantial bodily harm.” Former RCW 9A.36.021(1)(a) (1987). In 1988, the word “recklessly” was added and the current definition of second degree assault was adopted.

⁷ RCW 9A.32.060(1) provides that “[a] person is guilty of manslaughter in the first degree when: (a) He recklessly causes the death of another person.”

No. 34125-5-II

(1996),⁸ the Supreme Court held that second degree felony murder has no lesser included offenses and stated that we had “erroneously remanded for an entry of conviction of first degree manslaughter.” *Gamble III*, 154 Wn.2d at 460. The court then remanded the case to the trial court for further, unspecified proceedings “in accord with” its decision. *Gamble III*, 154 Wn.2d at 470.

REMAND

On remand, the State charged Gamble with second degree intentional murder and, in the alternative, first degree manslaughter. The State also sought an exceptional sentence specifying, under both counts of the information, that Carroll was “particularly vulnerable or incapable of resistance” when Gamble committed the act. Clerk’s Papers (CP) at 91. Before trial, Gamble argued that constitutional double jeopardy provisions and mandatory joinder rules required dismissal of the charges. The trial court denied the motion.

Gamble’s second trial began on November 7, 2005. Over Gamble’s objection, the trial court declined to give his proposed second degree manslaughter instruction holding that, although second degree manslaughter was a lesser offense of first degree manslaughter, the evidence presented to the jury did not support such an instruction.

The jury found Gamble guilty of first degree manslaughter. Following the verdict, the trial court orally instructed the jury on the aggravating factor of particular vulnerability based on Carroll being unconscious during a portion of the attack. The jury returned a special verdict finding Carroll was *particularly* vulnerable. The trial court sentenced Gamble to 102 months

⁸ See also, *State v. DeRosia*, 124 Wn. App. 138, 153 n.23, 100 P.3d 331 (2004).

No. 34125-5-II

and added 48 months to reflect Carroll's particular vulnerability, for a total of 150 months.⁹ Gamble again appeals.

ANALYSIS

DOUBLE JEOPARDY

Gamble first asserts that constitutional double jeopardy provisions bar the State from filing intentional murder and first degree manslaughter charges for Carroll's death, arguing that a conviction on either of these charges would result in him being "twice punished for the same offense, homicide." Br. of Appellant at 9. We disagree.

The double jeopardy clause of the Fifth Amendment of the federal constitution and article I, section 9 of the Washington constitution¹⁰ contain three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *State v. Wright*, 131 Wn. App. 474, 478, 127 P.3d 742 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)), review granted, 2007 Wash. LEXIS 139 (Wash. Mar. 8, 2007); see also, *State v.*

⁹ The original trial court sentenced Gamble to 320 months for the first degree felony murder conviction that we later vacated due to insufficient evidence. It did not enter a judgment and sentence on the second degree felony murder conviction.

¹⁰ The Fifth Amendment of the United States Constitution provides that a person may not be "subject for the same offense to be twice put in jeopardy of life or limb." Similarly, the Washington Constitution's article I, section 9, provides that a person shall not "be twice put in jeopardy for the same offense."

The federal double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). Washington courts have interpreted article I, section 9 to be the same as the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 103, 896 P.2d 1267 (1995) (citing *State v. Ridgley*, 70 Wn.2d 555, 556, 424 P.2d 632 (1967); *State v. Larkin*, 70 Wn. App. 349, 352-53, 853 P.2d 451 (1993); *State v. Kirk*, 64 Wn. App. 788, 790-91, 828 P.2d 1128, review denied, 119 Wn.2d 1025 (1992)).

No. 34125-5-II

Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). An accused must “suffer jeopardy before he can suffer double jeopardy.” *Serfass v. United States*, 420 U.S. 377, 393, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975).

