No. 97066-1

Court of Appeals No. 49337-3-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION TWO

In re the Personal Restraint of:

AMANDA CHRISTINE KNIGHT,

Petitioner.

REPLY ON PERSONAL RESTRAINT PETITION

By:
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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. THE ROBBERY OF JAMES SANDERS MERGES WITH THE FELONY MURDER OF JAMES SANDERS 1

B. THE ASSAULT OF CHARLENE SANDERS MERGES WITH THE ROBBERY OF CHARLENE SANDERS 4

III. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, *reh'g denied*, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004) 1

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990) 2

State v. Peyton, 29 Wn. App. 701, 630 P.2d 1362, *review denied*, 96 Wn.2d 1024 (1981) 3

State v. Whittaker, 192 Wn. App. 395, 367 P.3d 1092 (2016) 3

State v. Williams, 131 Wn. App. 488, 128 P.3d 98, *review granted, cause remanded on other grounds*, 158 Wn.2d 1006, 143 P.3d 596 (2006) 2, 3

Statutes

RCW 9A.32.020 3

I. INTRODUCTION

The State largely concedes that the Ms. Knight has stated the correct legal standards, yet the State nevertheless follows faulty standards when arguing the merits of the claims.

II. ARGUMENT

A. THE ROBBERY OF JAMES SANDERS MERGES WITH THE FELONY MURDER OF JAMES SANDERS

The State concedes that this merger claim is not time-barred because it falls under the exception for double jeopardy claims.[1] State's Response at 5. The State also concedes that analysis of the merger doctrine must be based on the jury instructions and verdict forms, rather than on trial testimony or arguments of counsel during the trial.[2] The State also concedes that when the jury instructions or verdicts are ambiguous, the rule of lenity requires this Court to apply the scenario most favorable to the defendant. State's Response at 9.

The State maintains, however, that the robbery was complete once the rings were taken, and therefore the killing had a separate purpose. State's Response at 9-12. In particular, the State argues that the force used in the robbery of James Sanders was complete before the force used in

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[1] Throughout its brief, the State refers to claims that are exempt from the one-year time bar as being "time-barred" but also "exempt." What the State seems to mean is that the claims were filed more than a year after the mandate issued, but they fl within exceptions to the one-year limit. Such claims are not "time-barred" in any sense.

[2] This makes sense: It is up to jurors, not judges, to decide what has been proved at trial. *See generally*, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, *reh'g denied*, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004).

shooting James came into being. State's Response at 10-11. There are several problems with that analysis.

First, the State seems to assume that the robbers were only interested in the rings. In fact, the record is clear that they continued to seek other valuables throughout their time in the home. Ms. Knight was looking for such items when James broke free of his zip-tie and began to fight back against some of the other robbers. It was then that he was shot and killed. Thus, the robbery was clearly ongoing at the time of the shooting.

Second, unlike intentional or premeditated murder, felony murder is based on the mens rea of the underlying felony. *See* PRP at 11, discussing *State v. Dennison*, 115 Wn.2d 609, 615, 801 P.2d 193 (1990). In this case, the required evil intent was to commit robbery, not to commit murder. Thus, there was no separate purpose to the killing.

State v. Williams, 131 Wn. App. 488, 128 P.3d 98, *review granted, cause remanded on other grounds*, 158 Wn.2d 1006, 143 P.3d 596 (2006), a case cited with approval by the Washington Supreme Court, is directly on point. The State's attempt to distinguish *Williams* is unavailing. As the State points out, *Williams* involved an attempt to commit robbery. After Williams lured the victim into an alley, the victim ran away. Williams then shot him. The State's argument in the *Williams* case was essentially the same as its argument in this case. The State argued that the attempted robbery was complete when Williams took a substantial step towards the robbery several hours before the killing and therefore the killing had a

separate purpose.,The appellate court disagreed, finding that the shooting had no purpose or intent outside of accomplishing the robbery or facilitating Williams's departure from the scene. *Id.* at 497-500. Further, the Court noted that the State's position was at odds with the jury's finding that the murder was in the course of or in furtherance of the robbery.

