**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 26694-0-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **DONALD L. SMILEY-LYLE,** | ) | **UNPUBLISHED OPINION** |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Kulik, C.J. — Donald L. Smiley-Lyle was charged with aggravated first degree premeditated murder (count I) and first degree felony murder (count II) following the death of Bud Robert Johnson. In November 2007, a jury found Mr. Smiley-Lyle guilty of first degree manslaughter, a lesser-included offense of premeditated first degree murder, and first degree felony murder. The trial court entered judgment and sentence solely on count II, the felony murder conviction. The felony murder judgment and sentence references the conviction on first degree manslaughter.

On appeal, Mr. Smiley-Lyle contends the trial court erred by: (1) admitting evidence of other crimes he allegedly committed after the murder, (2) admitting

statements he made to a police detective, and (3) allowing the State to amend the information to include count II on the morning of trial. In his additional grounds for review, Mr. Smiley-Lyle further argues that he received multiple convictions for a single homicide in violation of double jeopardy. We affirm the felony murder conviction but remand for vacation of the manslaughter conviction and removal of any references to the manslaughter conviction in the judgment and sentence.

FACTS

On April 18, 2006, Donald L. Smiley-Lyle was charged with one count of premeditated first degree murder with aggravating circumstances for the death of Bud Robert Johnson. The information specifically alleged that in March 2006, Mr. Smiley-Lyle, Robert A. Entel, and Kathryn B. Kelly, caused the death of Mr. Johnson under three theories of aggravation—that the murder was committed in the course of, in furtherance of, or in immediate flight from the crimes of residential burglary, first degree kidnapping, and first degree robbery. The information further alleged that at the time of the murder, Mr. Smiley-Lyle was armed with a deadly weapon other than a firearm under the provisions of former RCW 9.94A.602 (1983)[1] and RCW 9.94A.533(4).

*CrR 3.5 Hearing*. Detective Kip Hollenbeck, a police detective with the major

[1] Recodified as RCW 9.94A.825 (Laws of 2009, ch. 28, § 41).

crimes unit of the Spokane Police Department (SPD) testified at the CrR 3.5 hearing. Detective Hollenbeck was assigned to investigate the disappearance of Bud Johnson. According to Detective Hollenbeck, Ms. Kelly approached a detective with the Spokane County Sheriff's Office and alleged that her cousin, Mr. Entel, and his friend, Mr. Smiley-Lyle, told her that they murdered Mr. Johnson and dumped his body in the Spokane River. The Sheriff's Office then contacted the SPD.

On March 14, Detective Hollenbeck was unable to locate Mr. Johnson and found that his apartment was in disarray. Based on this information, and the information provided by Ms. Kelly, Detective Hollenbeck obtained a search warrant for Mr. Entel's vehicle. Mr. Entel was last seen leaving Mr. Johnson's house in that vehicle with Mr. Smiley-Lyle. The detective then put out a "stop and detain" request on a nationwide alert system. I Report of Proceedings (RP) at 38.

On March 18, Oregon State Police contacted Detective Hollenbeck and advised him that they had stopped the vehicle and that Mr. Entel and Mr. Smiley-Lyle had been detained. The Oregon police informed the detective that Mr. Smiley-Lyle did not want to answer questions and had asked for an attorney. Because of the limited nature of the detention, Mr. Smiley-Lyle was released.

Mr. Entel, however, was willing to talk to Oregon police. He proceeded to confess

to the killing and, in doing so, provided information that implicated Mr. Smiley-Lyle. Mr. Entel directed police to Mr. Johnson's body in the Spokane River. Meanwhile, SPD received information that Mr. Smiley-Lyle had purchased a Greyhound bus ticket and was headed for Spokane. SPD officers arrested Mr. Smiley-Lyle on the charge of first degree murder when he arrived in Spokane on the bus.

Following his arrest, Mr. Smiley-Lyle was taken to SPD's major crimes unit. There, Detective Hollenbeck contacted Mr. Smiley-Lyle in an interview room. Mr. Smiley-Lyle told the detective that he wanted to talk to an attorney and, at that point, Mr. Smiley-Lyle was booked into the Spokane County Juvenile Detention Facility. During the contact, Detective Hollenbeck did not ask Mr. Smiley-Lyle any questions. Instead, the detective told Mr. Smiley-Lyle that Mr. Entel had already confessed and implicated him in the murder.

The next day, March 19, Sergeant Warren of the SPD called Detective Hollenbeck and told him that he wanted to speak with Mr. Smiley-Lyle about a burglary in Whitman County. Detective Hollenbeck learned that the Whitman County burglary occurred soon after Mr. Smiley-Lyle and Mr. Entel fled from Spokane. Detective Hollenbeck informed Sergeant Warren that Mr. Smiley-Lyle would not answer any questions regarding the murder. The detective told Sergeant Warren that if he wanted to approach Mr. Smiley-

Lyle concerning a separate investigation, he could do so on his own.

On March 20, Detective Hollenbeck again had contact with Mr. Smiley-Lyle. After juvenile jurisdiction had been declined, Detective Hollenbeck and another officer served an arrest warrant on Mr. Smiley-Lyle and transported him to the county jail. Detective Hollenbeck did not ask Mr. Smiley-Lyle any questions. However, while he was being booked into the jail, Mr. Smiley-Lyle asked if he would be put in a cell anywhere near Mr. Entel. Mr. Smiley-Lyle said that if he talked and told police everything, that Mr. Entel would kill him, and that Mr. Entel was "'completely psychotic.'" I RP at 42. Detective Hollenbeck spoke to Mr. Smiley-Lyle about putting a "Keep Separate" order in place. I RP at 42.

Then, on March 21, Detective Hollenbeck learned that Mr. Smiley-Lyle had voluntarily done a television interview and that he had confessed to his involvement in the murder. The detective watched the television broadcast.

Later, on April 6, Detective Hollenbeck assisted Deputy Zehm from the Whitman County Sheriff's Office with a search of Mr. Entel's vehicle as part of the investigation into the Whitman County burglary. Deputy Zehm left early to interview Mr. Entel and Mr. Smiley-Lyle while Detective Hollenbeck finished conducting the vehicle search. Detective Hollenbeck arrived at his office at the same time that Deputy Zehm finished his

interview with Mr. Smiley-Lyle. Afterwards, Deputy Zehm told Detective Hollenbeck that Mr. Smiley-Lyle admitted to the burglary.

Detective Hollenbeck assisted Deputy Zehm in walking Mr. Smiley-Lyle back to the jail when Mr. Smiley-Lyle commented that he wanted to talk to the detective about the murder. Detective Hollenbeck informed Mr. Smiley-Lyle that he had already asked for an attorney and that he, in fact, had an attorney. The detective stated he would not talk to Mr. Smiley-Lyle about the murder unless Mr. Smiley-Lyle "re-approached me and initiated questioning with me." I RP at 44. Mr. Smiley-Lyle told the detective that this is what he wanted to do. The detective then told Mr. Smiley-Lyle that he was in the process of obtaining a search warrant to collect DNA[2] samples from Mr. Smiley-Lyle for analysis in the murder case. Detective Hollenbeck testified: "I told him I wanted him to think about it, and I would return the following day in order to serve the search warrant. And he could give me his answer at that time." I RP at 44.

At approximately 11:00 a.m. the next morning, April 7, Detective Hollenbeck returned to the jail and contacted Mr. Smiley-Lyle with the search warrant for his DNA. At that time, Mr. Smiley-Lyle told the detective that he wanted to talk to him about the murder and that he was doing so against the advice of his attorney. Detective Hollenbeck

[2] Deoxyribonucleic acid.

escorted Mr. Smiley-Lyle to an interview room, served him with the search warrant, and advised him of his constitutional rights. Mr. Smiley-Lyle told the detective that he understood those rights and waived them. After Mr. Smiley-Lyle signed and dated the card, they began talking about the case. The card was admitted for purposes of the CrR 3.5 hearing without objection. Detective Hollenbeck videotaped the interview.

Defense counsel argued that the State had deliberately attempted to stimulate a conversation with Mr. Smiley-Lyle concerning his role in the murder after he had invoked his right to counsel. Counsel argued that Mr. Smiley-Lyle's statements to Detective Hollenbeck were obtained in violation of the Fifth and Sixth Amendments and must be suppressed. The trial court ruled that Mr. Smiley-Lyle had initiated the contact with Detective Hollenbeck and that his statements to the detective were admissible.

