IN THE MISSOURI SUPREME COURT

No. SC85556

STATE OF MISSOURI,

Respondent,

vs.

JOHN D. COUTS,

Appellant.

Appeal from the Circuit Court of Jackson County, Mo.
16th Judicial Circuit, Division 12
The Honorable Edith L. Messina, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions for murder in the second degree, under a theory of felony murder, §565.031, RSMo 2000, and armed criminal action, §571.015, RSMo 2000, obtained in the Circuit Court of Jackson County and for which appellant was sentenced as a prior and persistent offender to two consecutive sentences of life in the custody of the Department of Corrections. The appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore the Court of Appeals, Western District, had jurisdiction. Art. V, §3, Missouri Constitution (as amended 1982). This appeal is properly before this Court because of this Court's October 28, 2003 order of transfer. Rule 83.04.

STATEMENT OF FACTS

Appellant, John D. Couts, was charged by indictment with murder in the second degree, under a theory of felony murder, and armed criminal action (L.F. 1-2). The felony-murder was based on the felony of unlawful use of a weapon by shooting into a dwelling (L.F. 28). An information in lieu of indictment further alleged that appellant was a prior and persistent offender (L.F. 4-5). On May 15, 2002, the cause went to trial before a jury in the Circuit Court of Jackson County, the Honorable Edith L. Messina presiding (Tr. 1-2).

Viewed in the light most favorable to the verdicts, the following evidence was adduced: On November 29, 1999, the victim, David Beck, lived at 2448 Spruce in Kansas City in Jackson County with his wife, Cathy Beck, and his three children, Kennyboy, Sissy, and Brandon (Tr. 260-261, 282). At about midnight, Joe Green, who was a friend of Kennyboy, arrived there (Tr. 261, 282). Green asked if Kennyboy wanted to go to a friend's house to hang out for a little while (Tr. 282). Green drove a truck to appellant's house, while Kennyboy, Sissy, and her friend, Agita Harris, followed him in Sissy's car (Tr. 283).

When they arrived at appellant's house, appellant, John Camacho, appellant's father, and some other people were there (Tr. 285). They sat around for about an hour and a half, smoking marijuana and talking about boxing (Tr. 285-287). Green and Camacho had both boxed in the past and they were bragging about their records and about who was better (Tr. 307).

When Kennyboy, Sissy, and Harris left appellant's residence in the early morning hours of November 30, 1999, Green was still talking with Camacho (Tr. 287). About 10 to 15 minutes after they arrived back at 2448 Spruce, Green arrived there (Tr. 263, 288). Shortly

thereafter, appellant and Camacho arrived there in Camacho's blue Chevrolet Caprice (Tr. 263-264, 289, 474-476). Individuals from inside 2448 Spruce came out on the porch, where appellant and Camacho were at (Tr. 288-290). Patrick Beck, the victim's brother who lived next door at 2450 Spruce, also came out there (Tr. 261, 289, 377).

Green and Camacho began arguing and then fighting (Tr. 290-292, 378-384). During this short fight, Patrick Beck saw that Camacho was holding onto something that was concealed in his pocket (Tr. 290, 383). He pulled on Camacho's hand and a foot-long metal file with a pointed end came out of his pocket (Tr. 290-291, 383-384). After the file was taken from Camacho, who was losing the fight, he said that he did not want any trouble and ran to the blue Caprice with appellant (Tr. 291-292, 384). Appellant and Camacho got into that car and drove off (Tr. 292, 384-385). Camacho was driving the car, while appellant was in the passenger seat (Tr. 385).

Green went home, while the residents of 2448 Spruce went back inside and attempted to go to sleep (Tr. 266, 292-293). Patrick Beck went back to his house (Tr. 385).

Appellant picked up a gun and about 20 to 30 minutes later, at about 2:00 a.m., appellant and Camacho returned to 2448 Spruce in the Caprice (Tr. 293, 385-386, 559). Camacho was driving, while appellant was in the passenger seat (Tr. 293-294, 300, 313, 558-559). Kennyboy heard the car, looked out a window, saw that appellant and Camacho had returned, and saw the gun that appellant possessed (Tr. 294, 311-312, 387).

