
NO. 34153

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

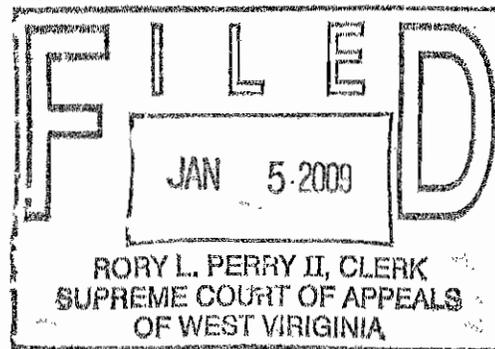
STATE OF WEST VIRGINIA,

Appellee,

v.

GARY WAYNE KENT,

Appellant.



BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA

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I.

KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW

This is an appeal by Gary Wayne Kent (hereafter "Appellant") from his conviction of first degree murder in the Circuit Court of Marion County, West Virginia (Fred L. Fox, II, Judge, presiding), for which he was sentenced to life in the penitentiary with the possibility of parole.

This was Appellant's second trial on these charges, his first conviction for deliberate and premeditated first degree murder having been set aside by this Court in 2003. In this appeal, Appellant challenges his conviction of first degree murder under a felony murder theory, on double jeopardy grounds.

II.

STATEMENT OF FACTS

In the early evening hours of July 26, 1998, Sergeant Gilbert E. Campbell of the City of Fairmont Police Department was patrolling an area of Fairmont, West Virginia, when he noticed a van pulled off along the side of a dead end road. (Tr. 355.¹) Upon investigation, Sgt. Campbell discovered the body of Thomas Allen, the proprietor of a local convenience store and known gambling bookie, slumped over behind the wheel. Allen was dead from two gunshot wounds, both lethal, one a penetrating wound to the head where the bullet remained lodged in his scalp, and the other a perforating wound to his neck where the bullet entered and exited. (Tr. 437-39.)

Pursuant to a lead that Appellant had been seen with the victim earlier in the evening, Lieutenant Mark Hayes of the Fairmont Police Department located Appellant and asked him to submit to questioning. (Tr. 466-67.) Appellant agreed to go with the police. Shortly after arriving at the station he was given *Miranda*² warnings and made two statements thereafter, wherein he described what he did that day and denied any involvement with the murder. Appellant admitted being with Allen prior to the crime, but said the victim dropped him off at a relative's house and left. (Tr. 480.) Following the interview, Appellant agreed to submit to a gunshot residue test, and to provide his clothing for testing.

Several witnesses refuted key elements of Appellant's version of events and others placed him near the scene around the time of the murder. In Appellant's first statement, he claimed he thought that Allen had died of a heart attack. Appellant's sister testified that she lived near where

¹Citations are to the transcript of Appellant's trial on March 12-16, 2007 (Record, Vol. IV).

²*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the van was found and witnessed the police working the crime scene. She called her brother to tell him about the murder and specifically told him the victim died of a gunshot. (Tr. 616.) Another witness testified that Appellant approached him to borrow money earlier on the day of the crime. (Tr. 405.) Witness Sonda Felton testified that she saw Appellant in the evening hours on the day of the murder "acting weird." (Tr. 809.) Felton observed that Appellant had a "wad of money in his hand and he had [a] gun." Appellant told Ms. Felton, "you haven't seen me." (*Id.*) Ms. Felton said Appellant also had a bank bag, and that he pointed the gun at her and said, "I'll blow your damn head off." (Tr. 810.) Witnesses testified that Tommy Allen was well known for carrying around large amounts of money and for taking the substantial cash proceeds from his business home in bank bags after closing every night. (Tr. 636, 728-29, 1115, 951-53.)

Several pieces of physical evidence were discovered over the course of the police investigation that connected Appellant with the homicide. A shell casing was discovered in plain view on Appellant's front porch, and when compared with shell casings found inside Allen's van, it was determined that they were a match. (Tr. 753.) Analysis by the Forensic Laboratory of the West Virginia State Police located one particle of gunshot residue on the sample taken from Appellant's left hand. (Tr. 716-17.) While executing a search warrant of Appellant's residence on July 28, 1998, officers discovered three bank bags, along with some papers, on a shelf in Appellant's bedroom. (Tr. 1009.) One of the bank bags was subsequently identified as belonging to Allen, and the two others were identified as being consistent with bank bags often used by him. (Tr. 959-63.) On July 29, 1998, Patrolman Douglas Yost, while conducting a search of the path that connects the end of Pierpont Avenue with Ogden Avenue (where Appellant lived), discovered three partially burned checks, also positively identified as checks recently cashed at Allen's store, as well as various

numbers tickets he wrote out on the day before he was murdered. (Tr. 669-70, 683-84.) The van containing Allen's body was discovered in the vicinity of Appellant's home and his sister lived close enough to observe law enforcement working the scene. (Tr. 614.)