On November 5, 2007, the morning of trial, the State moved to amend the information to add count II, charging Mr. Smiley-Lyle with first degree felony murder with first degree burglary as the predicate felony. Defense counsel objected on the record to any amendment at such a late stage, but went on to tell the trial court, "I'm not going to ask for a continuance if the Court grants the amendment." I RP at 17. Over defense counsel's objection, the trial court granted the motion. The case proceeded to a two-week trial.

According to the testimony at trial, Ms. Kelly was homeless and suffered from a drug problem when Mr. Johnson let her stay with him in his apartment in Spokane. They had a brief relationship and, at one point, Mr. Johnson gave Ms. Kelly a Beatles poster to see how much it would sell for on eBay. However, she did not pay him for the poster or give it back to him. Ms. Kelly then moved in with her 18-year-old cousin, Mr. Entel, in Spokane Valley.

In early March 2006, Allen Glidewell, a good friend of Mr. Johnson's who lived in the same apartment complex, assisted Mr. Johnson in retrieving the poster. Mr. Glidewell allowed Mr. Johnson to drive his white Subaru to Ms. Kelly's residence. Mr. Glidewell drove down the street while Mr. Johnson got the poster from Ms. Kelly's apartment, which Mr. Glidewell later learned was Mr. Entel's residence. They then went to the house of Mr. Johnson's daughter, where he dropped off the poster. The night after the poster was retrieved, Mr. Glidewell awoke to find his car in flames. The fire occurred a few days before Mr. Johnson disappeared. A van belonging to Mr. Glidewell's roommate was also burned.

Ms. Kelly was described as "very upset" and "very aggravated" in response to the burglary. II RP at 204, 340. She immediately suspected that Mr. Johnson was responsible. According to Mr. Entel, Ms. Kelly called Mr. Johnson afterwards and he

admitted to taking the poster. Ms. Kelly then asked Mr. Entel if he would kill Mr. Johnson. Mr. Entel responded, "'Yeah'" and comforted Ms. Kelly. II RP at 205. Mr. Entel testified that he was angry because his residence had been broken into.

Later, a second conversation concerning Mr. Johnson took place at Mr. Entel's apartment, with Mr. Smiley-Lyle present. Ms. Kelly requested that Mr. Johnson be killed. According to Mr. Entel, Mr. Smiley-Lyle announced that he was an assassin, and they made an agreement to kill Mr. Johnson. Ms. Kelly then provided Mr. Entel and Mr. Smiley-Lyle with floor plans to Mr. Johnson's apartment and showed them areas where they could hide. Ms. Kelly also told them that the bottom lock to Mr. Johnson's front door was broken, and gave them the key to the only other locking mechanism, a deadbolt.

At approximately 3:00 a.m. on the morning of March 11, Mr. Entel and Mr. Smiley-Lyle, dressed in black, military-style clothing, entered Mr. Johnson's apartment, pretending to be police officers. After strangling Mr. Johnson using a choke hold and then a computer cord, the two men drove to Boulder Beach on the Spokane River where they rolled his body off a cliff into the water.

Following the murder, Mr. Smiley-Lyle and Mr. Entel admitted to Ms. Kelly and another friend that they had killed Mr. Johnson by strangling him and that they had thrown his body into the Spokane River. Mr. Smiley-Lyle and Mr. Entel then fled

Spokane and traveled to San Jose, California. Along the way, they committed a burglary and arson in Whitman County. After a short stay in California, they headed back to Spokane when, on March 18, they were detained by Oregon State Police near Salem.

Mr. Smiley-Lyle did not testify at trial. However, pursuant to the trial court's earlier CrR 3.5 ruling, the videotaped interview involving Detective Hollenbeck and Mr. Smiley-Lyle was admitted into evidence and played for the jury. In addition, the videotaped news interview was played.

*Verdict and Sentencing*. On November 16, 2007, the jury found Mr. Smiley-Lyle guilty of the lesser-included offense of first degree manslaughter on count I and guilty of first degree felony murder on count II. Deadly weapon enhancement verdicts were also returned on each count. At sentencing, defense counsel argued that Mr. Smiley-Lyle should be sentenced only on count I, as it was the most serious charge for which a verdict was returned. The trial court rejected this argument, entered judgment on count II, and imposed a standard range sentence of 290 months of confinement and a 24-month deadly weapon enhancement. The judgment and sentence reflects that Mr. Smiley-Lyle was found guilty by a jury of both first degree manslaughter and first degree felony murder, count I and count II, but provides that "[n]o Judgment entered as to First Degree Manslaughter, the lesser included offense of Count [I]." Clerk's Papers (CP) at 113.