Kennyboy went to his parents' bedroom and said to the victim, "They're back" (Tr. 266, 294-295). As the victim went to the bedroom window, appellant fired about twelve shots in his

direction (Tr. 295, 343, 351, 358, 559). Two of those shots struck the victim (Tr. 266, 295, 329). One bullet struck the victim in the upper portion of his abdomen, while the other bullet struck him in the left hip region (Tr. 329-330). The victim died as the result of blood loss from the bullet wound to his abdomen (Tr. 339).[1]

Patrick Beck, who had seen the Caprice coming back down the street and had grabbed his .357 caliber lever-action Winchester rifle and three bullets, stepped outside and put the bullets into the gun (Tr. 388-389). By the time that he had chambered a round, appellant had finished emptying the clip in his gun and was leaning back changing clips (Tr. 390-391). Since Patrick Beck no longer had a good view of appellant, he aimed at Camacho and fired his rifle (Tr. 391). As Camacho and appellant drove off, Patrick Beck fired two more shots at them (Tr. 391). One of the shots fired by Patrick Beck struck Camacho in the arm (Tr. 446, 452).

The victim's wife called for an ambulance (Tr. 268). The police and paramedics arrived on the scene (Tr. 256-264). Kennyboy told the police that Little John did it (Tr. 461, 463). Appellant and Camacho were both named John, but appellant was smaller than Camacho (Tr. 379, 383, 514).

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[1] **A test done during the victim's autopsy revealed that the victim did not have any alcohol or drugs in his system at the time of his death (Tr. 334).**

Members of the victim's family were not completely cooperative at first, but eventually made statements to the police and identified appellant and Camacho from photographic arrays (Tr. 268, 297, 300-302, 392-413, 524-528).

On March 2, 2000, an officer from the Kansas City Police Department who was searching for appellant saw him driving a car on west 6th Street towards Northern (Tr. 570). The officer, Thomas Mahoney, stopped his car in front of appellant's car, so that appellant could not proceed forward (Tr. 570). However, appellant put his car into reverse and drove backwards for about a block until he backed into a curb that had a pole behind it (Tr. 571). Appellant then jumped out of his car and fled on foot (Tr. 572). Officer Mahoney chased appellant for about a block, tackled him, and placed him under arrest (Tr. 572).

On March 17, 2000, Camacho was arrested (Tr. 529). He admitted to his involvement in the murder and stated that appellant had been the shooter (Tr. 557-559).

Appellant did not testify or present any witnesses to testify on his behalf. At the close of the evidence, instructions and argument of counsel the jury found that appellant was guilty as charged (L.F. 37-38). After finding the appellant to be a prior and persistent offender, the trial court sentenced appellant to two consecutive sentences of life in the custody of the Department of Corrections (L.F. 44-45; Tr. 28).

On appeal, the Court of Appeals found that the trial court committed plain error by entering convictions for appellant for armed criminal action in addition to murder in the second degree, under a theory of felony-murder, because this resulted in double jeopardy. State v. Couts, No. WD61714 **(Mo.App., W.D.** July 15, 2003). It stated that armed criminal action

could not be based on a felony-murder if the felony-murder was based on the shooting into a dwelling because of the definition of armed criminal action that is found in § 571.015.4, RSMo 2000. State v. Couts, supra at 6. The Court of Appeals did not explain how this definition was relevant to this case or even mention what was contained in it.

Respondent filed a motion to transfer the case to this Court. That motion was granted by this Court on October 28, 2003.

ARGUMENT

The trial court did not commit plain error when it accepted, without any objection from the parties, the verdicts from the jury and then sentenced appellant for second degree felony-murder and armed criminal action because this did not result in double jeopardy in that the legislature has indicated its intent that these offenses be punished cumulatively.

Appellant alleges that the trial court committed plain error when it accepted, without any objection from the parties, the verdicts of the jury and then sentenced appellant for murder in the second degree, under a theory of felony-murder, and armed criminal action because this was double jeopardy (App.Br. 16; L.F. 28). He appears to argue that these offenses merged together because they involved the same "gravamen" in that felony-murder was based on unlawful use of a weapon by shooting into a dwelling in addition to causing the death of a person (App.Br. 16).