The Appellant denied any involvement in the death of Tommy Allen (Tr. 1134), and said that the witnesses against him were all lying or confused. His defense was alibi; he claimed that he was at home during the afternoon of the murder.

On March 19, 2007, following a six-day trial, the jury convicted Appellant of first degree murder (felony murder), with a recommendation of mercy. By order entered June 4, 2007, the circuit court sentenced Appellant to life in the penitentiary, with the possibility of parole. It is from this order that Appellant now appeals.

III.

PROCEDURAL HISTORY

During its October 1998 Term, the Marion County Grand Jury returned a single-count indictment charging the Appellant with First Degree Murder, in violation of West Virginia Code § 61-2-1.³ The indictment alleged as follows:

That on or about the 26th day of July, 1998, in the said County of Marion, State of West Virginia, GARY DEWAYNE KENT committed the offense of FIRST

³ West Virginia Code § 61-2-1 [1991] provides in relevant part:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

DEGREE MURDER, in that he unlawfully, feloniously, intentionally, willfully, maliciously, deliberately, and premeditatedly, or in the commission of, or attempt to commit, ROBBERY, did slay, kill, and murder THOMAS LEE ALLEN, then and there committing said felony offense with the use, presentment or brandishing of a firearm, against the peace and dignity of the State.

(R. Vol. I at 1.)

At the conclusion of the Appellant's first trial on October 1, 1999, the jury was instructed that they could return one of five possible verdicts: 1) Not Guilty; 2) Guilty of Murder of the First Degree (Felony Murder); 3) Guilty of Murder of the First Degree (Deliberate and Premeditated); 4) Guilty of Murder of the Second Degree, a lesser included offense of Deliberate and Premeditated Murder; and 5) Guilty of Voluntary Manslaughter, a lesser included offense of Deliberate and Premeditated Murder.⁴ (R. Vol. II, Tr. 1218, 1301.)⁵ The jury returned a verdict of Guilty of Murder of the First Degree (Deliberate and Premeditated) (R. Vol. I at 627; Vol. II, Tr. 1305), and declined to recommend mercy (R. Vol. I at 642; Vol. II, Tr. 1465). As previously discussed, this conviction was overturned by this Court on appeal.

During a hearing prior to Appellant's retrial on these charges in March of 2007, his defense counsel argued for the first time that the jury should not be able to consider a felony murder verdict, because Appellant had in effect been acquitted of felony murder by the jury's verdict of first-degree murder during the first trial. In support of his motion to bar a felony murder instruction, defense counsel cited the decision of the United States Supreme Court in *North Carolina v. Pearce*, 395 U.S.

⁴Appellant's first trial was bifurcated on the issues of guilt and mercy.

⁵Citations here are to the transcript of Appellant's first trial on September 27-October 1, 1999 (Record, Vol. II).

711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969);⁶ and the decisions of this Court in *State v. Young*, 173 W. Va. 1, 311 S.E.2d 118 (1983); *State ex rel. Young v. Morgan*, 173 W. Va. 452, 317 S.E.2d 812 (1984); and *Stuckey v. Trent*, 202 W. Va. 498, 505 S.E.2d 417 (1998). (See R. Vol. IV, Hr'g Tr. 187-94, March 8, 2007.) Because the defense had not filed a written motion prior to the hearing, the prosecuting attorney was granted an opportunity to address their arguments in writing.

The next day, the State filed its response in opposition to the Appellant's motion, stating:

The Defendant relied [on] two separate cases to argue that the State should be barred from proceeding upon alternating theories of Felony Murder and Premeditated Murder: *State ex rel. John Lewis Young v. Damon B. Morgan, Jr.*, 173 W. Va. 452, 317 S.E.2d 812 (1984) and *James Stuckey v. George Trent, Warden, and West Virginia Division of Corrections*, 202 W. Va. 498, 505 S.E.2d 417 (1998). A thorough review of both cases does not bar the State from proceeding under both theories of Felony Murder and Premeditated Murder.

"In particular, this Court holds that, in West Virginia, (1) murder by any willful, deliberate and premeditated killing, and (2) felony-murder constitute alternative means under W. Va. Code, 61-2-1 [1987], of committing the statutory offense of murder of the first degree; consequently, the State's reliance upon both theories at a trial for murder of the first degree does not, per se, offend the principles of due process, provided that the two theories are distinguished for the jury through court instructions; nor does the absence of a jury verdict form distinguishing the two theories violate due process, where the State does not proceed against the defendant upon the underlying felony." *James Stuckey v. George Trent, Warden, and West Virginia Division of Corrections*, 202 W. Va. 498, [505,] 505 S.E.2d 417[424] (1998). In the above referenced matter, the Defendant has not been charged with an underlying felony. Nor has the Defendant asserted any affirmative defense, such as self-defense, which would necessitate an election on the part of the State as to which theory the State would proceed upon.