This appeal followed.

ANALYSIS

Mr. Smiley-Lyle first contends that the trial court erred by admitting evidence of the Whitman County burglary and arson allegedly committed by Mr. Smiley-Lyle and Mr. Entel following the murder. Mr. Smiley-Lyle argues that such evidence amounted to propensity or character evidence, inadmissible under ER 404(b).

Under ER 404(b), evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove the character of a person in order to show action in conformity therewith. However, such evidence may be admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

"Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, is relevant to prove an element of the crime charged, and, on balance, the probative value of the evidence outweighs its prejudicial effect." *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003). Appellate courts will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Mr. Smiley-Lyle argues that the trial court erred by admitting testimony regarding the Whitman County crimes, in violation of ER 404(b). Significantly here, the evidence at issue was the subject of a motion in limine brought by the State. Prior to opening statements, the State sought a ruling on whether evidence of the burglary and arson in Whitman County, which occurred approximately a day and one-half after the murder, would be admissible.

The trial court ruled that the evidence of flight was admissible under the res gestae rule. The court then indicated that the evidence of the other crimes was relevant as to whether there was a concert of action, whether Mr. Smiley-Lyle was pressured into his participation in the crimes, and whether he had the intent to commit any of the acts.

The trial court deferred entering a final ruling on the State's motion, ruling only that the State could outline the subsequent events in its opening statement. Mr. Entel testified. He admitted that he and Mr. Smiley-Lyle committed the burglary and arson in Whitman County after fleeing the Spokane area.

The issue concerning the admission of the ER 404(b) evidence has not been properly preserved for review. Although the trial judge's rulings on the State's motion were clearly tentative, defense counsel never sought a final decision. When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived

unless the trial court is given an opportunity to reconsider its ruling and make a final decision. *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991). Mr. Smiley-Lyle did not ask for a final ruling, and he failed to renew his objection or raise any ER 404(b) arguments during trial. Mr. Smiley-Lyle, therefore, waived any error in admitting that evidence.

Moreover, evidentiary errors under ER 404(b) are not of constitutional magnitude, and they cannot be raised for the first time on appeal. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); RAP 2.5(a)(3).

Mr. Smiley-Lyle next contends that the trial court erred by admitting the statements he made to Detective Hollenbeck. Mr. Smiley-Lyle argues that the statements were obtained in violation of his Fifth and Sixth Amendment rights. He claims that when Sergeant Joe Peterson encouraged him to discuss the Whitman County incident after his assertion of his rights, Detective Hollenbeck "stimulated" Mr. Smiley-Lyle to discuss the Spokane County charges. Br. of Appellant at 30. Mr. Smiley-Lyle asserts that because the detective "stimulated" the incriminatory statements after Mr. Smiley-Lyle had asserted his rights to silence and counsel, his conviction must be reversed, and the case remanded for a new trial.

A defendant's Sixth Amendment right to counsel attaches, with or without a

request for counsel, when the State initiates adversarial proceedings against him or her. *Brewer v. Williams*, 430 U.S. 387, 401, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). The Sixth Amendment guaranty of assistance of counsel applies to every "critical stage" of the proceedings. *State v. Everybodytalksabout*, 161 Wn.2d 702, 708, 166 P.3d 693 (2007) (quoting *State v. Tinkham*, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994)).

To determine whether a government agent has violated a defendant's Sixth Amendment right to assistance of counsel, courts apply the "deliberately elicited" standard. *Everybodytalksabout*, 161 Wn.2d at 708. Importantly, the Sixth Amendment is not violated whenever, by luck or chance, the State obtains incriminating statements from the accused after the right to counsel has attached, or when the State agent made no effort to stimulate conversations about the crime charged. *Id*. (quoting *Main v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); *Kuhlmann v. Wilson*, 477 U.S. 436, 442, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986)).

In reviewing findings of fact on a motion to suppress evidence, we review only those findings of fact to which error has been assigned to determine whether substantial evidence in the record supports them. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are deemed verities on appeal. *Id.* at 644. This court reviews conclusions of law in a suppression order de novo. *State v. Armenta*, 134 Wn.2d

1, 9, 948 P.2d 1280 (1997).

