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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDWARD M. GLASMANN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 04-1-04983-2

Brief of Respondent

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 ORIGINAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether jeopardy terminated on Counts I and II where the jury disagreed on the greater offense charged, convicted of the lesser degree, and the convictions were later reversed and remanded for new trial?
2. Where the jury followed the instructions of the court and left the verdict form blank when it could not agree, and failed to find the defendant not guilty, was there an "implied acquittal"?
3. Whether the defendant demonstrates that *State v. Ervin* and *State v. Daniels* are wrongfully decided and harmful?

B. STATEMENT OF THE CASE.

1. Procedure

On October 25, 2004, the Pierce County Prosecuting Attorney (State) charged the defendant, Edward Glasmann, with attempted assault in the first degree, attempted robbery in the first degree, kidnapping in the first degree, and obstructing a law enforcement officer. CP 1-5. Count I was later amended to assault in the first degree. CP 70-74.

The case proceeded to trial. After hearing all the evidence, the jury convicted the defendant of assault in the second degree (as a lesser

degree), attempted robbery in the second degree (as a lesser degree), kidnapping in the first degree, and obstructing. CP 57, 61, 62, 65.

The defendant's case was affirmed on appeal. *State v. Glasmann*, #34997-3-II, noted at 142 Wn. App. 1041 (2008)(2008 WL 186783). In a later Personal Restraint Petition (PRP), his case was reversed and remanded for a new trial. *In re Personal Restraint of Glasmann*, 175 Wn. 2d 696, 286 P. 3d 673 (2012).

The case was reset for trial before Hon Katherine Stolz. The State proceeded on the amended Information of July 21, 2005, which were the charges of the first trial. CP 70-74. The defendant objected to arraignment, arguing that double jeopardy prevented the State from retrying the defendant on the original, greater charges. CP 100. The court denied his motion. CP 100.

This Court accepted direct review.

2. Facts

The substantive facts of this case can be found in *In re Personal Restraint of Glasmann*, 175 Wn. 2d 696, 286 P. 3d 673 (2012), and will not be repeated in detail here. In brief, the defendant was charged with several crimes arising from domestic violence against his girlfriend and a series of acts, which began in a motel room and continued into the street and a nearby convenience store/gas station.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN FOLLOWING THE HOLDING IN *STATE V. DANIELS*.

- a. The defendant must demonstrate that *State v. Ervin* and *State v. Daniels* are both wrongly decided and harmful.

The doctrine of *stare decisis* requires a clear showing that “an established rule is incorrect and harmful before it is abandoned.” *See, State v. Nunez*, 174 Wn.2d 707, 713, 285 P.3d 21 (2012); *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). The defendant shows neither regarding *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007), and 165 Wn.2d 627, 200 P.3d 711 (2009) (*Daniels I and II*).

- b. The jury indicated its inability to agree on the record when it left verdict forms 1A and 2A blank, per the court’s instructions.

When courts instruct juries regarding uncharged lesser degrees or lesser-included offenses, the court includes a “transition instruction”. There are different types of transition instructions. Some jurisdictions use a “hard transition” requiring actual acquittal on the greater charge before

moving on to the lesser charge. See, e.g., *Blueford v. Arkansas*, -U.S.-, 132 S. Ct. 2044, 182 L. Ed. 2d 937 (2012). At one time, such an “acquit first” instruction was an option in Washington. See, *State v. Taylor*, 109 Wn.2d 438, 745 P.2d 510 (1987). In *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 2626 (1991), this Court clarified the status of the law regarding transition instructions, discussing *State v. Watkins*, 99 Wn.2d 166, 660 P.2d 1117 (1983), and *Taylor*, *supra*. Since then, Washington has permitted and favored “soft transition” instructions which permit the jury to return a verdict on a lesser offense “if after full and careful consideration of the evidence it is unable to reach unanimous agreement on the greater charge”. *Id.*, at 423; see also, WPIC 155.00.