Further, *State ex rel. Young* sets forth the theory of "implicit acquittal" and deals with a Defendant being convicted of a lesser included offense (i.e. Murder in the Second Degree) which would in the future bar the State from pursuing the higher offense. In the instant case, the Defendant's prior conviction was for Murder in the

⁶Because the Supreme Court's decision in *Pearce* was grounded in the Due Process Clause rather than the Double Jeopardy Clause, it is inapplicable to the present case, and Appellant has not cited it in his brief to this Court.

First Degree. He is being retried for the offense of Murder in the First Degree. There was no "implicit acquittal" of a higher offense. The State may proceed to attempt to convict the Defendant on any theory allowable by law. The United States Supreme Court in *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed.2d 555 (1991), stated that "[w]hether or not everyone would agree that the mental state that precipitates death in the course of robbery [for example] is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense," as quoted in *Stuckey*[, 202 W.Va. at 504, 505 S.E.2d at 423].

Wherefore, based upon the foregoing statement of the law and the Court instructing the jury on the two alternate theories, the State should not be barred from arguing the two alternate theories to prove Murder in the First Degree. . . .

(R. Vol. III at 2183-84.)

On the first day of the trial, prior to seating the jury, the circuit court ruled as follows:

I have read the cases cited in the defense motion. I think they are 1) distinguishable; 2) I don't think they say what defense counsel said they did specifically; and third, I think West Virginia law was wrong. It is not in conformance with the United States Supreme Court law, and this may be -- the present Supreme Court may be a case which they might want to rectify that. So I will instruct [the] jury on both felony murder and premeditated and deliberate murder.

(R. Vol. IV, Tr. 222.)

At the conclusion of the second trial, the jury was given the choice of one of seven possible verdicts: 1) Not Guilty; 2) Guilty of Murder of the First Degree (Deliberate and Premeditated); 3) Guilty of Murder of the First Degree (Deliberate and Premeditated), with a recommendation of mercy; 4) Guilty of Murder of the First Degree (Felony Murder); 5) Guilty of Murder of the First Degree (Felony Murder), with a recommendation of mercy; 6) Guilty of Murder of the Second Degree; and 7) Guilty of Voluntary Manslaughter.⁷ (R. Vol. IV, Tr. 1176, 1296.) On March 19,

⁷The guilt and mercy phases of Appellant's second trial were not bifurcated, at his request. (See R. Vol. IV, Hr'g Tr. 154, February 26, 2007.)

2007, the jury returned a verdict of Guilty of Murder of the First Degree (Felony Murder), and recommended mercy. (R. Vol. III at 2394; Vol. IV, Tr. 1313-14.)

On March 26, 2007, the Appellant by counsel filed a Motion for Judgment of Acquittal based in part on the ground that “[p]ursuant to the teachings of *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969) and *State v. Young*, 311 S.E.2d 118 (WV 1983) the Court erred in denying Defendant’s pretrial motion to prohibit the State from instructing on felony murder. In Defendant’s first trial the jury implicitly acquitted the Defendant of felony murder and double jeopardy principles prohibit the State from retrying the Defendant on acquitted conduct.” (R. Vol. III at 2404.) Appellant also filed a Notice of Intent to Appeal and Motion for a New Trial on the same day, stating in relevant part that “[t]he Trial Court erred in its previous ruling allowing the State to pursue felony murder charges against the Defendant. As stated in *Defendant’s Motion for Judgment of Acquittal*, felony murder is prohibited by the principles of double jeopardy since the Defendant was acquitted of said felony murder conduct in 1999.” (*Id.* at 2396, 2405.)

The State filed its response to Appellant’s motions on May 14, 2007, asserting:

As the State set forth in its State’s Response to Defendant’s Motion to Bar Instruction on Felony Murder the “implicit acquittal” theory the Defendant is relying upon does **not** apply in the above referenced matter. The Defendant was previously convicted of Murder in the First Degree. He was retried for the offense of Murder in the First Degree. Alternating theories on how to prove the commission of such offense have been specifically approved by the West Virginia Supreme Court in *James Stuckey v. George Trent, Warden, and West Virginia Division of Corrections*, 202 W. Va. 498, 505 S.E.2d 417 (1998) and by the United States Supreme Court in *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed.2d 555 (1991). There was no implicit acquittal of a “higher” offense.

