No. 54007-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Petitioner,

v.

DORCUS ALLEN,

Respondent.

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

ANSWER

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A. INTRODUCTION

The State again returns to this Court seeking permission to ignore the preclusive effect of a prior jury's acquittals. In its present motion for discretionary review, the State wrongly claims the Supreme Court has endorsed the State's current efforts to ignore the acquittals. In fact, the Supreme Court has never addressed the reasoning employed by the trial court nor endorsed the argument the State makes. In fact, the trial court properly applied the law and there is no basis for discretionary review.

B. ISSUE PRESENTED

The double jeopardy provisions of the Fifth Amendment do no permit the State to litigate anew a factual issue which was finally determined in a previous case. Here the prior jury acquitted Mr. Allen of aggravated first degree murder specifically rejecting the charge that:

> The victim was a law enforcement officer who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.

Did the trial court properly conclude that acquittal bars the State from asking a new jury to decide an identical element in a subsequent trial?

C. STATEMENT OF THE CASE

1. The State's misconduct leads to Mr. Allen's conviction.

Through a six-week trial, the State proved beyond a reasonable doubt that Maurice Clemmons killed four police officers. However, Maurice Clemmons was dead and not on trial, having been fatally shot in a confrontation with police a few days after his crime.

By comparison, the State's proof against the person actually on trial, Dorcus Allen, was substantially lacking. The State had charged Mr. Allen with four counts of aggravated first degree murder under RCW 10.95.020, and four counts of second degree murder.[1] Appendix at 13-19.

Recognizing the weakness of its case, the State relied upon a misstatement of the law regarding knowledge and

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[1] The trial court dismissed the four second degree counts for insufficient evidence at the close of evidence. Appendix at 24.

accomplice liability. In an effort to free itself of the burden of proving Mr. Allen possessed the requisite knowledge, the State presented a closing argument which focused on redefining the term knowledge to include what Mr. Allen "should have known." *State v. Allen*, 182 Wn.2d 364, 376-78, 341 P.3d 268 (2015) (*Allen I*). Thus, the State repeated numerous times, Mr. Allen was guilty as an accomplice so long as the jury found "he should have known." *Id*. That purposeful misstatement of the law led to Mr. Allen's convictions of four counts of first degree murder. *Id*. at 380.

However, the jury acquitted Mr. Allen of the four counts of aggravated murder, rejecting the RCW 10.95.020 law-enforcement allegation set forth above.[2] Appendix at 20-23.

Mr. Allen appealed his convictions arguing in part the State's egregious and repeated misconduct denied him a fair trial. The State conceded its repeated misstatements of the law were improper. *Id.* at 374. The Supreme Court agreed and

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[2] In convicting Mr. Allen of first degree murder, the jury found the existence of the aggravating factor from RCW 9.94A.535(3)(v).

found the repeated misstatements of the law on a critical issue was "particularly egregious." *Id.* at 380. The Court reversed the remaining convictions.

2. The Supreme Court rules the State cannot ignore the jury's acquittal.

After remand to the trial court, Mr. Allen filed a motion to dismiss the RCW 10.95.020 aggravating factors on which the jury had acquitted him. *State v. Allen*, 192 Wn.2d 526, 531, 431 P.3d 117 (2018) (*Allen II*). The trial court granted that motion. *Id*. The State sought discretionary review arguing double jeopardy protections did not apply to the jury's acquittal.

On discretionary review, first this Court and then the Supreme Court rejected the State's claims and affirmed the trial court. *Id*. at 531, 544. The Supreme Court held that because the aggravating factors are elements of the offense of aggravated first degree murder, the Fifth Amendment Double Jeopardy Clause barred retrial. *Id*. at 544.

3. The State again argues the acquittal does not prevent it from relitigating the same issue.

On remand, Mr. Allen filed a motion to strike an allegation of an aggravator from the information that mirrors the one on which the jury acquitted him. Appendix at 2. The trial court agreed with Mr. Allen concluding double jeopardy protections require striking the aggravator. Appendix at 1.

The State again seeks discretionary review, once again contending double jeopardy provisions do not apply.

D. ARGUMENT

The trial court correctly ruled the State cannot ignore the prior jury's verdict.

The Fifth Amendment Double Jeopardy Clause applies to state prosecutions by virtue of the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 795-96, 89 S. Ct. 206, 23 L. Ed. 2d 707 (1969).

> [T]he Clause embodies two vitally important interests. The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

> anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States,* 355 U.S. 184, 187–188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). The second interest is the preservation of "the finality of judgments." *Crist v. Bretz,* 437 U.S. 28, 33, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978).