In *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006), this Court held that when a jury is instructed using “unable to agree” instructions and leaves a blank verdict form on a greater charge while convicting on a lesser offense, that the blank jury form is not equivalent to an implied acquittal on the greater offense. In *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007), the Washington Supreme Court held that there was no “implied acquittal” terminating jeopardy on Daniels's homicide by abuse charge and she could be retried after her successful appeal. *Id.*, at 262. A year later, the Court reconsidered its decision in light of *Brazzel v. Washington*, 491 F.3d 976 (9th Cir.2007). See, *State v. Daniels*, 165 Wn.

2d 627, 200 P.3d 711 (2009). The Court adhered to its original opinion. *Id.*, at 628.

Without citing any cases subsequent to *Daniels II*, the defendant asks this Court to again reconsider its original *Daniels* decision in light of the Ninth Circuit Court of Appeals decision in *Brazzel v. Washington*. *See*, App. Br. at 10, 11. As pointed out earlier, that is exactly what this Court did in *Daniels II*, where it declined to change its decision in light of *Brazzel*. *Daniels*, 165 Wn.2d at 628.

At the outset, it should be noted that the Ninth Circuit's constitutional holdings are not binding on this Court. *In re Personal Restraint of Grisby*, 121 Wn.2d 419, 430, 853 P.2d 901 (1993); *In re Personal Restraint of Benn*, 134 Wn.2d 868, 937, 952 P.2d 116 (1998). This Court generally gives careful consideration to Ninth Circuit decisions, but is under no obligation to adopt its reasoning. This Court should again reject the reasoning in the *Brazzel* decision regarding implied acquittals, because to do so would be to abandon the holdings this Court issued in *State v. Ervin* and both *Daniels* cases, when these holdings are not contrary to federal law.

Based on *Brazzel*, the defendant's position would require a new procedure, with a new jury instruction and verdict form. *Brazzel* acknowledged that retrial is permitted where there is a mistrial declared due to the "manifest necessity" presented by a hung jury. 491 F. 3d at 982,

citing *United States v. Perez*, 9 Wheat, 579, 22 U.S. 579, 580, 6 L. Ed. 165 (1824). *Brazzel* went on to point out that the record needed to reflect that the jury was genuinely deadlocked; and that the prosecution has the burden to justify a mistrial in the case of a hung jury. 491 F.3d at 982.

Under *Brazzel*, and the defendant's argument, in order to avoid an "implied acquittal", the trial court would have to instruct the jury to report their "genuine disagreement" on the verdict form and in court before proceeding to the lesser offenses. This is neither the law nor the intent under the current "soft transition" instruction used in Washington.

In *Labanowski*, the Court explained the advantages of the "unable to agree" transition instruction. An important reason was the efficient use of judicial resources. 117 Wn.2d at 420. "Unable to agree" instructions would reduce the number, and strain to the judicial system, of mistrials due to hung juries, and encourage juries to deliberate to a verdict. *Id.*, at 420, 422. The *Labanowski* court also considered whether it was necessary to record the jury "disagreement" before permitting the jury to move on to the lesser offenses. *Id.*, at 424. The Court declined to require this because the jury was properly instructed. *Id.*, at 425.

The defendant cites *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) as preventing his retrial for the greater offenses. *See*, App. Br. at 17, 21. As this Court discussed in *Ervin*, our state has considered the concept of "implied acquittal" for many years.

See, Ervin, 158 Wn. 2d at 753, citing *State v. Schoel*, 54 Wn.2d 388, 394, 341 P.2d 481 (1959), and *State v. Davis*, 190 Wash. 164, 166–167, 67 P.2d 894 (1937). In these decisions, this Court has followed federal law, including *Green, supra*, and *Selvester v. United States*, 170 U.S. 262, 269, 18 S. Ct. 580, 42 L. Ed. 1029 (1898). *See, Ervin*, at 753. In these cases, an “implied acquittal” required jury “silence” as to the greater charge. *Id.*, at 757.