(R. Vol. III at 2411.)

In its June 13, 2007, order denying Defendant’s motions on this ground, the court found:

In the first trial of this case, the jury found the Defendant guilty of murder of the first degree (deliberate and premeditated), and defense counsel take the position that this represents a jury finding of not guilty of murder of the first degree (felony murder). This Court simply does not agree with the Defendant's "implicit acquittal" theory. In addition, the cases cited by defense counsel in support of their position are cases which enjoin a jury from finding guilt of a higher offense in the second trial, and those cases do not fit the fact pattern which presents itself herein.

(R. Vol. III at 2446.)

IV.

RESPONSE TO ASSIGNMENT OF ERROR

Although Appellant assigned four errors in his Petition for Appeal, this Court granted the appeal solely on Assignment of Error No. 1:

The Trial Court erred in its ruling allowing the State to pursue felony murder charges against the petitioner because in the petitioner's first trial, the jury implicitly acquitted the petitioner of felony murder and double jeopardy principles prohibit the State from retrying the petitioner on the acquitted conduct of felony murder.

The State's Response: In both trials, Appellant was convicted of first degree murder, which includes both a deliberate, premeditated killing and a homicide occurring during the commission of a felony. Because there was no difference in the nature or degree of the offenses of which Appellant was convicted, double jeopardy principles did not bar Appellant's conviction of first degree murder in his second trial under a felony murder theory.

V.

ARGUMENT

Appellant's double jeopardy claim is based entirely on the premise that the jury's verdict finding him guilty of deliberate and premeditated first degree murder in his first trial was an implied acquittal of felony murder, barring his retrial under that theory. This argument has no basis in the

facts or the law. As this Court has held, felony murder and deliberate and premeditated murder are alternative means of committing the same statutory offense – first degree murder. The jury did not acquit Appellant of felony murder in his first trial; it found him guilty of first degree murder by deliberation and premeditation. Thus, double jeopardy principles did not bar Appellant’s retrial for first degree murder under either a deliberate and premeditated or felony murder theory.

A. THE STANDARD OF REVIEW.

“Where the issue on appeal is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. Pt. 1, *State v. Ray*, 221 W. Va. 364, 655 S.E.2d 110 (2007).

The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.

Syl. Pt. 1, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977).

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Syl. Pt. 1, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992).

“[A] double jeopardy claim ... [is] reviewed *de novo*.” Syllabus Point 1, in part, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996).

Syl. Pt. 2, *State v. Ray*, *supra*.

B. APPELLANT'S CONVICTION FOR FELONY MURDER DID NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.

The Double Jeopardy Clauses of both the United States⁸ and West Virginia⁹ Constitutions bar a prosecution for the same offense after an acquittal. In addition, the United States Supreme Court has held that once a defendant has been implicitly acquitted of first degree (felony) murder by a jury verdict of guilty of second degree murder, if his conviction is reversed on appeal he cannot be retried for first degree murder without violating double jeopardy principles. *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). Appellant places great reliance on this decision, arguing that it compels the same result in his case. The State disagrees.

The facts of *Green* are in some respects similar to the case at bar, but with a significant difference. Green was charged in a two-count federal indictment with committing arson and causing the death of a woman by this alleged arson. At Green's first trial, under the second count of the indictment the jury was given a choice of verdicts between first degree murder (killing while perpetrating a felony) and second degree murder (killing with malice aforethought) as a lesser included offense. The jury found Green guilty of arson and second degree murder, but did not find him guilty on the charge of first degree murder. The verdict was silent on that charge. The second degree murder conviction was reversed on appeal, and on retrial Green raised the defense of former jeopardy which was rejected by the trial court. The second jury found Green guilty of first degree

⁸The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." This guarantee is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

⁹Article III, § 5 of the West Virginia Constitution provides, in relevant part: "No person shall . . . in any criminal case. . . be twice put in jeopardy of life or liberty for the same offence."

murder, and he appealed. The Supreme Court reversed the conviction, holding that “this second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution.” 355 U.S. at 190, 78 S. Ct. at 225. The Court reasoned that because the original jury had refused to convict Green of first degree murder, but chose to convict him of second degree murder instead, it had implicitly acquitted him on the charge of first degree murder. Moreover, because the jury was dismissed without returning any express verdict on the first degree murder charge and without Green’s consent, under established principles of former jeopardy he could not be retried for that offense. *Id.* at 191, 78 S. Ct. at 225. The Court further held that Green’s successful appeal did not amount to a waiver of his defense of former jeopardy. *Id.* at 191-92, 78 S. Ct. at 226.