Following the CrR 3.5 hearing, the trial court entered findings on the disputed and undisputed facts. Mr. Smiley-Lyle fails to assign error to the trial court's findings of fact. We, therefore, treat them as verities.

The trial court noted, orally and in its written findings, that when Detective Hollenbeck first contacted Mr. Smiley-Lyle on March 18, 2006, he asked if Mr. Smiley-Lyle wanted to make a statement. Mr. Smiley-Lyle declined to do so, and he was subsequently booked into juvenile detention. When Mr. Smiley-Lyle was contacted by Detective Hollenbeck on April 6, he told the detective that he wanted to make a statement regarding the Spokane charges. Detective Hollenbeck reminded Mr. Smiley-Lyle that he had an attorney and that Detective Hollenbeck could not talk with Mr. Smiley-Lyle unless Mr. Smiley-Lyle initiated the conversation. The detective told Mr. Smiley-Lyle that he should think it over prior to making a statement and that the detective would contact Mr. Smiley-Lyle the next day. Mr. Smiley-Lyle had that afternoon and night to consider his actions.

Detective Hollenbeck returned the next day to serve a warrant on Mr. Smiley-Lyle. Mr. Smiley-Lyle said he wanted to make a statement. Detective Hollenbeck advised Mr. Smiley-Lyle of his constitutional rights using a standard *Miranda*[3] card. Mr. Smiley-Lyle

acknowledged that he understood those rights, waived them, and made a videotaped statement. The trial court found that "for purposes of the Fifth Amendment, the defendant re-initiated contact, was properly admonished of his *Miranda* rights, and knowingly and intelligently waived them." CP at 146.

As for Mr. Smiley-Lyle's Sixth Amendment argument that there was a pattern of law enforcement action to stimulate conversation, the trial court found that local law enforcement cooperated and coordinated with Whitman County officers to the extent of arranging interviews. The trial court concluded that those actions, standing alone, were not enough to establish a pattern of conduct intended to stimulate statements by Mr. Smiley-Lyle. The trial court also found that there was no evidence of a direct agreement to stimulate conversation between the different law enforcement agencies nor did the progression of events establish an inference of such an agreement.

The trial court found that "Detective Hollenbeck could properly consider the defendant's statement on April 6, 2006 as re-initiation of contact." CP at 147. Mr. Smiley-Lyle understood his rights and had previous experience with *Miranda* rights. Accordingly, the trial court entered a finding that Mr. Smiley-Lyle knowingly and voluntarily waived his right to counsel. Most significantly, the court stated:

There was no evidence that Detective Hollenbeck either individually or in

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

> cooperation with other law enforcement officers coerced or induced the defendant to waive his right to counsel.
>
> The Court finds that the defendant re-initiated contact, had time to consider his legal rights, counsel was available to the defendant, and the defendant was alert and knowledgeable about his rights.

CP at 147.

In sum, substantial evidence supports the trial court's findings of fact, and those findings support the court's conclusions of law.

Mr. Smiley-Lyle also contends that the trial court erred by granting the State's motion to amend the information to add, as count II, first degree felony murder occurring in the course of first degree burglary. The State moved to amend the information on the morning of the first day of trial, and the amendment was allowed over the objection of the defense. Mr. Smiley-Lyle now argues that the State failed to comply with Spokane County Local Criminal Rule (LCrR) 2.1(d) and that he was prejudiced by the amendment in light of the fact that he was found guilty by a jury on count II. We review a trial court's decision allowing the State to amend an information for an abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995).

LCrR 2.1(d) governs the amendment of an information prior to, during, or after trial. LCrR 2.1(d)(2) provides that a motion to amend an information during or after trial has begun is governed by CrR 2.1(d). CrR 2.1(d) states that the court "may permit any

information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced."

Here, the State's motion to amend was heard by the trial court on the first day of trial. Defense counsel objected to the amendment as untimely but then clearly stated that he would not seek a continuance if the trial court were to grant the amendment. To the contrary, defense counsel indicated only that he "might have to ask the Court's indulgence for, say, a period of a few hours at some point during the trial or a couple of hours to try to gain my bearings on this particular alternative theory." I RP at 17. The record does not show that defense counsel was unduly surprised by the amendment or in any way unable to prepare a defense to the new charge.