But the double jeopardy clause “imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside” on any ground other than insufficiency of the evidence because the defendant’s appeal is part of the initial or continuing jeopardy. *State v. Corrado*, 81 Wn. App. 640, 647-48, 915 P.2d 1121 (1996) (quoting *Tibbs v. Florida*, 457 U.S. 31, 40, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982)); see also *United States v. Tateo*, 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964); *State v. Brown*, 127 Wn.2d 749, 756-57, 903 P.2d 459 (1995). Thus, if a defendant’s conviction is reversed on trial court errors or legal grounds other than insufficiency of evidence, the State may retry the defendant “for the convicted offense and any lesser included offenses.” *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982).

Here, we reversed Gamble’s first degree felony murder conviction because the evidence was insufficient to prove Gamble intended to rob Carroll. *Gamble I*, 2003 Wash. App. LEXIS 444 at *8. Thus, double jeopardy clearly bars the State from retrying Gamble for first degree felony murder.

But the evidence of Gamble’s intentional assault on Carroll was not insufficient—it was overwhelming. We vacated Gamble’s second degree felony murder charge solely because the Supreme Court’s decision in *Andress* declared the charge invalid and required that we vacate the jury’s verdict as a matter of law. Because we did not reverse Gamble’s second degree felony murder conviction for insufficient evidence, constitutional double jeopardy provisions do not bar

Gamble's second trial for properly drafted homicide charges and any necessarily included offenses. *Corrado*, 81 Wn. App. at 647 (citing *Tibbs*, 457 U.S. at 40).

"ENDS OF JUSTICE" EXCEPTION TO CrR 4.3.1

Gamble next argues that even if double jeopardy does not prohibit retrial, the mandatory joinder rule of CrR 4.3.1(b)¹¹ prohibits the State from trying him on charges not contained in the original information. Again, we disagree.

Generally, the mandatory joinder rule requires the State to charge all related offenses in a single information. If the State fails to timely charge a related offense, the mandatory joinder rule precludes it from later charging that defendant with the related offense arising out of the same conduct "unless the court determines that . . . the ends of justice would be defeated if the motion [to dismiss for failure to join a related offense] were granted." CrR 4.3.1(b)(3).

In *State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004), Division One of this court observed that the Supreme Court's unprecedented ruling in *Andress* was such an extraordinary

¹¹ CrR 4.3.1(b), Failure to Join Related Offenses, provides in part:

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

circumstance that the ends of justice would be defeated if defendants otherwise properly convicted of second degree felony murder were set free by operation of a court-created procedural rule requiring joinder of related offenses. We agree.¹²

Here, as in *Ramos*, the State acknowledges that the vacated second degree felony murder and manslaughter charges are related offenses. 124 Wn. App. at 339. “Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct. ‘Same conduct’ is conduct involving a single criminal incident or episode.” *Ramos*, 124 Wn. App. at 338 (quoting *State v. Watson*, 146 Wn.2d 947, 957, 51 P.3d 66 (2002)). But the State argues that the trial court properly invoked the “ends of justice” exception to the mandatory joinder rule to allow the State to, in effect, amend the information on remand to correct a technical charging defect and comply with newly announced law. Thus, a new trial on the properly stated charge could proceed. *Ramos*, 124 Wn. App. at 339.

The *Ramos* court concluded that the *Andress* decision

abandon[ed] an unbroken line of precedent on a question of statutory construction after more than 25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of [the defendants]. This is not a case in which the State negligently failed to charge a related crime or engaged in harassment tactics.

¹² To the extent *Ramos* suggests that *double jeopardy* prohibited the State from retrying *Ramos* for second degree felony murder with the predicate felony of assault, *see* 124 Wn. App. at 338, we respectfully disagree.

As is the case here, *Ramos*’s second degree felony murder conviction was improper solely because *Andress* declared the charge invalid, and that conviction was vacated as a matter of law. *Andress* addressed the sufficiency of the charging documents and the information, not the sufficiency of the evidence supporting the conviction. Thus, the second degree felony murder predicated on assault of the victim charge was invalid based on legal, rather than sufficiency, grounds and double jeopardy does not apply. *See Anderson*, 96 Wn.2d at 742; *cf. State v. Hughes*, 118 Wn. App. 713, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004) (remand for resentencing on predicate felony of assault charged under RCW 9A.36.021(1)(c) after second degree felony murder conviction reversed under *Andress*).