A. Claim is not preserved for appeal

Appellant admits that this claim is not preserved for appeal because it is being raised for the first time on appeal (App.Br. 19). Thus, he requests plain error review (App.Br. 16, 19). The assertion of plain error places a much greater burden on a defendant than when he asserts prejudicial error. State v. Hunn, 821 S.W.2d 866, 869 (Mo.App., E.D. 1991). A defendant must not only show that prejudicial error resulted; he must further show that the error so substantially affected his rights that manifest injustice or a miscarriage of justice will inexorably result if left uncorrected. Id. at 869-870.

B. Double jeopardy standards

Appellant's reliance on the Double Jeopardy Clause of the Missouri Constitution is misplaced, because that clause only protects a defendant from being prosecuted a second time for an offense after a verdict of acquittal (App.Br. 16). State v. McTush, 827 **S.W.2d** 184, 186 (Mo.banc 1992); Article I, Section 19 of Missouri Constitution. This case does not involve a second prosecution of a defendant after an acquittal.

Nor are the merger doctrine, State v. Bouser, 17 **S.W.3d** 130, 135-140 **(Mo.App., W.D.** 1999), the single act of force doctrine, State v. McTush, supra at 186-188, or the same transaction test, State v. Barber, 37 **S.W.3d** 400, 403 **(Mo.App., E.D.** 2001), used any more in Missouri in determining double jeopardy claims. Appellant's "gravamen" analysis is irrelevant (App.Br. 16).

The only test that is used in determining whether double jeopardy results from cumulative punishments for the same act is whether the legislature intended for cumulative punishments to be imposed. State v. Coody, 867 **S.W.2d** 661, 665-666 **(Mo.App., S.D.** 1993); State v. McTush, supra at 186; State v. Mayes, 63 **S.W.3d** 615, 634 (Mo.banc 2001).

C. Cumulative punishments were authorized by §565.021.2, RSMo 2000

Cumulative punishments for murder in the second degree and armed criminal action may be imposed because it is clear that the legislature intended for that to occur. State v. Blackman, 968 **S.W.2d** 138, 140-141 (Mo.banc 1998). "The Missouri General Assembly has authorized multiple punishments for second degree felony-murder and armed criminal action." State v. Coleman, 949 **S.W.2d** 137, 141 **(Mo.App., W.D.** 1997).

The statute that sets out the offense of murder in the second degree under a theory of felony-murder, § 565.021.2, RSMo 2000, expressly states that "the punishment for murder in the second degree shall be in addition to the punishment for commission of a related felony or attempted felony, ***other than murder or manslaughter***" (Appendix at A4)(emphasis added). Thus, the legislature has clearly stated that any related felony can be punished cumulatively to felony-murder, as long as that felony is not murder or manslaughter. Since this case does not involve either of those two related offenses, it is obvious that the legislature has authorized cumulative punishment of murder in the second degree and armed criminal action. State v. Flenoy, 968 **S.W.2d** 141, 145 (Mo.banc 1998)(legislature intended cumulative punishments for felony-murder in the first trial and robbery in the first degree and armed criminal action in a second trial, even though the two prosecutions involved the same acts); State v. Owens, 849 **S.W.2d** 581, 583-585 **(Mo.App., W.D.** 1993)(legislature intended cumulative punishments for felony-murder, attempted robbery in the first degree, and armed criminal action); State v. Coody, supra at 665-666 (legislature intended cumulative punishments for felony-murder and abuse of a child).

If the statutory language is clear, unambiguous, and admits of only one meaning, as occurred in the case at bar, there is no room for construction and the legislature is presumed to have intended what the statute says. Clare v. Director of Revenue, 64 **S.W.3d** 877, 879 **(Mo.App., E.D.** 2002); Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 858 (Mo.banc 1998). Here, the legislature has clearly stated that any related felony can be punished cumulatively to felony-murder, as long as that felony is not murder or

manslaughter. Since this case does not involve either of those two related offenses, it is obvious that the legislature has clearly and unambiguously authorized cumulative punishment of murder in the second degree under a theory of felony-murder and armed criminal action. Thus, appellant's claim on appeal is without merit.