Yeager v. United States, 557 U.S. 110, 117–18, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009) (some internal citations omitted).

The Double Jeopardy Clause of the Fifth Amendment bars (1) prosecution for the same offense after acquittal, (2) prosecution for the same offense after conviction, and (3) multiple punishments times for the same offense. *Brown v. Ohio,* 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by, Alabama v. Smith,* 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). For this purpose, lesser and greater offenses are the same offense. *Brown,* 432 U.S. at 168-69. Thus, an acquittal on a greater offense bars an effort to try a person for

a lesser offense. *Id.* This is precisely what the trial court held here.

The trial court did not commit any error and did not depart from the usual course of judicial proceedings. Discretionary review is not warranted under RAP 2.3.

1. *The jury acquitted Mr. Allen of aggravated first degree murder.*

A jury unanimously acquitted Mr. Allen on each of the four counts of aggravated first degree murder. Specifically, the jury unanimously answered "No" to the allegation that

> The victim was a law enforcement officer who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.

Appendix 20-23.

After the State, nonetheless, sought to retry Mr. Allen on those four counts, the Supreme Court made clear that double jeopardy protections barred such efforts. *Allen II*, 192 Wn.2d at 544. An acquittal on a count not only bars retrial on that count, it also bars trial on lesser counts. *Brown,* 432 U.S.

at 168-69. "Where the same act or transaction constitutes a violation of two distinct statutory provisions" the two offenses constitute the same offense unless "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180 76 L. Ed. 2d 306 (1932).

Now accepting as it must that the jury's acquittal of aggravated first degree murder bars it from retrying that offense, the State seeks to retry Mr. Allen on first degree murder with an aggravating factor that

> The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v).

The language of this aggravator mirrors that of the factor on which Mr. Allen was acquitted. *Compare* Appendix at 20-23. Neither factor requires proof of an additional fact not required by the other. Because they are the same for

purposes of double jeopardy the jury's prior acquittal bars the State's efforts to try Mr. Allen anew on the law enforcement aggravator in RCW 9.94A.535(3)(v). The trial court committed no error in properly applying the law.

In attacking the trial court's ruling, the State accuses the court of "ignoring" the prior holdings of the Supreme in *Allen I* and *Allen II*. But neither case concerned application of double jeopardy protections at issue here. "An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory." *State v. Granath*, 200 Wn. App. 26, 35, 401 P.3d 405 (2017)), affirmed, 190 Wn.2d 548, 415 P.3d 1179 (2018)). The Supreme Court has explained:

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. "An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *Continental Mutual*

> *Savings Bank v. Elliot*, 166 Wash. 283, 300, 6 P.2d 638 (1932).

In re the Personal Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014).

The portion of *Allen I* which the State points to concerned whether an aggravating factor could rely upon accomplice liability. The Court concluded it could and mentioned Mr. Allen could be retried. *Allen I*, 182 Wn.2d at 382-83. But the court never addressed double jeopardy much less the issue presented here. Indeed, it is ironic that the State suggests *Allen I* resolved the pending double jeopardy claim, as *Allen II* was necessitated by the State's blind insistence that double jeopardy did not apply to certain elements at all. Moreover, the present issue arises because of the preclusive effect of the acquittal affirmed in *Allen II*, and thus it certainly could not have been a part of the holding of *Allen I*.

The Supreme Court did not address this issue in either case, and thus, there were no prior holdings for the trial court to "ignore." Instead it is the State which has reimagined the

actual holdings and procedural history of this case. The trial court properly applied existing double jeopardy cases.

2. *None of the cases the State cites required the trial court to ignore the preclusive effect of the acquittal*.

The State maintains the trial court's reasoning is contrary to several Supreme Court decisions. Motion for Discretionary Review at 11-14.

The State insists *Allen II* "cited with approval" the Court's prior decision in *State v. Benn*, 161 Wn.2d 256, 165 P.3d 1232 (2007). Motion for Discretionary Review at 11 (citing *Allen II*, 192 Wn. 2d at 541). That is a plain and indefensible misstatement of what the Supreme Court actually said. The only discussion of *Benn* in *Allen II* consisted of two sentences in which the Court found *Benn* "clearly distinguishable" because it did not involve an actual acquittal. *Allen II*, 192 Wn.2d at 541. The State's purposeful misstatement aside, *Allen II* never ruled on the application of double jeopardy to the elements at issue now.