However, the Supreme Court also noted that “Green’s plea of former jeopardy does not rest on his conviction for second degree murder but instead on the first jury’s refusal to find him guilty of felony murder.” In this regard, “[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense.” 355 U.S. at 194 n.14, 78 S. Ct. at 227 n.14.

This Court subsequently followed the reasoning of *Green* in holding: “Upon retrial of a criminal defendant, who has previously been convicted of second degree murder under a general homicide indictment, the court may not impose judgment for a more serious degree of homicide than that imposed at the original trial.” Syl. Pt. 1, *State v. Young, supra*.

1. Premeditated Murder and Felony Murder Are Alternative Means of Committing the Same Offense.

In the present case, the Appellant was not convicted of two distinct and different offenses in his separate trials; he was convicted of the same offense both times – first degree murder, in violation of West Virginia Code § 61-2-1, *supra*. “W. Va. Code, 61-2-1, enumerates three broad categories of homicide constituting first degree murder: (1) murder by poison, lying in wait, imprisonment, starving; (2) by any wilful, deliberate and premeditated killing; (3) in the commission of, or attempt to commit, arson, rape, robbery or burglary.” Syl. Pt. 6, *State v. Sims*, 162 W. Va. 212, 248 S.E.2d 834 (1978).

In West Virginia, (1) murder by any willful, deliberate and premeditated killing, and (2) felony-murder constitute alternative means under W. Va. Code, 61-2-1 [1987], of committing the statutory offense of murder of the first degree; consequently, the State's reliance upon both theories at a trial for murder of the first degree does not, *per se*, offend the principles of due process, provided that the two theories are distinguished for the jury through court instructions; nor does the absence of a jury verdict form distinguishing the two theories violate due process, where the State does not proceed against the defendant upon the underlying felony.

Syl. Pt. 5, *Stuckey v. Trent*, 202 W. Va. 498, 505 S.E.2d 417 (1998).

In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder--willful, deliberate, and premeditated killing and felony-murder--if, under the facts of the particular case, the jury can find the defendant guilty of either category of first degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent.

Syl. Pt. 9, in part, *State v. Giles*, 183 W. Va. 237, 395 S.E.2d 481 (1990).

Appellant was indicted for first degree murder under the alternative theories that he either killed Tommy Allen willfully, maliciously, deliberately and premeditatedly, or in the commission

of, or attempt to commit, robbery. He was not charged with the robbery itself.¹⁰ During both of Appellant's trials, there was sufficient evidence adduced to support a guilty verdict for murder of the first degree under either theory. Jurors were properly instructed on the elements of each category of first degree murder, and the jury was offered a choice of possible verdicts, including two lesser included offenses. Significantly, jurors were instructed each time that they could return only one verdict under the single count of the indictment. (See R. Vol. II, Tr. 1218, 1301; R. Vol. IV, Tr. 1176, 1296.) Consequently, each time they returned a single verdict: guilty of murder of the first degree. In the first trial, jurors found the murder to be deliberate and premeditated, and did not recommend mercy. On retrial, jurors based their verdict on a felony murder theory, and recommended mercy. They did not acquit Appellant of any charge, and there was no procedural or constitutional error in their verdict.

Under West Virginia law, premeditated and felony murder form parts of a single crime, and a jury need not even agree on which one leads to a conviction when both are presented to it. In the absence of a robbery count, separate verdict forms for premeditated murder and felony murder are not even constitutionally required. See *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991); *Stuckey v. Trent*, 202 W. Va. at 505, 505 S.E.2d at 424.¹¹ As the Supreme Court observed in *Schad*, construing an Arizona murder statute similar to ours:

¹⁰Separate convictions for robbery and felony murder based upon the same robbery would have violated double jeopardy principles. See Syl. Pt. 8, *State v. Williams*, 172 W. Va. 295, 305 S.E.2d 251 (1983).

¹¹Where separate verdict forms for premeditated murder and felony murder are used, it may be advisable to provide the jury with the option of finding the defendant guilty or not guilty on each theory, to prevent similar issues from arising in future cases. This option was not offered by the court or requested by defense counsel in Appellant's first trial.

[I]t is significant that Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. At common law, murder was defined as the unlawful killing of another human being with "malice aforethought." The intent to kill and the intent to commit a felony were alternative aspects of the single concept of "malice aforethought." See 3 J. Stephen, *History of the Criminal Law of England* 21-22 (1883). Although American jurisdictions have modified the common law by legislation classifying murder by degrees, the resulting statutes have in most cases retained premeditated murder and some form of felony murder (invariably including murder committed in perpetrating or attempting to perpetrate a robbery) as alternative means of satisfying the mental state that first-degree murder presupposes. . . .

. . . . Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.

501 U.S. at 640-41, 644, 111 S. Ct. at 2501-02, 2503-04, 115 L. Ed. 2d at 571, 573.

2. **Double Jeopardy Principles Do Not Bar a Retrial for the Same Offense after a Successful Appeal.**

As a general rule, where a reversal is obtained on a ground other than sufficiency of the evidence, it is ordinarily proper to retry the defendant for the same offense. *See, e.g., Montana v. Hall*, 481 U.S. 400, 402, 107 S. Ct. 1825, 1826, 95 L. Ed. 2d 354 (1987) (per curiam) ("It is a 'venerable principl[e] of double jeopardy jurisprudence' that '[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, *Burks v. United States*, [437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)], poses no bar to further prosecution on the same charge.'" (quoting *United States v. Scott*, 437 U.S. 82, 90-91, 98 S. Ct. 2187, 2193, 57 L. Ed. 2d 65 (1978)); *Ball v. United States*, 163 U.S. 662, 672, 16 S. Ct. 1192, 1195, 41 L. Ed. 300 (1896) ("it is quite clear that a defendant who procures a judgment against him upon

an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.”). In the present case, Appellant’s first conviction was reversed solely on the ground that he was incompetent at the time of his first trial, an issue that is not presented in this appeal. Because there was no finding that the evidence was insufficient to support the verdict, the holding of *Burks v. United States*, 437 U.S. 1, 985 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), is inapplicable. Consequently, double jeopardy principles did not bar Appellant’s retrial for the same offense.

The few courts that have considered this question have arrived at different conclusions depending upon the particular circumstances of the case. In *Wilson v. Meyer*, 665 F.2d 118, 123-24 (7th Cir. 1981), Clarence Wilson was charged in separate counts and convicted of deliberate intent murder, felony murder, and attempted burglary for the killing of a police officer during an attempt to burglarize a local grocery store. Following his conviction but prior to sentencing, the trial court granted the prosecutor’s motion to nolle prosequi the felony murder count. After Wilson’s intent murder conviction was vacated in federal habeas corpus proceeding by the Seventh Circuit Court of Appeals, the case was remanded to the Illinois court for retrial. The felony murder count was not involved in that appeal, and the burglary conviction was allowed to stand.

On remand, the state court granted the prosecutor’s motion to reinstate the original felony murder count, and the state was permitted to present both intent murder and felony murder to the jury as alternative counts. The jury returned a single verdict of guilty, and the conviction was affirmed on appeal. Wilson again sought federal habeas relief, alleging that his retrial and conviction after the felony murder count had been nolle prossed and later reinstated placed him in double jeopardy.

The district court denied the petition, but the Seventh Circuit reversed, holding that the Double Jeopardy Clause barred Wilson's retrial for felony murder. 665 F.2d at 125.

In so holding, the Court relied on the decisions of the Supreme Court in *Green v. United States*, *supra*, and *Abney v. United States*, 431 U.S. 651, 660-62, 97 S. Ct. 2034, 2040-41, 52 L. Ed. 2d 651 (1977), wherein "the Court restated the proposition that the primary purpose of the Double Jeopardy Clause is to prohibit successive exposure to the rigors of trial." *Wilson*, 665 F.2d at 122. The Court of Appeals reasoned:

Forcing Wilson to undergo a second prosecution for felony murder placed him in a related situation feared by the Court in *Green* and *Abney*. It is clear that jeopardy had attached as to the felony murder count. *See Serfass v. United States*, 420 U.S. 377, 391-92, 95 S. Ct. 1055, 1064, 43 L. Ed. 2d 265 (1975). No appeal of Wilson of the intent count reactivated the felony count's viability for retrial. The State's arguments ignore what actually occurred. Two convictions for two distinct counts of murder under the same Illinois murder statute were returned. The State, realizing as well as conceding that no conviction or sentence could be entered on both, selectively nolle prossed one of the two—the felony murder count.

Wilson, 665 F.2d at 122-23.

The Court surmised that the likely reasons for the state's motion were to eliminate the duplicate conviction, given that murder is only one crime in Illinois; to prevent a double jeopardy question from arising as to sentencing for the felony murder count as well as the felony itself; and to allow consecutive sentences for the intent murder conviction and the felony.

The impact, however, not the motivation behind the State's act to nolle prosequi the felony murder count is what is important. We view the effect of that action as amounting to an indication by the State that it would not longer prosecute or proceed against Wilson on the felony murder count. Thus, all that remained after the nolle were separate guilty verdicts for the intent murder count and for the attempt burglary count.

Wilson, 665 F.2d at 123. Rejecting the district court's conclusion that this was merely a "procedural quirk" that had not harmed Wilson in any way, the Court said:

There is strong suggestion in the record that the purpose behind the State's nolle motion was reasoned action, rather than a mere quirk. Further, Wilson suffered definite prejudice. The nolle prosequere precluded any appellate review of the guilty verdict on the felony murder count, even if Wilson had desired to pursue such a course. If Wilson's felony murder conviction had been determined on appeal to have been based upon insufficient evidence, clearly no reprosecution could have been permitted. *Burks v. United States*, *supra*, 437 U.S. at 18, 98 S.Ct. at 2150. The abandonment of prosecution by the State of the felony murder count effectively foreclosed Wilson from exploring that avenue upon appeal.

Wilson, 665 F.2d at 124. The Court reversed and remanded the case on the condition that Wilson be discharged unless retried only under the intent murder count, without recourse to the felony murder theory or count. *Id.* at 125-26.

The factual circumstances in *Wilson* are clearly distinguishable from those presented here. The Appellant was charged in only one count with murder of the first degree, and appealed his conviction on that charge. He was retried on the same charge, which was entirely appropriate under the holdings of *Ball v. United States*, *supra*, and its progeny. The State made no representation that it did not intend to retry him under a felony murder theory, and Appellant has suffered no prejudice, either in the presentation of his defense at trial or in exercising his right to appeal. Thus, the holding of *Wilson* is inapplicable to the Appellant's case.

3. **Because the Jury in Appellant's First Trial Was Not Given the Opportunity to Render a Verdict on the Issue of Felony Murder, No Implied Acquittal May Be Found.**

A case that bears a remarkable resemblance to Appellant's is *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir. 1972). In that case, Nathan Jackson was convicted of the murder of a police officer after an armed robbery. At trial the jury was presented with evidence, and was

instructed on, both premeditated murder and felony murder, each of which was murder of the first degree under the New York statute. Without objection by Jackson, "the jury was also instructed that if it returned a verdict on one count it was to remain silent on the other. The conviction was for premeditated murder, and no verdict was rendered as to felony murder." 462 F.2d at 1043. After state appeals were unsuccessful, Jackson obtained federal habeas relief resulting in the vacating of his conviction.

At the second trial the prosecution again introduced evidence pertaining to felony as well as to premeditated murder. Appellant promptly objected on double jeopardy grounds and preserved his objections in all respects, objecting to all portions of the charge relating to felony murder as well. The charge was essentially as given at the first trial.

The rub is that the jury found Jackson guilty on the second trial of felony murder and remained silent on premeditated murder. He was accorded a hearing before that same jury and sentenced to death. This conviction and sentence were affirmed. *People v. Jackson*, 20 N. Y.2d 440, 285 N.Y.S.2d 8, 231 N.E.2d 722 (1967), cert. denied, 391 U.S. 928, 88 S.Ct. 1815, 20 L.Ed.2d 668 (1968). In rejecting Jackson's claim that he was subject to double jeopardy on the felony murder count and affirming the conviction unanimously, the New York Court of Appeals said that "[t]his court . . . has never directly decided whether felony murder and premeditated murder constitute a single offense or multiple offenses for the purposes of double jeopardy." 20 N.Y.2d at 451, 285 N.Y.S.2d at 18, 231 N.E.2d at 730. The court went on to say that in Jackson's case the jury was charged and directed to bring in a verdict as if they constituted a single offense. The Court of Appeals then held that, because the trial judge in the first trial said the jury could render a verdict on only one charge, "[w]e cannot say that the jury's silence on the felony murder theory had the effect of acquitting Jackson of that theory Since the jury was instructed to render only one verdict, it had no reason to consider the felony murder charge once it found the defendant guilty of premeditated murder." *Id.* at 452, 285 N.Y.S.2d at 19, 231 N.E.2d at 730.

Governor Rockefeller commuted the sentence to life imprisonment before appellant brought his habeas corpus petition to the Southern District, which petition was denied in due course.

Jackson, 462 F.2d at 1044 (footnote omitted).

On appeal, Jackson argued that he was exposed to the “risk of conviction” for a second time of the same offense for which he was initially tried. *Id.* He also relied on *Green v. United States*, *supra*, in arguing that, “even if his conviction for premeditated murder were not an ‘implicit acquittal’ of the charge of felony murder, his first jury was dismissed without his consent after having been given a ‘full opportunity to return a verdict’ on that charge without any circumstances appearing that prevented it from doing so.” 462 F.2d at 1045. Distinguishing prior cases of the Supreme Court prohibiting a retrial for murder after a conviction for a lesser included offense has been set aside for trial error, the Second Circuit said:

While undoubtedly petitioner was exposed to “a risk of conviction” for felony murder on his first trial, the fact is that he was convicted of a form of first degree murder—premeditated—and the question we have is whether retrial for the crime of first degree murder is barred. In no sense can it be said that felony murder is a lesser-included offense.

