STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1254-CRLV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREAL WASHINGTON,

Defendant-Petitioner.

ON INTERLOCUTORY APPEAL FROM A PRETRIAL ORDER DENYING A MOTION TO DISMISS, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court err when it denied Defendant-Petitioner Andreal Washington's pretrial motion to dismiss on the ground that this prosecution violates his right to be free from double jeopardy?

The trial court held that this prosecution of Washington for second-degree reckless homicide and for being a felon in possession of a firearm, after his acquittal of felony murder arising out of the same incident, did not violate the Double Jeopardy Clause of the United States Constitution because second-degree reckless homicide and felony murder are not the "same offense."

This Court should affirm because Washington's prosecution is neither constitutionally nor statutorily barred.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This appeal involves the application of established principles of law to the unique facts presented.

INTRODUCTION

Felony murder and second-degree reckless homicide are not, as both a matter of double jeopardy law and simple logic, the "same offense." Each requires proof of elements that the other does not. It follows that the State did not violate Washington's right to be free from double jeopardy when it charged him with second-degree reckless homicide after a jury acquitted him of felony murder arising out of the same facts and involving the same homicide victim.

This prosecution is also not barred just because second-degree reckless homicide is a less serious form of homicide

than felony murder within the scope of Wis. Stat. § 939.66(2). That statutory section only prohibits multiple *convictions* for statutorily-defined greater and lesser homicide offenses. It does not bar trial on the lesser homicide charge after an acquittal on the greater homicide charge. This Court should affirm.

STATEMENT OF THE CASE

Washington challenges a non-final order entered by Milwaukee County Circuit Court Judge Jeffrey A. Conen on June 20, 2018, denying his motion to dismiss charges of second-degree reckless homicide and being a felon in possession of a firearm as having been brought in violation of his constitutional right to be free from double jeopardy. (R. 10.)

Washington was initially charged in an amended information in 2016 with felony murder for his role in causing the death of Travis Williams on April 30, 2016. The alleged underlying felony was armed robbery. A jury acquitted Washington of felony murder on September 8, 2017. (Washington's Br. 1.) The pivotal issue at trial was whether Washington committed the murder in the course of committing an armed robbery. The jury presumably found that the death, though caused by Washington, was not committed during an armed robbery. (R. 15:9–11.) In the trial court's words: "And there was very little dispute on the cause of death . . . the main dispute was on the armed robbery." (R. 15:16.)

In a complaint issued on May 2, 2018 (R. 2), and in an information issued on May 15, 2018 (R. 7), the State charged Washington with second-degree reckless homicide and being a felon in possession of a firearm, both charges arising out of

the same events on which the original felony murder charge was based, and involving the same victim (R. 7).

On June 11, 2018, Washington moved to dismiss the new charges as having been brought in violation of his right to be free from double jeopardy. (R. 9.) The State opposed the motion. (R. 8.) The trial court held a hearing on the motion on June 15, 2018. (R. 15.) The trial court denied Washington's motion to dismiss orally from the bench at the close of the hearing. (R. 10; 15:21–23.) The court issued a written order to that effect on June 20, 2018. (R. 10.)[1]

The trial court held that there was no double jeopardy violation because the second-degree reckless homicide charge was not the same offense as felony murder under the longstanding constitutional test adopted in *Blockburger v. United States*, 284 U.S. 299 (1932). (R. 15:21.) The trial court also relied on the Wisconsin Supreme Court's decision in *State v. Vassos*, 218 Wis. 2d 330, 579 N.W.2d 35 (1998), where the court upheld against both a double jeopardy and a statutory challenge, a prosecution for misdemeanor battery after an acquittal of felony battery involving the same facts, because each offense required proof of different elements. (R. 15:22.) With regard to felony murder and second-degree reckless homicide, the trial court concluded: "So we're not even close on elements. The elements don't even match up." (R. 15:22.) The only common element is that "somebody died." (*Id.*) The court also rejected Washington's argument that retrial on the new charges was barred by collateral estoppel. (R. 15:22–23.)

Washington filed a petition for leave to appeal the non-final order on July 6, 2018. (R. 11.) On the same day, this

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[1] Washington does not challenge the felon-in-possession charge.

Court issued an order directing the parties to file briefs addressing the double jeopardy issue and directing Washington to arrange for the filing of the transcript. (R. 1.)[2]

STANDARD OF REVIEW

The issue whether there has been a double jeopardy violation is one of law, reviewable de novo. *State v. Steinhardt*, 2017 WI 62, ¶ 11, 375 Wis. 2d 712, 896 N.W.2d 700.

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[2] Washington does not pursue the collateral estoppel argument here. (Washington's Br. 2, 10.) Had he done so, it also would have lacked merit.

The collateral estoppel doctrine does not bar prosecution for second-degree reckless homicide because of how the first trial unfolded. *State v. Vassos*, 218 Wis. 2d 330, 342–45, 579 N.W.2d 35 (1998). Washington has not met his burden of proving "that the issue about which he . . . seeks to foreclose relitigation was actually decided" in the felony murder trial. *Id.* at 343. Specifically, the jury at the first trial did not decide the issue whether Washington's conduct causing the victim's death was criminally reckless; the issue was whether the death admittedly caused by him was committed during an armed robbery. (R. 15:22–23.) Washington admitted under oath at the felony murder trial that he caused the victim's death, but he did so accidentally and not to facilitate the commission of an armed robbery. (R. 8:3; 15:9–10.)

The primary issue at the second trial will be whether Washington's admitted discharge of the gun causing the victim's death was criminally reckless or merely negligent conduct. Wis. Stats. §§ 939.24, 939.25. That fact issue was not decided at the first trial.

ARGUMENT

The trial court properly held that Washington's acquittal of felony murder did not bar his prosecution for second-degree reckless homicide arising out of the same facts and involving the same victim because they are not the "same offense" for purposes of the Double Jeopardy Clause.

A. The applicable law

The Double Jeopardy Clause proscribes putting a defendant twice in jeopardy "for the same offence." U.S. Const. amend. V. The protection against being twice put in jeopardy applies both to successive prosecutions for the same criminal offense and multiple punishments for the same offense. *United States v. Dixon*, 509 U.S. 688, 695–96 (1993); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *Steinhardt*, 375 Wis. 2d 712, ¶ 13; *State v. Kurzawa*, 180 Wis. 2d 502, 515–16, 509 N.W.2d 712 (1994).

Wisconsin courts adhere to the double jeopardy test adopted long ago by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether two offenses are the "same offense" for double jeopardy purposes. The court faced with a double jeopardy challenge must determine whether the two offenses are identical in law and in fact. *State v. Derango*, 2000 WI 89, ¶ 29, 236 Wis. 2d 721, 613 N.W.2d 833.

The constitutional issue is whether each offense requires proof of an additional fact that the other does not. *Blockburger*, 284 U.S. at 304. This test involves comparing the statutory elements of the two offenses. *State v. Johnson*, 178 Wis. 2d 42, 49, 503 N.W.2d 575 (Ct. App. 1993).

If the *Blockburger* test is satisfied, and each offense requires proof of an element the other does not, there is a presumption that the state legislature intended to permit multiple charges and cumulative punishment for both offenses absent clear evidence of a contrary intent sufficient to overcome that presumption. *Derango*, 236 Wis. 2d 721, ¶ 30; *State v. Swinson*, 2003 WI App 45, ¶ 28, 261 Wis. 2d 633, 660 N.W.2d 12. This is consistent with how the United States Supreme Court has interpreted the Double Jeopardy Clause. *Garrett v. United States*, 471 U.S. 773, 779 (1985); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

B. Felony murder and second-degree reckless homicide are not the "same offense."

This prosecution of Washington for second-degree reckless homicide after his acquittal of felony murder does not violate Wis. Stat. § 939.71 or the Double Jeopardy Clause of the United States Constitution because each offense requires proof of elements that the other does not. *See Vassos*, 218 Wis. 2d at 335 ("Wisconsin Stat. § 939.71 substantially enacts the *Blockburger* test for determining whether the two offenses are the 'same offense' for double jeopardy purposes.").

Felony murder requires proof that the death was caused "while committing or attempting to commit" one of the enumerated felonies, including armed robbery. The State must prove that the underlying felony was a substantial factor in bringing about the victim's death. Wis. Stat. § 940.03; Wis. JI–Criminal 1030 and 1031 (2013). *See State v. Krawczyk*, 2003 WI App 6, ¶ 21, 259 Wis. 2d 843, 657 N.W.2d 77 ("[I]t is the defendant's conduct in facilitating the underlying crime that triggers felony murder liability when a death results from the crime, there being no requirement that

a defendant's conduct be physically related to the fatal shot or assault"). *See also State v. Oimen,* 184 Wis. 2d 423, 428, 516 N.W.2d 399 (1994) (felony murder liability upheld where the intended victim fatally shot one of the *defendant's* cohorts during a botched armed robbery); *State v. Rivera*, 184 Wis. 2d 485, 487–90, 516 N.W.2d 391 (1994) (felony murder liability upheld where a house guest was accidentally shot and killed by the intended victim of a botched armed robbery committed by the defendant).

