No. 80131-2

SANDERS, J. (dissenting)—CrR 4.3.1(b)(3) precludes retrying these defendants on related offenses *unless* an exception applies. I do not see how this situation falls into an exception since the prosecution could have pursued, but chose not to, related charges at the first trial.

Defendants were tried and convicted of felony murder based upon the underlying felony of assault. *See* former RCW 9A.32.050(1)(b) (effective July 1, 1976) . At that time the prosecution did not charge possible related offenses, including second degree intentional murder, homicide by abuse, and manslaughter. The felony murder convictions were vacated because this court determined that felony murder could not be predicated on assault. *See In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).[1] However after the felony murder convictions were vacated the prosecution charged the defendants with the related offenses so as to make them stand trial again for the same incident. The defendants moved to have those charges dismissed. CrR 4.3.1(b)(3) provides in part:

---

[1] The legislature amended RCW 9A.32.050(1)(b) (effective Feb. 12, 2003) to expressly include assault.

> The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

Here the prosecution does not even argue it lacked sufficient facts to pursue the related charges at the first trial. Certainly the prosecution could have brought the related charges but chose not to.

The majority excuses the prosecution's choice, trailblazing an expansion of the "for some other reason" exception, asserting this court's decision in *Andress* was "not within the control of the [prosecutor]" and "out of the ordinary." *See* majority at 7. This expansion is unsupported by the language and purposes of the rule and ignores that the operation of CrR 4.3.1(b)(3) is not contingent on the prosecutor's motive for not bringing related charges.

The phrase "for some other reason" does not permit a court to allow a prosecutor to bring later charges against a defendant for just any reason. When interpreting a general exception that completes a list of more specific exceptions, this court follows the principle of statutory interpretation—ejusdem generis. *See, e.g., State v. Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). The content and nature of the specific exceptions modify and restrict the meaning of the general exception. The general exception must be interpreted consistently with and relate to the specific

exceptions.

Here the general "for some other reason" language does not entail the any-way-you-want-it catch-all exception envisioned by the majority. The specific exceptions cover circumstances where the prosecution lacks facts or evidence and thus *cannot* bring the related charges at the time of the first trial. *See* CrR 4.3.1(b)(3). Here, the prosecution was in no way precluded from bringing the additional charges; rather, the prosecution intentionally *chose* not to do so. This court's determination in *Andress* that assault does not constitute a basis for a felony murder charge has no relation to the specific CrR 4.3.1(b)(3) exceptions, which involve a prosecutor's factual ignorance and inability to bring related charges.

Furthermore, CrR 4.3.1(b)(3) is a limit on what the prosecution can do, *regardless* of the prosecution's motive for doing it. *See State v. Dallas*, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995). The majority emphasizes that this court's determination in *Andress* was "not within the control of the [prosecutor]." Majority at 7. That is irrelevant. What was in the prosecutor's control was whether it would charge the related offenses. It could have done so, but did not.[2]

[2] The prosecution no doubt had various strategic reasons for charging only felony murder based on assault. For instance, felony murder does not require a showing of an intent to kill, but only an intent to commit the underlying felony. Also, perhaps in these situations, securing one conviction at trial appeared easier or more likely than securing multiple convictions. But CrR 4.3.1(b)(3) protects defendants from multiple prosecutions for the same conduct *regardless* of the prosecution's motive in choosing not to seek initial convictions on multiple charges. *See Dallas*, 126 Wn.2d at 332.

The prosecution now sees its choice not to bring additional charges as problematic since the initial convictions are no longer valid. The appropriate manner to address this problem is not to plow a line straight through CrR 4.3.1(b)(3), which protects defendants from multiple prosecutions based on the same conduct. *See State v. Russell*, 101 Wn.2d 349, 353 n.1, 678 P.2d 332 (1984) (citing *ABA Standards Relating to Joinder and Severance* 19 (Approved Draft 1968)). The proper resolution is for the prosecution to pursue the related offenses at the time of the first trial if the prosecution wishes to secure convictions on those related offenses.

The majority attempts to justify its outcome-driven[3] articulation here by inexplicably limiting the application of CrR 4.3.1(b)(3) only to defendants acquitted by a jury. *See* majority at 8 ("The rule is intended to prevent the prosecution from trying the defendant again for the same conduct if the jury acquits the first time. This did not happen in these cases—none of the defendants was acquitted by a jury."). But neither the language of CrR 4.3.1(b)(3) nor its underlying purposes support differentiating among retrying a defendant who has been convicted, acquitted by a jury, or has otherwise succeeded in having his or her conviction vacated. The majority cites no precedent for its made-up rule, snatched from thin air. The purposes of the rule "are to protect the defendants from (a) successive prosecutions that can act as a hedge

[3] The majority's first step down the outcome-driven primrose path is clear: "[T]hese defendants would *never* have any viable homicide charges brought against them, as a legal matter, for the deaths they caused if the mandatory joinder rule were to apply and bar any additional homicide charges." Majority at 7.

against the risk of an unsympathetic jury at the first trial, (b) a 'hold' on the defendant after the defendant has been sentenced, or (c) harassment of the defendant through multiple trials." Majority at 4; *see also Russell*, 101 Wn.2d at 353 n.1 (citing *ABA Standards Relating to Joinder and Severance* 19). These protections do not hinge on the outcome of the defendant's first trial. CrR 4.3.1(b)(3) gives the prosecution one bite at the apple—an individual convicted at his or her first trial is no less free from further state harassment, coercion, or threat for the same conduct than an individual who is acquitted. A criminal trial provides finality, as best it can, for all parties involved.

Yet under the majority's rewrite of CrR 4.3.1(b)(3), *see* majority at 8, defendants who are not acquitted at their first trial are subject to subsequent prosecution for the same conduct at the whim of the State. The majority's outcome-driven resolution contradicts the language and purposes of CrR 4.3.1(b)(3). The majority does not serve the "ends of justice," it defeats them.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: