FILED
SUPREME COURT
STATE OF WASHINGTON
2/2/2021
BY SUSAN L. CARLSON
CLERK

THE SUPREME COURT OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**ORDER DENYING MOTION FOR RECONSIDERATION**
AMANDA CHRISTINE KNIGHT,	)	
	)	No. 97066-1
Respondent.	)	
	)	Court of Appeals No. 49337-3-II
	)	
	)	Pierce County Superior Court No. 10-1-01903-2
______________________________________	)	

The Court considered the “PETITIONER’S MOTION FOR RECONSIDERATION” and the “STATE’S RESPONSE TO MOTION FOR RECONSIDERATION”;

The Court determined by majority to enter the following order, with the attached dissent.

ORDERED:

That the motion for reconsideration is denied.

DATED at Olympia, Washington this 2nd day of February, 2021.

For the Court

CHIEF JUSTICE

No. 97066-1

GORDON McCLOUD, J. (dissenting)—A motion for reconsideration should be granted if it points out, "with particularity," an important "point of law or fact" that "the court has overlooked or misapprehended." RAP 12.4(c). Amanda Christine Knight, the moving party, pointed out that the majority opinion misapprehended the contents of the State's closing argument. It was a critical misapprehension of the facts; it led the majority to conclude that the State argued for convictions of two different crimes based on two different robberies, when in fact the State argued for convictions of those two different crimes based on exactly the same robbery of the same ring from the same person at the same time. In other words, that misapprehension of the facts resulted in a serious deviation from controlling United States Supreme Court law on double jeopardy.

I therefore respectfully dissent from this court's decision to deny the motion for reconsideration.

BACKGROUND

Knight and three others committed a home invasion robbery. The victims were James Sanders, Charlene Sanders and two children. The robbery included the taking of three rings, other expensive items from both floors of the house, and a

struggle over a safe. James Sanders was shot and killed by one of Knight's companions. *In re Pers. Restraint of Knight*, noted at 7 Wn. App. 2d 1076 (2019), 2019 WL 1231402.

Knight was convicted as an accomplice of one count of felony murder in the first degree (based on the underlying felony of robbery), two counts of robbery in the first degree, two counts of assault in the second degree, and burglary in the first degree. She was 21 years old at the time of the events; she was sentenced to 860 months in prison—over 71 years.

This court ruled 5-4 to affirm in part and reverse in part a Court of Appeals' decision about double jeopardy and merger. The key question for us was whether Knight's convictions of both (1) felony-murder-based-on-robbery of James Sanders and (2) robbery of James Sanders, violated double jeopardy clause protections.

SOME DOUBLE JEOPARDY BASICS

The legal issue—as both the majority and the dissent recognized—is whether the crimes of felony-murder-based-on-robbery and the underlying robbery were based on the same criminal taking. If they were, then under controlling law of this court and the United States Supreme Court, the double jeopardy clause bars conviction on both counts. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct.

1432, 63 L. Ed. 2d 715 (1980); *State v. Muhammad*, 194 Wn.2d 577, 451 P.3d 160 (2019) (plurality opinion). If they were not, then both convictions survive.

The majority agreed with this this analytical framework. *In re Pers. Restraint of Knight*, 196 Wn.2d 330, 337, 473 P.3d 663 (2020) ("'when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime'") (quoting *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005)), 345 (Yu, J., dissenting).

The majority even states that if we were to apply only clearly established United States Supreme Court precedent—*Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)—to the facts of this case, then Knight's convictions of both crimes would violate double jeopardy clause protections. *Id.* at 337 ("If our analysis stopped here [with an "examination of legislative intent" and an application of "the *Blockburger* test"], then Knight's separate convictions would violate double jeopardy because Knight's felony murder charge required the jury finding that Knight committed a robbery against James Sanders.").

But after finding that a double jeopardy violation would exist under *Blockburger*, the majority went on to apply the "independent purpose or effect test" that this court adopted in *Freeman*. It called Freeman's "independent purpose

or effect test" an "exception[]" to *Blockburger* and held that that exception applied in this case. *Id.* at 338-39.