Notably, in its later extended discussion of double jeopardy, the *Ramos* court discussed only the original charge of first degree intentional murder and the lesser included offense of second degree intentional murder, not the lesser included offense of second degree felony murder. 124 Wn. App. at 342-43.

Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control.

124 Wn. App. at 342. We agree.

In *Andress*, the Supreme Court made the extraordinary decision to go behind a facially valid judgment and sentence in a collateral attack and then beyond the plain language of the statute to interpret the legislature's intent 30 years ago when it enacted the second degree felony murder statute. Accordingly, we, like Division One, also hold that this nearly unprecedented procedure triggered the "ends of justice" exception to another procedural rule—the mandatory joinder rule set out in CrR 4.3.1. *See Ramos*, 124 Wn. App. at 337; *see also, Wright*, 131 Wn. App. 474 (the State's failure to request an intentional murder instruction at the initial trial had no effect on the State's ability to proceed on that alternative and rejecting the defendant's claims under the mandatory joinder rule).

Both the trial court and this court are bound by the Supreme Court's *Andress* decision. *See State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997). CrR 4.3.1, however, grants a trial court the authority to determine when the operation of the mandatory joinder rule would defeat the ends of justice.

It is axiomatic that a defendant has a due process right to notice of the laws with which he must comply. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). But the people of the State also have a right to the protection of their laws. Accordingly, when the Supreme Court announces a new interpretation of a statute that negates a prior conviction, the ends of justice demand that the people, through their elected prosecutors, have an opportunity to file the appropriate charge and try the defendant for the appropriate crime if the facts of the crime

No. 34125-5-II

demonstrate that the defendant's acts were equally unlawful under a different statute that existed at the time of the offense. *See Dale v. Haeberlin*, 878 F.2d 930 (6th Cir. 1989) ("fair warning" component of the ex post facto clause and due process requires that a defendant be fully informed as to whether his actions are criminal; key to a fair warning analysis is what the defendant could have anticipated at the time he committed the crime), *cert. denied*, 494 U.S. 1058 (1990). Gamble's trial for Carroll's death may well be a second or third trial, but it is not a "retrial," because the original charge has been ruled to have been legally defective and, at the defendant's request, has been vacated and the matter remanded to the trial court. *See Corrado*, 81 Wn. App. at 646-47.

Here, the trial court properly relied on *Ramos* and denied Gamble's motion to dismiss, finding that there were extraordinary circumstances triggering the "ends of justice" exception to the mandatory joinder under CrR 4.3.1. We agree that *Andress* is such an extraordinary circumstance as to trigger the "ends of justice" exception to the procedural rule-based joinder requirement. Thus, the trial court did not err when it allowed the State to try Gamble on homicide charges that would have been joined in the original information under CrR 4.3.1 if the State had been on notice of the *Andress* interpretation of the second degree felony murder statute at the time it filed the original charges.

DENIAL OF PROPOSED JURY INSTRUCTION

Gamble also argues that the trial court erred when it refused to instruct the jury on the lesser included offense of second degree manslaughter.¹³ The trial court held that, although second degree manslaughter is a lesser included offense of first degree manslaughter, the evidence was insufficient for any jury to have found that Gamble had acted only in a negligent manner when he intentionally punched Carroll and then stomped and kicked him while he was unconscious, thereby causing his death.

A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is necessarily included in the charged offense; and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime. *Andress*, 147 Wn.2d at 613 (citing *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Lyon*, 96 Wn. App. 447, 450, 979 P.2d 926 (1999), *review denied*, 140 Wn.2d 1003 (2000)). This test is commonly referred to as the *Workman* test. Gamble argues that he has met both the legal and factual prongs of this test. Again, we disagree.

