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SUPREME COURT NO. 95374-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent / Cross-Petitioner

v.

ARTHUR THOMAS,

Petitioner / Cross-Respondent.

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

The Honorable Jeffrey M. Ramsdell, Judge
The Honorable Hollis Hill, Judge

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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A. ADDITIONAL ISSUE PRESENTED¹

Upon the agreement of the parties, the trial court entered a verdict on second degree assault, as well as the blank verdict form on the firearm allegation corresponding to that charge. The court dismissed the jury. But the trial court entered no finding that such dismissal was manifestly necessary.

Under these circumstances, did retrial on the firearm allegation violate the prohibition on double jeopardy?

B. ADDITIONAL FACTS

The jury was instructed that if it was unable to reach a unanimous decision as to the firearm special verdict, it should leave the form blank. CP 95. After a deliberating juror was dismissed, a reconstituted jury deliberated for slightly more than one day before reaching its verdicts. CP 194-97.

¹ The petitioner files this brief pursuant to this Court's July 30, 2018 letter requesting that the parties address the following three questions:

1. Per the colloquy on October 29, 2015, (VRP, Volume I, October 29, 2015, at pages 21-22) and the Clerk's Minutes (Supp'l CP at 196-197), was a verdict entered on the special verdicts?
2. If so, did the court's verdict have a preclusive effect?
3. The parties are also invited to address any double jeopardy implications of the trial court's subsequent empanelling of a second jury to answer the firearm enhancement question.

Having found Thomas of second degree assault,² a lesser degree of the first degree assault charge, the jury nonetheless left the corresponding firearm special verdict form blank. CP 112. The trial court found that leaving the firearm form blank constituted a “verdict” as to that allegation. 8RP 20-21; CP 196-97. The parties agreed. 8RP 22. The verdicts were entered. CP 109-12.

A week later, the State told the Court it was seeking retrial on the firearm enhancement, suggesting that the blank verdict form was tantamount to a “hung” jury.” 8RP 30. A jury answered “yes” on a firearm verdict after the ensuing seven-day trial. CP 123.

C. ADDITIONAL ARGUMENT

1. THE ENTRY OF THE VERDICTS TERMINATED JEOPARDY.

In the absence of a finding of a manifest necessity for retrial, Mr. Thomas’s jeopardy terminated upon entry of the jury’s verdict on the second degree assault charge and corresponding blank special verdict form. For the reasons explained in argument section 2 below, moreover, double jeopardy prohibited retrial on the firearm allegation.

² As the jury was instructed, second degree assault was defined as an intentional assault resulting in reckless infliction of substantial bodily harm. CP 91.

The United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. The state constitution prohibits persons from being “twice put in jeopardy for the same offense.” CONST. art. I, § 9. “This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek.” Currier v. Virginia, ___ U.S. ___, 138 S. Ct. 2144, 2149, ___ L. Ed. 3d (2018) (citing Green v. United States, 355 U.S. 871, 78 S.Ct. 122, 2 L.Ed.2d 76 (1957)).

This Court interprets Washington’s double jeopardy provision identically to the federal provision. State v. Glasmann, 183 Wn.2d 117, 121, 349 P.3d 829 (2015) (citing State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959)).

In general, this Court will find a double jeopardy violation “where (1) jeopardy has previously attached, (2) that jeopardy has terminated, and (3) the defendant is in jeopardy a second time for the same offense in fact and law.” State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006).

“[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant’s jeopardy.” Green, 355 U.S. at 188.

But, according to Green, a jury's silence can also terminate jeopardy. The Court identified two ways this might occur. First, when a jury finds a defendant guilty of a lesser charge and remains silent on a greater charge, in the event of a successful appeal, the defendant cannot be retried on the greater charge. Silence on the greater charge has sometimes been referred to as an "implicit acquittal." Id. at 190.

But, under Green, discharge of the jury in the absence of a verdict may also terminate jeopardy. Id. at 190-91. It is sufficient for double jeopardy purposes that the jury was "given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." Id. at 191. Otherwise, where the jury is dismissed, jeopardy terminates. Id. (citing Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949) (holding retrial is permissible under only where a manifest necessity exists)). Absent a finding of manifest necessity,³ a jury's silence is "treated no differently" than an acquittal, insofar as it terminates the state's single opportunity to obtain a conviction on the charge. Green, 355 U.S. at 191; accord Price v. Georgia, 398 U.S. 323, 328-29, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970).