Whether there is an “implied acquittal” depends a great deal upon the law of the jurisdiction (*see, Blueford, supra*), how a jury is instructed, and the verdict forms provided. As this Court discussed in *Ervin*, 158 Wash. 2d at 756-757, the jury was not “silent”; nor was it in this case. Where the jury was instructed to leave the verdict form blank if it could not agree, the jury had “spoken”; or indicated its disagreement for the record. *Id.*, citing *State v. Linton*, 156 Wn.2d 777, 789, 132 P.3d 127 (2006).

The *Ervin* analysis begins with a well established principle – well established with the United States Supreme Court as well as in Washington - that a jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 235, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000); *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). The *Ervin* Court then progressed logically by examining the wording of the given instructions to determine the meaning of a blank

verdict form on greater charges when the jury convicted on a lesser; the court concluded that - under the given instructions - a blank verdict form is an express statement of the jury's inability to agree on the greater charge. The defendant fails to cite any United States Supreme Court precedent which would contradict the analysis set forth in *Ervin*.

In *Daniels I*, this Court pointed out that in both *Ervin* and *Daniels*, the jury had been correctly instructed to proceed to the lesser offense only after acquittal or failing to agree on the greater, charged, offense. *Daniels*, 160 Wash. 2d at 264. Thus, as in *Ervin*, the jury had to do one of two things before moving on to lesser offenses: acquit the defendant of the greater charge, and fill out the verdict form accordingly; or reach an impasse- be unable to agree after full deliberations. Because the jury is presumed to follow the instructions, and neither had filled out the verdict "not guilty", the jury had genuine disagreement and the jury could move on to consider the lesser offense. *Id.*, at 264. Therefore, jeopardy did not terminate on the greater charge for the purpose of retrial on appeal. *Id.*, at 265.

In the present case, the jury was similarly instructed. CP 52. The jury responded as did the jury in *Daniels*. CP 56, 60. *Daniels* and *Ervin* control this case.

Other federal courts have ruled consistently with this Court on this issue. The Eighth Circuit Court of Appeals came to a similar conclusion as

the *Ervin* court. In *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997), the trial court submitted the case to the jury with instructions on the greater offense of attempted aggravated sexual abuse as well as on the lesser included offense. The jury was given an “unable to agree” type instruction that read:

If your verdict under these instructions is not guilty, or if, after all reasonable efforts you are unable to reach a verdict, you should record that decision on the verdict form and go on to consider whether defendant is guilty of the crime of abusive sexual contact under this instruction.

United States v. Bordeaux, 121 F.3d 1187, 1190 (8th Cir. 1997). When it could not agree on the greater charge, the jury wrote, as instructed, on the verdict form for that offense that “[a]fter all reasonable efforts, we, the jury, were unable to reach a verdict on the charge ‘Attempted Aggravated Sexual Abuse.’” *Id.* at 1192. It went on to convict Bordeaux of the lesser charge. When Bordeaux obtained a reversal of the conviction on the lesser offense, the issue arose as to whether he could be retried on the greater offense. The Eighth Circuit held that the government could proceed on the greater charge as the record showed that the jury had been unable to agree on the greater charge. *Id.* at 1193. *See also, United States v. Williams*, 449 F.3d 635 (2006) (where record shows the jury was unable to reach agreement, blank jury form does not preclude retrial).

The jury in Bordeaux's case was instructed to write a note expressing its inability to agree on the verdict form while the jury in the defendant's case was instructed to leave the verdict form blank. Both cases involve the jury following the given instructions as to how to express an inability to agree on a particular charge. The appellate courts in *Ervin*, *Daniels*, and *Bordeaux* each considered relevant decisions of the United States Supreme Court on double jeopardy and each reached a similar conclusion. The Ninth Circuit decision in *Brazzel* does not undermine the rationale used in *Ervin*, *Daniels*, or *Bordeaux*.

Recently, the United States Supreme Court considered a case of supposed "implied acquittal". In *Blueford v. Arkansas*, *supra*, the defendant was charged with capital murder. The jury was instructed on lesser-included offenses of first degree murder, manslaughter, and negligent homicide. The court instructed the jury that if they had a reasonable doubt as to the greater, they could consider the lesser offense. 132 S. Ct. 2048.