Appellant does not appear to dispute that the murder in the second degree statute clearly authorizes cumulative punishments. He seems to argue that the clear authorization of cumulative punishments in that statute is without effect because the armed criminal action statute is ambiguous as to whether a defendant can be convicted of both murder in the second degree and armed criminal action (App.Br. 25-26). He fails to cite any law holding that an ambiguous statute overcomes the wording of a clear statute. On the contrary, when construing statutes, this Court harmonizes all provisions if possible. In re Beyersdorfer v. Beyersdorfer, 59 **S.W.3d** 523, 525 **(Mo.banc** 2001). Thus, a clear statute will clarify an ambiguous statute on the same subject if statutory construction is required. However, statutory construction is not required here because, as will be discussed below, the armed criminal action statute is not ambiguous and it also authorizes cumulative punishments for the offenses in question.

D. Armed criminal action statute also authorizes cumulative punishments

The statute that sets out the offense of armed criminal action also authorizes the cumulative punishments in question. § 571.015.1, RSMo 2000, states that it applies to any person who commits "any felony under the laws of this state, by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon...." §571.015.4, RSMo 2000, and then states that the armed criminal action provisions do not apply to felonies defined in

"sections 564.590, 564.610, 564.620, 564.630, 564.640, RSMo." (Appendix at A5). The cited sections are not from the present criminal code. Rather, they are from the 1969 criminal code, and none of the cited provisions from that code involve the offense of murder in the second degree.[2] Thus, the legislature clearly indicated through § 571.015 its intent for armed criminal action to be punished cumulatively to murder in the second degree because murder in the second degree is "any felony" other than the listed felonies that were excluded from supporting the offense of armed criminal action by § 571.015.4, RSMo 2000 (Appendix at A8-A9).

The case that is the most directly on point is State v. Coleman, supra. That case involved a charge of felony-murder with the underlying felony being based on a similar theory as the felony-murder in the case at bar. The felony-murder in Coleman appears to have been based

[2] **As will be discussed below, none of these offenses from the 1969 code involve an offense of unlawful use of a weapon by shooting into a dwelling, which was the underlying offense for felony-murder in the case at bar (L.F. 28).** In the 1969 code, shooting into a dwelling was found in § 562.070, RSMo 1969. **This has nothing to do with the above analysis, but will be important in subsequent analysis.**

on unlawful use of a weapon by shooting into a motor vehicle, under §571.030.1(3), RSMo 2000, while the case at bar involves unlawful use of a weapon by shooting into a dwelling under that same subsection (L.F. 28). In Coleman, the Court of Appeals found that "Both the second degree felony murder statute and the armed criminal action statute specifically authorize separate punishment for each offense." Id. at 149. Thus, it rejected the defendant's double jeopardy claim.

This Court should follow Coleman and Flenoy and should refuse to follow State v. Ivy, 81 **S.W.3d** 199 **(Mo.App., W.D.** 2002), which is relied on by appellant. Respondent will explain why Ivy was wrongly decided, and why it is irrelevant to this case if it was properly decided.[3]

Ivy was wrongly decided because it declined to follow the clear and unambiguous language in the statutes, discussed above. In Ivy the Court of Appeals failed to recognize that the fact that unlawful use of a weapon by exhibiting in a threatening manner cannot serve as the predicate offense for armed criminal action does not mean that felony-murder cannot serve as a predicate offense for armed criminal action if it is based on unlawful use of a weapon by exhibiting in a threatening manner.