Second-degree reckless homicide requires proof that the death was caused by the defendant's criminally reckless conduct. Wis. Stat. § 940.06(1); Wis. JI–Criminal 1060 (2015). Here, the State will have to prove that Washington caused the victim's death by conduct that created an unreasonable and substantial risk of death or great bodily harm to the victim, and Washington was aware of that risk. *Id*. *See* Wis. Stat. § 939.24(1) (defining "criminal recklessness").

Felony murder does not require proof that the death was caused by criminally reckless conduct. Felony murder requires proof that the defendant committed or attempted to commit one of the enumerated felonies. Conversely, second-degree reckless homicide does not require proof that the death was caused while committing a felony such as armed robbery, but it does require proof that the defendant caused the victim's death. Prosecuting Washington now for second-degree reckless homicide after his acquittal of felony murder is, therefore, constitutional. (R. 15:21–22); *Vassos*, 218 Wis. 2d at 334–42.

C. Washington's prosecution for second-degree reckless homicide is not barred even though it is a lesser degree of homicide.

Washington essentially concedes that there is no double jeopardy violation because these two offenses satisfy the *Blockburger* test (Washington's Br. 7–8), but he maintains that this prosecution is barred because second-degree reckless homicide is a statutorily included offense of felony murder (Washington's Br. 9–10). This argument is also utterly devoid of merit.

For the same reasons that second-degree reckless homicide is not the "same offense" as felony murder, it is not statutorily-included in felony murder under Wis. Stat. § 939.66(1). *See Vassos*, 218 Wis. 2d at 337 (like section 939.71, section 939.66(1) "codifies the *Blockburger* same-elements test").

Washington argues, nonetheless, that this prosecution is statutorily barred because second-degree reckless homicide is an included offense of felony murder in that it is "a less serious type of criminal homicide" under Wis. Stat. § 939.66(2). That statutory section does not, however, prevent multiple prosecutions for these separate homicide offenses. It only prevents multiple *convictions* for those offenses. Wis. Stat. § 939.66 ("the actor may be convicted of either the crime charged or an included crime, but not both."). Washington was not convicted of felony murder; he was acquitted.

In *Vassos*, the defendant was tried and acquitted of aggravated battery, a felony. He was retried for misdemeanor battery. This, the Wisconsin Supreme Court held, was proper because the elements of the two offenses satisfied the *Blockburger* test. Further, although, misdemeanor battery was an included offense of aggravated battery by operation of

Wis. Stat. § 939.66(2m), that section did not bar a prosecution for the statutorily included misdemeanor battery after the defendant's acquittal of felony battery because section 939.66 only proscribes multiple convictions for both a greater and an included offense. *Vassos*, 218 Wis. 2d at 337–41. Washington failed to prove that his upcoming second-degree reckless homicide trial is statutorily barred.

Washington's apparent argument that his prosecution is for some reason barred because the State initially charged him with first-degree reckless homicide, but later amended that charge to felony murder before jeopardy attached at the first trial, has no support in law or logic. (Washington's Br. 6.) Precisely because the State amended the original charge from reckless homicide to felony murder, the issue whether Washington engaged in criminally reckless conduct was neither tried nor adjudicated at the first trial. Washington cites no authority for the proposition that the Double Jeopardy Clause bars this prosecution for second-degree reckless homicide—a lesser-included offense of first-degree reckless homicide initially charged but dropped before jeopardy attached—after he was acquitted of the amended felony murder charge—a charge that was manifestly not the "same offense" as second-degree reckless homicide. The State is not prohibited from attempting to prove *for the first time* to a jury that Washington engaged in criminally reckless conduct that caused the victim's death.

Washington failed to prove that his prosecution for second-degree reckless homicide after his acquittal of felony murder is constitutionally or statutorily prohibited. The trial court properly denied Washington's motion to dismiss.

CONCLUSION

This Court should affirm the order denying Washington's motion to dismiss.

Dated this 24th day of September, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,257 words.

Dated this 24th day of September, 2018.

_____
DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of September, 2018.

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