Under the Supremacy Clause, I doubt that this court can apply an "exception" to the double jeopardy clause that is far less protective of individual rights than the double jeopardy test adopted by the Supreme Court. U.S. CONST. art. VI, cl. 2.

But even assuming that *Freeman* controls over *Blockburger*, the motion for reconsideration still points out "with particularity" that the criminal acts supporting the conviction of robbery of Mr. Sanders and the criminal acts supporting the conviction of felony-murder-based-on-robbery of Mr. Sanders were identical. If the motion for reconsideration is correct about this factual matter, then even under the majority's legal analysis, conviction of both of those crimes violates the double jeopardy clause.

THE FACTS THAT THE MAJORITY OVERLOOKED OR MISAPPREHENDED WHEN APPLYING THE DOUBLE JEOPARDY TEST

The motion for reconsideration is correct about this factual matter. The Information—the charging document—in this case certainly did not specify the criminal taking that formed the basis for the robbery or the felony-murder-based-on-robbery. The jury instructions did not specify that, either. The State argued that it alone specified the taking upon which the two crimes were based, that it did

so in closing argument to the jury, and that its specification (or in the words of our cases, its "election") in closing argument sufficed to ensure that the two convictions were based on different takings.

The majority agreed. It concluded that the robbery conviction was based on the taking of Mr. Sanders's ring, while the felony-murder-based-on-robbery conviction was based on the taking of Mr. Sanders's safe later in the continuing criminal episode. The majority therefore ruled that under *Freeman*, there was no double jeopardy violation.

But the motion for reconsideration correctly identifies our court's controlling test for determining whether the state has made such an "election" in its closing argument, applies that test to the closing argument in this case, and concludes that the record shows that the state in fact did not make such an election.

As that motion says, our controlling test for determining whether the State has made such an election is demanding. And as the majority recognized, we described that test in *State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015). *Carson* holds that such an election need not be formally pled, and can occur solely in closing argument. But the election has to be crystal "clear" to the jury. In *Carson*, we explained this fully,

> Similar to the Court of Appeals holding in *Williams,* we held in *State v. Kier,* 164 Wn.2d 798, 811-13, 194 P.3d 212 (2008), that the prosecution's closing-argument election was ineffective because it

> *was not sufficiently clear*. In *Kier,* like the prosecutor in *Williams* and in contrast to the closing argument in this case, the prosecutor merely named the acts on which he *was* relying; he did not, as the prosecutor at Carson's trial did, tell the jury that they were the *only* acts on which the State was relying. This latter element is essential to a clear election: *the State must not only discuss the acts on which it is relying, it must in some way disclaim its intention to rely on other acts*.

Id. at 228 n.15 (emphasis added.) In other words, for the State to effectively "elect" the facts upon which it relies for a conviction, it must do so in a way that is "sufficiently clear." It must also tell the jury that it cannot "rely on other acts" in a way that is clear.

In this case, the State did neither.

The State did not specify the taking of the ring as the predicate upon which the felony murder charge was based in a "sufficiently clear" manner, as even the majority acknowledged. *In re Knight*, 196 Wn.2d at 340 ("[t]he State, concededly, *was unclear* when discussing the felony murder count and which robbery applied to that count") (emphasis added).

And the State did not "disclaim its intention to rely on other acts"—other than the taking of the contents of the safe—as the robbery upon which the felony murder was based.

In fact, the State did just the opposite: *it affirmatively relied on the taking of James Sanders' ring when it described the robbery upon which the felony murder was based*. This is clear from the transcript of closing argument. While the State

recounted the whole series of events as a factual summary in its closing, when it came to discussion of the charged crimes and jury instructions, the State did not describe any fact other than the taking of the ring in support of both the felony murder and the robbery.

Specifically, when describing the facts supporting the elements of the felony murder charge, here is the critical paragraph:

> With respect to *murder* in the first degree, which is Count I in your jury instructions, again, no issue that this occurred on April 28. Charlene testified that her wedding ring was stolen, *Jim's wedding ring was stolen*. The state has to prove that the defendant or an accomplice caused the death of someone who is not a participant in the crime. Excuse me. Higashi shot and killed James Sanders, Senior, in the course of this robbery. Charlene, Jimmy, and Chandler all testified that they heard the shot that caused the death of Mr. Sanders, and Mr. Sanders died when he was fatally shot through his heart and his lungs. Mr. Sanders was the victim of this crime. He was not a participant, and the acts occurred in the State of Washington. The state is asking you to find that each and every element of all the counts were proven beyond a reasonable doubt.