Next the State accuses the trial court of ignoring the holding of *State v. Daniels*, 160 Wn.2d 256, 265, 156 P.3d 905 (2007), *affirmed on reconsideration*, 165 Wn.2d 627, 200 P.3d 711 (2009), *writ of habeas corpus granted sub nom, Daniels v. Pastor, 2010 WL 56041.*[3] Motion for Discretionary Review at 12. As with its discussion of *Benn*, the State looks past the fact that *Daniels* similarly did not concern the question of whether retrial could occur following an acquittal. In fact the issue in *Daniels* was whether there was an acquittal at all. The Washington Supreme Court concluded there was not. The question of whether there was an acquittal was central to the case because had there been an acquittal that would have barred retrial. *See Daniels*, 160 Wn.2d at 262-65 (analyzing whether blank verdict constituted an acquittal.) Because it recognized an acquittal would have precluded retrial, *Daniels* fully supports the trial court's reasoning here.

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[3] The State's citation to *Daniels* does not reference the federal proceedings. But in fact, following the Washington Supreme Court decision, a writ of habeas was promptly granted vacating the conviction on double jeopardy grounds as the Washington Supreme Court decision was clearly contrary to settled United States Supreme Court law.

Finally the State claims the court failed to follow the Supreme Court's opinion in *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2007). Motion for Discretionary Review at 13. Once again, *Wright* did not concern an acquittal.

The trial court's ruling is entirely consistent with the actual holdings of each of these cases.

3. The trial court was not required to consider nonexistent verdicts when considering whether the acquittals preclude the State from asking a new jury to consider issues rejected by the prior jury.

The State contends the trial court's application of double jeopardy and collateral estoppel fails to give effect to the verdicts finding an aggravating factor under RCW 9.94A.535. But those verdicts no longer exist. Instead they were vacated five years ago in *Allen I*.

In *Allen I*, the Court found the State's egregious misconduct, purposefully and repeatedly misstating the law, permeated the State's argument to the jury. The Court found "the record reveals the jury was influenced by the improper statement of law during deliberations." *Allen I*, 182 Wn.2d at

378. The Court recognized "the jury was influenced" by the purposeful and flagrant misconduct. *Id*. at 380. Thus, the Supreme Court vacated those verdicts. Thus, the trial court did not ignore, disturb nor fail to give weight to these "verdicts." Those verdicts do not currently exist.

By contrast the verdicts of acquittal remain in full force. More specifically, the jury's rejection of the State's charge that Mr. Allen knew the victims of the crimes were law enforcement officers remains. Despite that specific rejection, the State contends nothing bars it from submitting substantially the same question to a new jury. The State is wrong.

The constitutional guarantee against double jeopardy "surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 446, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel "is an integral part of the protection against double jeopardy." *Harris v. Washington*, 404 U.S. 55, 56-57, 92 S. Ct. 183, 184, 30 L. Ed. 2d 212 (1971). "It means simply that when

an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties." *Ashe*, 397 U.S. at 443.

The doctrine of collateral estoppel generally bars a party from litigating a factual question if that factual issue was decided adversely to the party in a previous proceeding. *State v. Williams,* 132 Wn.2d 248, 254, 937 P.2d 1052 (1997). Importantly, Washington courts have applied a narrower standard than federal courts, requiring four specific criteria be satisfied:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

In re the Personal Restraint of Moi, 184 Wn.2d 575, 580, 360 P.3d 811, 813 (2015) (citing *Williams,* 132 Wn.2d at 254). The United States Supreme Court has never required an examination of potential injustice. *See Moi,* 184 Wn.2d at n.4.

Moi acknowledged the absence of an injustice analysis in the federal standard. *Id.* The Court expressly recognized that, if it were to rule in favor of the State and find application of the doctrine worked an injustice, Moi would be entitled to habeas relief. *Id.* Thus, Mr. Allen need not demonstrate application of collateral estopel will work an injustice, only that an issue of ultimate fact was finally decided in prior litigation involving the same parties.

There is no question the same parties, the State of Washington and Mr. Allen, were involved in the former and current litigation. That litigation finally determined an issue of ultimate fact: whether

> The victim was a law enforcement officer who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.

Appendix 20-23. For each of the four counts, the jury unanimously answered "No."

The State wishes to ask a new jury to decide whether:

> The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v). The language of these two elements is in all important respects identical.

The State has not identified a single case that requires a court to give effect to the vacated verdicts, ignore the acquittals and permit to retry the same question to a new jury. The trial committed no error when it concluded collateral estoppel precludes the State from submitting that element to a new jury.

E. CONCLUSION

The trial court properly struck the charged aggravator from the information. This Court should deny discretionary review.

Respectfully submitted this 22nd day of November, 2019.

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