³ One such manifest necessity is a deadlocked jury. This occurs only when the trial judge exercises discretion and finds a high degree of necessity for a new trial because the jury is genuinely deadlocked. Arizona v. Washington, 434 U.S. 497, 503-10, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

Brazzel v. Washington, 491 F.3d 976 (9th Cir.2007) is instructive, particularly under the circumstances present in this case. There, Ernest Brazzel was charged in a Washington state court with three counts related to assault of his girlfriend. Count I alleged attempted first degree murder or, in the alternative, first degree assault, committed between May 10 and May 16, 1998. Counts II and III each alleged second degree assault committed on different dates. Id. at 979.

The jury convicted Brazzel of first degree assault on Count I, leaving the first degree attempted murder verdict form blank. During the polling of the jury, the jurors did not claim to be hung or announce any splits or divisions. The prosecutor did not request that the jury be declared deadlocked as to the attempted murder count. The trial court discharged the jury, taking as final the convictions on the assault counts, and sentenced Brazzel to a lengthy prison sentence. Id.

Brazzel appealed, and his convictions were ultimately reversed based on instructional error. The State refiled the same alternative charges as the original Count I, including attempted first degree murder. In the trial court, Brazzel then argued that double jeopardy prohibited retrial on attempted first degree murder. The prosecutor argued the jury did not acquit Brazzel of that charge; rather, based on the “unable to agree”

language of the instructions, the jury had deadlocked on the greater charge. Id. at 979-80. The trial court agreed with the prosecutor. Id. at 980.

The Ninth Circuit reversed,⁴ however, holding that retrial on attempted murder was prohibited. Id. at 981-85.

The court explained that, in contrast to cases of express or implied acquittal, retrial *is* permitted where a mistrial is declared due to the “manifest necessity” presented by a hung jury. Id. at 982 (quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, 6 L. Ed. 165 (1824)). A hung jury occurs when there is an irreconcilable disagreement among the jury members. Brazzel, 491 F.3d at 982.

But a “high degree” of necessity is required to establish a mistrial due to jury deadlock. Id. (quoting Arizona v. Washington, 434 U.S. 497, 506, 98 S. Ct. 824, 54 L. Ed. 717 (1978)). The record must reflect that the jury is “genuinely deadlocked.” Brazzel, 491 F.3d at 982 (citing Richardson v. United States, 468 U.S. 317, 324-25, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) (explaining that when a jury is genuinely deadlocked, the trial judge may declare a mistrial and require the defendant to submit to a second trial); Selvester v. United States, 170 U.S. 262, 270, 18 S. Ct.

⁴ The jury had again left the attempted murder form blank, and again convicted Brazzel of assault. Holding that charge itself affected the outcome of trial, the Ninth Circuit reversed on the lesser charge. Id. at 986-87.

580, 42 L. Ed. 1029 (1898) (“But if, on the other hand, after the case had been submitted to the jury they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution.”)).

Thomas acknowledges that, unlike the Brazzel court, this Court has held that where the State charges a person with greater and lesser offenses, and the jury is unable to agree regarding the greater offense, the State may retry the defendant for the greater offense without violating double jeopardy. Glasmann, 183 Wn.2d 117 (citing State v. Daniels, 160 W.2d 256, 265, 156 P.3d 905 (2007) (Daniels I), adhered to on recons., 165 Wn.2d 627, 628, 200 P.3d 711 (2009) (Daniels II)). Here, however, unlike those cases, Thomas was charged with, and then retried on, a single freestanding firearm allegation.

The trial court, rather than finding the jury deadlocked, entered a verdict based on second degree assault alone. The parties agreed that this verdict, as well as the corresponding blank firearm special verdict, should be entered. Correspondingly, it is clear from the record that the trial court did not find “manifest necessity” requiring a mistrial on any charge. The entry of the verdicts therefore sufficed to terminate jeopardy. Cf. Green, 355 U.S. at 188 (“a verdict of acquittal is final, ending a defendant's jeopardy, and even when not followed by any judgment is a bar to a

In summary, Thomas's jeopardy terminated when the trial court entered the verdicts and dismissed the jury.

The question becomes whether the federal and state prohibitions on double jeopardy precluded retrial on the firearm allegation.