Id.

The Court noted that the New York Court of Appeals had construed the murder statute “to mean, in effect, that premeditated and felony murder constitute but a single offense.” *Id.* at 1048. Although “there are truly distinct evidentiary requirements necessary to prove premeditated murder and felony murder under the statute,” the Court observed that “[f]elony murder and premeditated murder were historically one offense even if they involved proof of different facts, but one set of facts—*e.g.*, those in Jackson’s case—might suffice for conviction of either offense.” *Id.* at 1048-49. In affirming the denial of habeas corpus relief, the Second Circuit held:

Petitioner was not acquitted on his first trial of felony murder; he was convicted of murdering a police officer, premeditated to be sure. Proof of the felony of robbery was admissible on either charge—no proof was had in respect to one count which was inadmissible for purposes of proving the other. The defenses to each were slightly different, it must be conceded, but there is no indication that there was any

evidentiary prejudice to petitioner as a result of retrial on both charges, and it is undisputed that he could have been retried on a charge of premeditated murder only. While the State could have asked for narrowing instructions and even a special verdict, petitioner had an equal opportunity at the first trial and went to the jury without objection to that portion of the court's charge permitting the jury to cease deliberations if it found him guilty on one of the two counts. . . .

Fairness to the public appears to us to demand that a valid indictment end in a verdict where there has been no conviction of a lesser-included offense, no mistrial by virtue of the court's action sua sponte without the defendant's consent, and where the cause for reversal of the conviction of the co-equal offense is reversible error in the admission of evidence, at least where, as here, the same evidence is admissible (or inadmissible) as proof of either offense charged. Nor is there any substantial unfairness to petitioner. . . . Jackson in any event would have been subject to retrial on the premeditated murder count, and . . . retrial on the felony murder count did not subject him to a greater penalty or stigma or greater embarrassment, expense or ordeal.

Id. at 1049-50 (citations omitted).

In a concurring opinion, Circuit Judge Mansfield noted that the indictment in Jackson's case did not charge him in separate counts with premeditated murder and felony murder:

The judge who presided at Jackson's trial, taking the view that premeditated murder and felony murder were but two equal forms of the same crime, instructed the jury that it could convict Jackson of one or the other, but not both. The jury found Jackson guilty of premeditated murder and, in accordance with the court's instructions, made no finding on the issue of whether he was also guilty of felony murder. To say that the jury considered the latter issue, much less that it acquitted Jackson of felony murder, would be pure speculation.

Unlike the situation in other cases holding that the Double Jeopardy Clause barred retrial of a count which had not been the subject of an expressed jury verdict, *e.g.*, *Green v. United States*, *supra*, the failure of the jury in this case to render a verdict on the charge of felony murder cannot be equated with an implied acquittal of that charge. Nor can it be attributed to circumstances beyond the control of Jackson or his counsel, a lawyer with extensive experience in criminal trial practice. On the contrary, the record reveals that his counsel was content to have the case go to the jury on the basis formulated by the court.

Jackson, 462 F.2d at 1052.

The same analysis should be applied to the present case. As in *Jackson*, the jury in Appellant's first trial was instructed, without objection from his defense counsel, that it could return only one of five possible verdicts, including premeditated murder and felony murder. "To say that the jury considered the latter issue, much less that it acquitted [Appellant] of felony murder, would be pure speculation." *Id.* Because the jury was not given the opportunity to render a separate verdict on felony murder, its verdict cannot be equated with an implied acquittal on that theory.

There has been no substantial unfairness to Appellant, who in any event would have been subject to retrial for premeditated murder, and retrial on the felony murder theory did not subject him to a greater penalty, expense or ordeal, or prejudice him in the presentation of his defense. This Court should therefore hold that double jeopardy principles did not prohibit Appellant's retrial for first degree murder under either a deliberate and premeditated or felony murder theory.

VI.

CONCLUSION

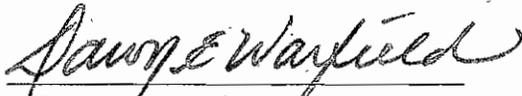
For the foregoing reasons, the judgment of the Circuit Court of Marion County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 5th day of January, 2009, addressed as follows:

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Additionally, I hereby certify that a copy of the foregoing brief was served by e-mail to the following counsel for Appellant at attorneyheidimgeorgisturm@yahoo.com, in addition to depositing it in the United States mail, first-class postage prepaid, on this 5th day of January, 2009, addressed as follows:

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