Williams applies with greater force here. The time between events in the Sanders robbery is measured in minutes rather than hours. The State concedes that the entire encounter in the Sanders' residence lasted about 20 minutes. State's Response at 23.

Alternatively, if this Court finds that there was not sufficient evidence to support the jury's finding that the murder took place in furtherance of a robbery then the murder conviction must be overturned. *See* PRP at 22-23.

The State relies on *State v. Peyton*, 29 Wn. App. 701, 630 P.2d 1362, *review denied*, 96 Wn.2d 1024 (1981), for the proposition that a murder during the course of a robbery can have an independent purpose. The analysis in that older case is questionable in view of newer cases such as *State v. Whittaker*, 192 Wn. App. 395, 367 P.3d 1092 (2016). In any event, the case is easily distinguishable. In *Peyton* the felony murder was not based on a killing during a robbery, but rather on a killing during flight from a robbery. The killing was significantly separated from the robbery in time and place. *Id.* at 704-05. The felony murder statute applies to killings in flight from a robbery as well as to killings during a robbery. *See* RCW 9A.32.020(C). But here, the felony murder charge was based solely on a

killing during a robbery. The trial court's instructions regarding the felony murder of James did not even provide for the option of a killing during flight. *See* Appendix A to PRP.

Thus, the robbery of James must merge with the felony murder of James.

B. THE ASSAULT OF CHARLENE SANDERS MERGES WITH THE ROBBERY OF CHARLENE SANDERS

The State maintains that the ends of justice do not favor relitigation of this claim. The State largely ignores the main reason that justice was not done in the direct appeal: due to defense counsel's confusing briefing, this Court believed that he was challenging the jury instructions, rather than explaining that the double jeopardy issue must be analyzed based on the jury instructions and verdict forms. *See* PRP at 19-20. Because of that, the central issue regarding the merger of Charlene's assault and robbery was never addressed. The State now concedes that the analysis should not be based on the testimony or arguments of counsel, but that is precisely what this Court did in the direct appeal.

> Knight's merger argument would be compelling if the second degree assault of Charlene could have involved only Higashi's pointing Knight's gun at Charlene when they robbed Charlene of her wedding ring at the beginning of the home invasion; but such were the not the facts here. On the contrary, accomplice Berniard's later assaults of Charlene (with a different firearm and by kicking her in the head) support the second degree assault conviction, independent of the firearm threat that Knight and Higashi had earlier used to take Charlene's ring during the robbery. Both the State's and Knight's closing arguments support the jury's treatment of Higashi's earlier firearm threat while removing

> Charlene's wedding ring from her finger as separate from Berniard's later threatening Charlene by pointing a gun at her head to force her to reveal the location of the safe and kicking her in the head. For example, two main points during Knight's closing argument were (1) her open admission that she had participated in the initial robbery of Charlene's ring while Higashi pointed the gun, claiming, however, that the others had forced her to participate in that robbery and the burglary; and (2) she had no prior knowledge of, she had been nowhere near, and she had not in any way participated in Berniard's later brutal assaults of Charlene, JS, and James.

Published Opinion, Exhibit B to State's Response at 16-17.

In short the Court agreed that, based on the verdicts and jury instructions, the assault could have been based on Higashi's pointing Knight's gun at Charlene, in which case merger would be appropriate. But the Court rejected that approach solely because it believed the testimony and arguments of counsel favored using Berniard's later assault of Charlene. It is now clear that that analysis is faulty.

As noted in the PRP the main reason for the mistaken standards is the sloppy briefing of Mitch Harrision. The State suggests, however, that Mr. Harrison's incompetence cannot be addressed because a claim of ineffective assistance of counsel would be time barred. But Ms. Knight has not raised a freestanding claim of ineffective assistance. *See* PRP at 4 (grounds for relief). The only claims raised are double jeopardy and insufficient evidence, both of which fall within the exceptions to the one-

year time limit.[3] Nevertheless, when considering the ends of justice, it is appropriate to note that Mr. Harrison confused the issue on direct appeal.