Mr. Smiley-Lyle has not demonstrated that he was prejudiced by the amendment. The trial court properly allowed the State to amend the information.

## ADDITIONAL GROUNDS FOR REVIEW

Finally, in his additional grounds for review, Mr. Smiley-Lyle contends that the trial court erred by sentencing him on count II, felony murder in the first degree. Mr. Smiley-Lyle claims that because he received multiple convictions for the same criminal conduct, the sentencing violated double jeopardy principles as set forth in *State v.*

*Womac*, 160 Wn.2d 643, 659, 160 P.3d 40 (2007). He urges this court to vacate the conviction on count II, the additional charge, and resentence on count I, the original charge.

Following oral argument, we stayed this case pending the Supreme Court's decision in *State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (2010).

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment,[4] provides "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington Constitution mirrors the federal constitution, stating "[n]o person shall be . . . twice put in jeopardy for the same offense." Washington's double jeopardy clause offers the same scope of protection as its federal counterpart, and the two clauses are interpreted identically. *State v. Gocken*, 127 Wn.2d 95, 102-03, 896 P.2d 1267 (1995).

The constitutional guaranty against double jeopardy protects a criminal defendant from a second prosecution for the same offense after conviction or acquittal, and from multiple punishments for the same offense. *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). Whether a defendant's

[4] *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

double jeopardy protections have been violated is a question of law we review de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Here, the State charged Mr. Smiley-Lyle by amended information with premeditated first degree murder under RCW 9A.32.030(1)(a) (count I) and first degree felony murder under RCW 9A.32.030(1)(c) (count II). The jury found Mr. Smiley-Lyle guilty of the lesser-included offense of first degree manslaughter on count I and guilty of first degree felony murder on count II. Although the jury returned guilty verdicts on counts I and II, the trial court entered judgment only on count II and did not enter judgment or sentence on count I.

At the sentencing hearing, the trial court heard argument on the issue of double jeopardy and determined that judgment should not be entered on count I, the manslaughter conviction, stating: "I've read all of the authorities in this, and obviously to enter judgment on both of these matters would result in double jeopardy. Clearly it's the same course of conduct. There's no doubt in my mind about that." RP (Dec. 18, 2007) at 26. The trial court went on to state "consequently I will sentence him on the felony murder. *I will not enter judgment on the manslaughter*." RP (Dec. 18, 2007) at 26-27 (emphasis added). The trial court then entered judgment and sentenced Mr. Smiley-Lyle on the felony murder count.

In *Turner*, the Supreme Court held that conditional vacations of lesser convictions violated double jeopardy. The conditional vacation order appended to Guy Turner's judgment and sentence and the similar language in Faulolua Faagata's judgment and sentence recognized the validity of the defendants' vacated lesser convictions. The Supreme Court held that these references violated double jeopardy. *Turner*, 169 Wn.2d at 465. The court stressed that double jeopardy prohibits references that lend validity "even when the lesser convictions are not actually reduced to judgment and do not appear on defendants' criminal records." *Id.*

Here, the felony murder judgment and sentence also referenced the lesser conviction of manslaughter. We, therefore, remand for vacation of the manslaughter conviction and removal of any references from the felony murder judgment and sentence.

We note that *Turner* provided for reinstatement of the vacated conviction if the more serious offense is overturned on appeal. *Id.* at 466. Because we affirm the felony murder conviction, no reinstatement of Mr. Smiley-Lyle's manslaughter conviction would be available. *Turner* also responds to Mr. Smiley-Lyle's assertion that he should have been sentenced only on the lesser offense. The court stated, "'when a jury convicts on both the greater and lesser included offenses, absent a clear indication by Congress [or the legislature] that it intended to allow punishment for both offenses, the [trial] court

should enter a final judgment of conviction on the greater offense and *vacate the conviction on the lesser offense*.'" *Id.* at 459 (quoting *United States v. Jose*, 425 F.3d 1237, 1247 (9th Cir. 2005)) (emphasis added).

We affirm Mr. Smiley-Lyle's conviction for felony murder. Here the trial court properly entered a judgment on only one of the two charges on which the jury found Mr. Smiley-Lyle guilty. But because the trial court did not vacate the conviction on the manslaughter charge, we remand for it to do so and, consistent with *Turner*, to remove any references to the manslaughter conviction in the felony judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Sweeney, J.

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Brown, J.