Deliberations proceeded and the jury reported that they could not agree. The trial court inquired of the presiding juror on the record. The presiding juror reported that the jury was unanimous that the defendant was not guilty of capital murder and first degree murder, but had reached an impasse on manslaughter. The jury was sent back to continue deliberations, but ultimately could not reach a verdict. A mistrial was

declared. A new trial was scheduled, again on capital murder. The defendant objected, arguing that he had been acquitted of capital murder and first degree murder. The Supreme Court disagreed. *Id.*, at 2050.

Although the jury had reported on the record that it was unanimous in finding Blueford not guilty of the most serious offenses, the Supreme Court found that this report was not final. 132 S. Ct. at 2050. The Court reasoned that because the jury could have reconsidered its “verdicts” on the greater offenses, jeopardy had not terminated. *Id.*, at 2051. Blueford also argued that the hung jury mistrial only applied to the offenses for which the jury could not agree. *Id.*, at 2052. But, the Court also rejected this, pointing out that, under Arkansas law and the instructions, the jury could find Blueford guilty of one offense or acquit on all. *Id.*, at 2052-2053.

In *Brazzel*, the Ninth Circuit characterized the unpublished decision in *State v. Brazzel*, # 27877-4-II, noted at 118 Wn. App. 1054 (2003), *review denied*, 151 Wn.2d 1025; 94 P.3d 959 (2004), as a decision by the Washington State Court of Appeals holding that a verdict form on a greater charge left blank under “unable to agree” instructions constitutes an implied acquittal of that charge when the jury returns a verdict on a lesser charge.

As the Ninth Circuit acknowledged in the *Brazzel* decision: “No [United States] Supreme Court case addresses precisely such an “unable to

agree” jury instruction, so the state court’s treatment of the jury’s silence cannot be characterized as “contrary to” federal law.” *Brazzel*, 491 F. 3d at 984. This fact means that the Ninth Circuit had no ability find that a state court decision on this issue was “contrary to” federal law regardless of holding of that state court decision. The federal court had to give deference to the Court of Appeals decision in *Brazzel* just as it would have to give deference to this court’s decision in *Ervin* were it to come before the Ninth Circuit in review of a federal *habeas corpus* proceeding. Consequently, the *Brazzel* decision does not create a reason for this Court to abandon the holdings of *Ervin* or *Daniels* or retreat from the legal analysis set forth in those cases.

The cases cited by the Ninth Circuit in *Brazzel* dealing with a discharge of a hung jury are ones where the jury was discharged over the defendant’s objection. Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the “manifest necessity” standard first enunciated in *United States v. Perez*, 9 Wheat. 579, 580 (1824) in reference to a mistrial following the jury’s declaration that it was unable to reach a verdict. While other situations have been recognized by the United States Supreme Court as meeting the “manifest necessity” standard, the hung jury remains the most frequent example. See, *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

In the present case, when the jury returned Verdict forms 1A and 2A, pertaining to the charges of assault in the first degree and attempted robbery in the first degree, with an empty blank rather than filling it with the words “not guilty” or “guilty,” it was expressing its inability to agree on that charge after a “full and careful consideration of the evidence.” See, CP 56, 60; Court’s Instruction No. 43, CP 52. The jury was able to reach agreements on assault in the second degree and attempted robbery in the second degree, and completed verdict forms 1B and 2B finding defendant guilty of those lesser charges. CP 57, 61. The jury was not “silent”; it indicated its decision or inability to agree as directed by the trial court.

D. CONCLUSION.

This case is controlled by *State v. Ervin* and *State v. Daniels*. These cases are consistent with, and the product of, prior Washington and federal cases discussing this issue. The defendant fails to demonstrate that these cases are incorrect or harmful. The trial court did not err in following

controlling precedent. The State respectfully requests that the trial court be affirmed and trial proceed.

DATED: June 30, 2014.

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Prosecuting Attorney



Thomas C. Roberts
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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~ES~~-mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Please see attached the State's Brief of Respondent in the below matter:

St. v. Glasmann
No. 88913-9
Submitted by: T. Roberts
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Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to T. Roberts