¹³ Gamble's proposed jury instruction provided:

To convict the defendant, Jacob Gamble, of the crime of Manslaughter in the second degree as a lesser included offense of Manslaughter in the First degree each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 26, 1999, Jacob Gamble or an accomplice with criminal negligence caused the death of Dan Carroll[.]

(2) That the acts occurred in Clark County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return the verdict of guilty.

On the other hand, if . . . after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Suppl. CP at 189.

To satisfy *Workman's* factual prong, Gamble was required to demonstrate to the trial court that, viewed in the light most favorable to him,¹⁴ the jury could find him guilty of the inferior or lesser offense only. *State v. Tamalini*, 134 Wn.2d 725, 729, 953 P.2d 450 (1998). The evidence in this case does not support an inference that Gamble committed only second rather than first degree manslaughter.

A person is guilty of first degree manslaughter if he "recklessly causes the death of another person." RCW 9A.32.060(1)(a). "A person is reckless or acts recklessly when he *knows of and disregards a substantial risk* that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(c) (emphasis added). A person is guilty of second degree manslaughter "when, with criminal negligence, he causes the death of another person." RCW 9A.32.070(1).

A person is criminally negligent or acts with criminal negligence when he *fails to be aware of a substantial risk* that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1)(d) (emphasis added). Thus, to establish a person committed *only* second degree manslaughter, the evidence had to show that he "fail[ed] to be aware of a substantial risk that a wrongful act may occur," and not that he knew of and disregarded "*a substantial risk* that a wrongful act may occur." RCW 9A.08.010(1)(c), (d) (emphasis added).

Gamble's recorded statement to the police, played to the jury at trial, suggests that Gamble did not intend to kill Carroll. But it clearly establishes that Gamble admitted

¹⁴ *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

intentionally punching Carroll and intentionally kicking him in the head. Gamble argues that the jury could find that he failed to be aware that this intentional conduct could result in Carroll's death and find him only criminally negligent. We disagree.

There was no evidence in the record from which the jury could conclude that Gamble was unaware of the potentially deadly consequences of his intentional assaults (punching, kicking, and stomping). Lacking such evidence, no reasonable jury could conclude that someone would be unaware that beating a person until they became unconscious and then continuing to beat that person could potentially kill the beating victim (particularly by kicking him in the head). Recently, our Supreme Court noted that a defendant need not be aware that the person he pushes and causes to fall has an antique china doll in his pocket in order to be liable for restitution for the loss of the item. *State v. Hiatt*, 154 Wn.2d 560, 115 P.3d 274 (2005). Likewise, Gamble need not have been aware that Carroll's skull would break when Gamble intentionally punched him and knocked him onto the concrete.

Thus, the trial court properly declined to instruct the jury on the lesser included offense of second degree manslaughter. *State v. Burley*, 23 Wn. App. 881, 885, 598 P.2d 428 (upholding court's refusal to provide lesser offense instruction of second degree manslaughter when no evidence in record supported defendant's position), *review denied*, 93 Wn.2d 1002 (1979).

EXCEPTIONAL SENTENCE

In his Statement of Additional Grounds for Review,¹⁵ Gamble first contends that the evidence did not support the jury's finding on the aggravating factor and that the trial court lacked the authority to impose an exceptional sentence. Again, we disagree.

¹⁵ RAP 10.10.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum, besides the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Hagar*, 158 Wn.2d 369, 373, 144 P.3d 298 (2006) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).¹⁶

Here, a jury, not the trial court, determined the underlying facts used to support the exceptional sentence—that the unconscious Carroll was particularly vulnerable and unable to defend himself against Gamble’s and May’s attack because he was lying unconscious on the ground as the two men kicked and stomped him. The jury entered the special verdict finding of Carroll’s particular vulnerability or incapacity of resistance. The trial court imposed a sentence of 150 months. The sentence reflected the top of Gamble’s standard range, 102 months, and an additional 48 months due to Carroll’s particular vulnerability of unconsciousness.