On November 17, 2016, the Washington Bar Review Committee ordered a public hearing regarding Mr. Harrison's incompetence in Ms. Knight's appeal and in many other cases. *See* Exhibit A. The interests of justice would be served by giving Ms. Knight a first chance to argue this claim with competent briefing.

As to the merits of the merger regarding Charlene, the State relies on the arguments of trial counsel to conclude that the assault at issue was not part of the robbery, despite its concession that that is the wrong analysis. Nothing prevented the jury from finding that the second-degree assault of Charlene was based on the threatened use of a deadly weapon. That assault also could have satisfied the element that the taking was accomplished through the threatened use of immediate force, violence, or fear of injury. *See* PRP at 16. When the rule of lenity is applied, the Court must find that the assault merges into the robbery.

III. CONCLUSION

This Court should find that the robbery of James Sanders merges with the felony murder of James Sanders, and the assault of Charlene Sanders merges with the robbery of Charlene Sanders. In the alternative, if the State is correct that the murder of James Sanders had a separate

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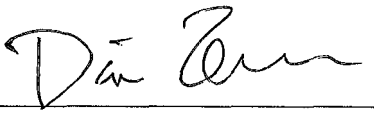
[3] The reason that no PRP was filed within the one-year limit was that Mr. Harrison took money from Ms. Knight on a promise that he would file a timely postconviction claimfor her, but never filed anything.

purpose from his robbery, the felony murder charge must be vacated for insufficient evidence.

DATED this 6th day of December, 2016.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Amanda Knight

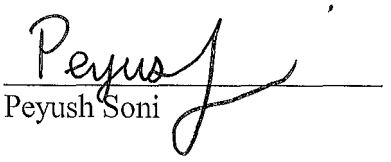
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Reply on Personal Restraint Petition on the following:

Ms. Chelsey Miller
Pierce County Prosecutor's Office
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402

Ms. Amanda Knight #349443
Washington Corrections Center for Women
9601 Bujacich Road NW
Gig Harbor, WA 98332-8300

12/06/2016
Date



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NOV 17 2016
DISCIPLINARY BOARD

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In re **MITCH HARRISON**, Lawyer (Bar No. 43040)	ODC File No. 16-00265 REVIEW COMMITTEE ORDER PUBLIC HEARING PROTECTIVE ORDER

The Review Committee considered materials submitted by the grievant, respondent and disciplinary counsel, and the applicable rules, statutes and caselaw:

ORDER
The Review Committee orders a public hearing on the alleged misconduct.

CONSOLIDATION
This grievance is consolidated for hearing with the following grievances:
ODC file number: 16-00796, 16-00867, 16-00912

PROTECTIVE ORDER – the request for a protective order is denied.
~~Under ELC 3.1(b)(1) the materials submitted to the Review Committee are public with the exception of materials subject to protective order under ELC 3.2(e). The Review Committee orders that pages 55 and 56 of the materials submitted to the Review Committee shall not be public, but dissemination otherwise consistent with the ELC is not prohibited.~~

Dated this 10th day of Nov, 2016.

[signature]
Review Committee Chairperson

Mailed on 11/17/16 to:

Respondent/~~Respondent's Counsel~~: Mitch Harrison

Grievant/~~Grievant's Counsel~~: David B. Zuckerman

The vote was: unanimous. The following Review Committee members voted: Aubrey Graber, Jamie Fabricante, S. Nic Reeves, Cedrick.

Exhibit A

DAVID ZUCKERMAN LAW OFFICE

December 06, 2016 - 4:21 PM

Transmittal Letter

Document Uploaded: 6-prp2-493373-Reply Brief.pdf

Case Name: In re the Personal Restraint of Amanda Christine Knight
Court of Appeals Case Number: 49337-3

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Reply on Personal Restraint Petition

Sender Name: David Zuckerman - Email: peyush@davidzuckermanlaw.com