2. CORRESPONDINGLY, DOUBLE JEOPARDY PRINCIPLES PRECLUDED RETRIAL ON THE FIREARM ALLEGATION.

Because jeopardy terminated, the prohibition on double jeopardy precluded retrial on the firearm allegation. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) establishes that, in this context, the firearm allegation should be considered an element of a greater offense, namely, second degree assault with a firearm enhancement. Thus, unlike cases involving reconsideration of mere sentencing factors, double jeopardy protections prohibited relitigation of the firearm enhancement. Case law arguably holding to the contrary—to the extent that it is not distinguishable—should be considered both incorrect and harmful.

The United States Supreme Court has held that the double jeopardy clause prevents retrying a defendant on aggravating factors supporting the death penalty when a previous jury rejected the imposition of the death penalty. Bullington v. Missouri, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981).

penalty. Bullington v. Missouri, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981).

Historically, however, double jeopardy protections were considered inapplicable to other sentencing proceedings because the determinations at issue did not place a defendant in jeopardy for an “offense.” See Monge v. California, 524 U.S. 721, 728, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998) (refusing to find a double jeopardy violation where state sought to prove prior conviction on remand after appellate court found insufficient evidence of that conviction for purposes of three-strikes law).

But, following Apprendi and its progeny, a “sentence enhancement,” as distinguished from a “sentencing factor,” must be considered “the functional equivalent of an element of a greater offense.” Apprendi, 530 U.S. at 494 n. 19.⁵

⁵ The term “sentencing factor”

appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury’s finding that the defendant is guilty of a particular offense. On the other hand, when the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense.

Apprendi, 530 U.S. 494 n. 19.

Thus, the firearm sentence allegation in this case was the “functional equivalent” of an element of a greater offense, namely, second degree assault with a firearm enhancement. When the verdict was entered on—in essence—the lesser offense of second degree assault, the State was prohibited from seeking conviction on the greater crime in a second proceeding.

This Court has, admittedly, rejected the Appendi “greater offense” formulation when analyzing a double jeopardy claim. But this Court did so in a different context.

The double jeopardy clauses prevent defendants from receiving multiple punishments for the same offense. State v. Aguirre, 168 Wn.2d 350, 366, 229 P.3d 669 (2010). In State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010), this Court rejected a double jeopardy challenge based on an argument that a weapon sentence enhancement is an element of a greater offense, and therefore creates redundant punishment in cases where the weapon is also an element of the underlying crime. Id. at 81.

But Kelley is distinguishable, as it involves a different species of double jeopardy challenge. The Kelley rejection of the Appendi “greater offense” analysis is, moreover, both incorrect and harmful when applied in this specific context. See In re Rights to Waters of Stranger Creek, 77

Wn.2d 649, 653, 466 P.2d 508 (1970) (this Court will disregard precedent if shown to be incorrect and harmful).

First, as stated, it is incorrect to treat a firearm allegation as a mere sentencing factor. Rather, such an allegation must be treated as the functional equivalent of an element of a greater offense. Apprendi, 530 U.S. at 494 n. 19. Second, permitting retrial on a mere element of a greater offense—where the jury only saw fit to convict on the lesser offense—allows tails to wag dogs, potentially leading to catastrophic waste of resources. In Monge, for example, the government was permitted to relitigate a sentencing proceeding based on mere recidivism. Monge, 524 U.S. 725. But here, in contrast, the State subjected Mr. Thomas (already convicted of second degree assault) to a whole new trial lasting almost as long as the first. As indicated, the original trial in this case lasted 10 days, whereas the “enhancement” trial took seven. Supp. Br. of Pet’r at 3 n. 3. What occurred here runs contrary to the reasoning behind “unable to agree” instructions in the first instance. Cf. State v. Labanowski, 117 Wn.2d 405, 420, 816 P.2d 26 (1991) (“unable to agree” instructions avoid costly retrials caused by hung juries, which are more likely in an “acquittal first” instructional scheme).

This case demonstrates the harmful effects of allowing a full retrial on what is no more than the functional equivalent of an element of a greater offense.

This Court should hold that, for purposes of double jeopardy analysis, entry of the verdict on the lesser crime of second degree assault, and corresponding blank special verdict, prohibited retrial on the greater offense.

D. CONCLUSION

For these additional reasons, this Court should reverse the Court of Appeals and remand for the firearm enhancement to be stricken.

DATED this 13th day of August, 2018.

Respectfully submitted,

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