Exceptional sentences violate *Blakely* when they are based on facts not stipulated to by the defendant or not found by a jury beyond a reasonable doubt. See *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006); *State v. Hughes*, 154 Wn.2d 118, 156, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Here, the jury found that Carroll was particularly vulnerable due to being unconscious when Gamble and May kicked and stomped him.

¹⁶ In *Blakely*, the United States Supreme Court clarified its holding in *Apprendi*, stating that the “‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303.

Gamble argues that the jury was required to find that Carroll was vulnerable before he punched him and, therefore, the evidence was insufficient to support the jury's aggravating factor finding. But to determine whether a crime is aggravated, the jury must review the crime as Gamble committed it. If Gamble had punched Carroll and then immediately called for an ambulance, Carroll's unconsciousness would not have made him particularly vulnerable to Gamble's prior assault. But Gamble did not seek medical help and in fact *continued* to assault and further injure Carroll as he lay unconscious on the sidewalk unable to defend himself from Gamble's repeated blows. This is sufficient evidence to support the jury's finding that Gamble's intentional assault that recklessly caused Carroll's death was aggravated.

Finally, we note that the trial court had the authority to impose an exceptional sentence based on the jury's finding because the statute allowing this procedure postdated his offense and was not available at the time of his first trial. Our Supreme Court recently held that the remedial jury trial procedure proscribed by RCW 9.94A.537 "applies to all sentencing proceedings held since [the statute] was signed into law . . . on April 15, 2005 . . . where trials have not begun or guilty pleas accepted." *State v. Pillatos*, 159 Wn.2d 459, 465, 480, 150 P.3d 1130 (2007).

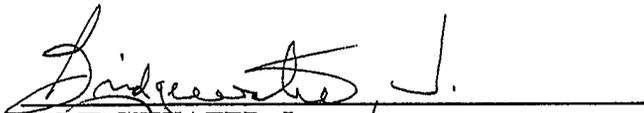
We also note that procedural statutes and rules apply on the date they become effective to all pending matters. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) ("A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."). Gamble's trial started in November 2005, well after the statute was enacted; thus, it applies here.

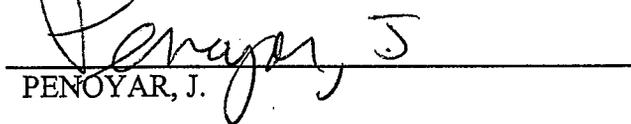
No. 34125-5-II

Finding no error, we affirm the jury's verdict finding Joseph Gamble guilty of first degree manslaughter for killing Carroll and the court's imposition of an exceptional sentence of 150 months.


QUINN-BRINTNALL, J.

We concur:


BRIDGEWATER, J.


PENOYAR, J.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED
COURT OF APPEALS
DIVISION II
07 MAY 10 AM 11:21
STATE OF WASHINGTON
BY LISA E. TABBUT
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,) Court of Appeals No. 34125-5-II
)
 vs.) AFFIDAVIT OF MAILING
)
 JACOB GAMBLE,)
)
 Appellant.)
 _____)

LISA E. TABBUT, being sworn on oath, states that on the 9th of May 2007, affiant
deposited in the mails of the United States of America, a properly stamped envelope
directed to:

Michael C. Kinnie
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666

And

Mr. Jacob Gamble/DOC #806775
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

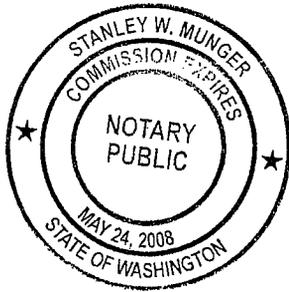
And that said envelope contained the following:

- (1) PETITION FOR REVIEW
- (2) AFFIDAVIT OF MAILING

Dated this 9th day of May 2007


LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 9th day of May 2007.




Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 05/24/08