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[3]**The validity of Ivy is also being questioned in State ex rel. Green v. Rowley, No. SC85234 (Mo.banc), which was pending in this Court when this brief was filed.**

More specifically, Ivy involved felony-murder based on unlawful use of a weapon by knowingly exhibiting a weapon readily capable of lethal use in an angry or threatening manner, § 571.030.1(4), RSMo 2000, and armed criminal action that was based on the felony-murder. Id at 206 (Appendix at A4-A6). In Ivy, the Court of Appeals correctly found that an offense of unlawful use of a weapon involving the exhibiting a weapon would not support a charge of armed criminal action because that way of committing unlawful use of a weapon was contained in § 564.610, RSMo 1969, which was referred to in § 571.015.4, RSMo 2000, as being excluded from the offense of armed criminal action. Id. (Appendix at A5). However, it then improperly concluded that this meant that the legislature did not intend a defendant to be punished for armed criminal action in addition to felony-murder if the felony-murder was based on the unlawful use of a weapon by exhibiting. Id. This analysis is directly contrary to the language discussed above from the felony-murder and the armed criminal action statutes. As was discussed above, the felony-murder statute allows for any related offense to be the underlying offense except for murder or manslaughter and the armed criminal statute allows for the use of any offense except listed offenses and none of those listed offenses were charged in that case.

Additionally, Ivy is irrelevant to this case because, like Coleman, the case at bar involves a form of unlawful use of a weapon that is not mentioned in the 1969 statutes that were relied on by the court in Ivy. Section 571.015.4, RSMo 2000, precludes the prosecution from using **some of the forms of the unlawful use of a weapon now contained in § 571.030, including carrying concealed weapons and exhibiting them in an angry or**

threatening manner, to support a charge of armed criminal action. However, most of the ways of committing the crime of the unlawful use of a weapon, specifically the methods contained in subsections (2), (3), (6), (7), (9) and (10) of § 571.030.1, can be used as the predicate felonies in a prosecution for armed criminal action because they were not included in former § 564.610, RSMo 1969 (Appendix at A8-A9). For example, the weapons crimes of setting a spring gun, discharging a firearm into a dwelling house or automobile, discharging a firearm from an automobile or within 100 yards of an occupied schoolhouse, courthouse, or school building, or carrying a firearm into any school or onto any school bus are all "unlawful use of weapons" offenses denounced by § 571.030 that can be used as predicate felonies for armed criminal action because they were not contained in former § 564.610 or any of the other statutes listed in § 571.015.4 (Appendix at A6-A9). Thus, the analysis in Ivy is irrelevant to this case because the form of unlawful use of a weapon found in this case, i.e., shooting into a dwelling, was not contained in the 1969 statutes in question and could be used to support a count of armed criminal action.

Appellant also argues that this Court would have to overrule other cases in order to affirm his conviction. However, none of the cases in question involve convictions for both murder in the second degree and armed criminal action. See State v. Davis, 849 **S.W.2d** 34 **(Mo.App., W.D.** 1993)(convictions for robbery in the first degree and tampering in the first degree did not result in double jeopardy); State v. Gottsman, 796 **S.W.2d** 27 **(Mo.App., W.D.** 1990)(conviction for felonious restraint and unlawful use of a weapon did not violate double jeopardy); State v. McKee, 826 **S.W.2d** 26 (Mo.App., W.D. 1990)(convictions for unlawful use

of a weapon by exhibiting in an angry and threatening manner and armed criminal action did not result in double jeopardy when based on different acts); State v. King, 748 **S.W.2d** 47 **(Mo.App., E.D.** 1988)(convictions for armed criminal action and unlawful use of a weapon by apparently exhibiting in an angry and threatening manner resulted in double jeopardy).[4]

In light of the above, respondent submits that the trial court did not commit plain error when it accepted, without any objection from the parties, the verdict of the jury and then

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[4]**King was properly decided because it appears to have involved a form of unlawful use of a weapon that will not support a conviction for armed criminal action, i.e., exhibiting in an angry or threatening manner. That** way of committing unlawful use of a weapon was contained in § 564.610, RSMo 1969, which was referred to in § 571.015.4, RSMo 2000, as being excluded from the offense of armed criminal action (Appendix at A8). However, as is explained above, this has nothing to do with whether convictions for murder in the second degree and armed criminal action result in double jeopardy.

sentenced appellant for murder in the second degree, under a theory of felony-murder, and armed criminal action based on the charge of felony-murder. Thus, appellant's point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of December, 2003, to:

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APPENDIX