7 Verbatim Report of Proceedings (Apr. 13, 2011) at 1007 (emphasis added).

Clearly, the State is telling the jury that the elements of the felony murder included the fact that "Jim's wedding ring was stolen." That means that the State is telling the jury that the robbery of the ring from James Sanders is the felony upon which the felony-murder-based-on-robbery was based. The State does not assert that it was the taking of Sanders' safe upon which the murder was based.

The majority's decision to uphold both convictions anyway conflicts directly with *Carson*, 184 Wn.2d at 227. *Carson* says that the State cannot successfully "elect" the acts upon which a crime is based unless it identifies those acts with heightened clarity *and* "disclaim[s] its intention to rely on other acts" with clarity. *Id*. at 228 n.15 (emphasis added).

The State's closing argument thus flunks both parts of the *Carson* test. It also introduces a totally new test, which upholds duplicative convictions even when the Information, the jury instructions, and the State all fail to clearly tell the jury that it cannot convict the defendant of two charged crimes unless it finds that the two crimes are really based on different acts. That conflicts with *Carson* (and also with the Court of Appeals' decisions applying the requirement that an "election" in closing argument must be clear and specific[1].

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[1] *State v. Thompson,* 169 Wn. App. 436, 474-75, 290 P.3d 996 (2012) ("[b]ecause the State clearly identified the act upon which the sexual motivation allegation was based" in closing, "no unanimity instruction was necessary"); *In re Pers. Restraint of Delgado*, 160 Wm. App. 898, 902, 251 P.3d 899 (2011) (State "'clearly elected . . . the criminal acts associated with the two counts during its closing arguments'" (quoting *State v. Delgado*, noted at 139 Wn. App. 1068, 2007 WL 2085344, at *4)); *State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007) (no clear election in closing argument because state "emphasized" one act over others but did not "expressly elect to rely only on" one act "in seeking the conviction").

CONCLUSION

I would not ordinarily write separately at this stage of the proceedings to highlight what I view as an unreasonable reading of the facts. I feel compelled to do so in this case, however, because that misapprehension of the facts creates several conflicts with controlling authority.

First, this court's decision conflicts directly with *Carson*'s requirement that an "election" in closing argument must be clear. It therefore also conflicts in principle with Court of Appeals' decisions applying that specification requirement.[2]

Second, it is contrary to *Blockburger*—because, as the majority acknowledges, under that clearly established United States Supreme Court precedent, conviction of both felony murder and the felony upon which it is based violates double jeopardy clause protections. Under the Supremacy Clause of the state and United States constitutions, we cannot water down the *Blockburger* test. WASH. CONST. art. I, § 2; U.S. CONST. art. VI, cl. 2. The result is a constitutional violation and a serious miscarriage of justice.

I therefore respectfully dissent from the denial of reconsideration.

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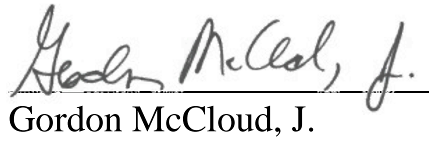
[2] *Id.*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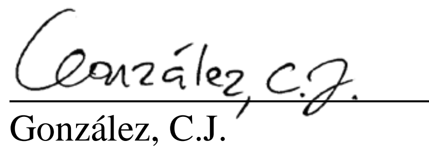
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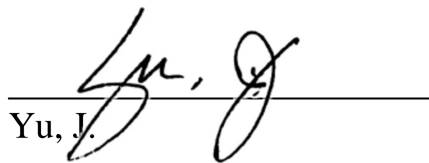
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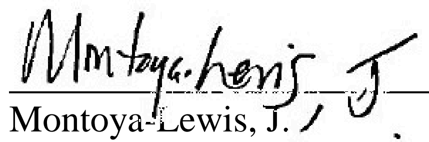
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