No. _____

ANDREW McWHORTER
Petitioner,

v.

THE STATE OF INDIANA,
Respondent.

PETITIONER'S APPENDIX

INDEX TO APPENDIX

In the
Indiana Supreme Court

Andrew W. McWhorter,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
33A01-1710-CR-02415

Trial Court Case No.
33C01-0512-MR-1

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 6/18/2019.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

McWhorter v. State

Court of Appeals of Indiana

December 26, 2018, Decided; December 26, 2018, Filed

Court of Appeals Case No. 33A01-1710-CR-2415

Reporter
117 N.E.3d 614 *; 2018 Ind. App. LEXIS 494 **; 2018 WL 6815001

Andrew ***McWhorter***, Appellant-Defendant, v. State of Indiana, Appellee-Plaintiff.

Subsequent History: Rehearing denied by *McWhorter v. State, 2019 Ind. App. LEXIS 105 (Ind. Ct. App., Mar. 6, 2019)*

Transfer denied by *McWhorter v. State, 2019 Ind. LEXIS 448 (Ind., June 18, 2019)*

Prior History: [1]** Appeal from the Henry Circuit Court. The Honorable Bob Witham, Judge. Trial Court Cause No. 33C01-0512-MR-1.

McWhorter v. State, 872 N.E.2d 218, 2007 Ind. App. LEXIS 1829 (Ind. Ct. App., Aug. 9, 2007)

Core Terms

voluntary manslaughter, murder, sudden heat, first trial, felony, double jeopardy, sentence, retrial, lesser, standalone, killed, reckless, habitual offender, trial court, unavailable, admitting, convicted, homicide

Case Summary

Overview

HOLDINGS: [1]-At defendant's trial on the charge of murder, defendant was highly incentivized to highlight any problem with the sole eyewitness testifying's perception and recollection and to elicit from her any evidence that tended to negate or lessen his criminal culpability; [2]-The witness's testimony at the first trial was properly admitted under *Ind. R. Evid. 804(b)(1)* at his second trial as defendant had a similar motive in both his first and second trials; [2]-Defendant was not denied due process in his second trial because he had been convicted in his first trial of voluntary manslaughter as a Class A felony that was not included in the information as that conviction had been reversed; [3]-The state's highest court had ruled that double jeopardy and collateral estoppel did not preclude defendant's retrial for reckless homicide or voluntary manslaughter.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > ... > Hearsay > Unavailability > Inability to Testify

Evidence > ... > Hearsay > Exceptions > Former Testimony of Unavailable Declarants

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN1[] **Evidence**

The decision to admit former testimony of an unavailable witness is within the sound discretion of the trial court and the appellate court will not reverse absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. While prior testimony is hearsay, *Ind. R. Evid. 804* provides an

exception to its exclusion if the declarant is unavailable. To be considered unavailable, the declarant must be unable to testify because of death or a then-existing infirmity, physical illness, or mental illness. If a witness is determined unavailable, former testimony given at a trial, hearing, or lawful deposition is not excluded by the hearsay rule. The exception applies if the testimony: (A) was given by a witness at a trial, hearing or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination. *Rule 804(b)(1)*.

Evidence > ... > Hearsay > Exceptions > Former Testimony of Unavailable Declarants

HN2[] **Former Testimony of Unavailable Declarants**

The plain language of *Ind. R. Evid. 804(b)(1)* requires only that the opponent have had a similar motive to develop the former testimony.

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Acquittals

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Convictions

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

HN3[] **Acquittals**

A defendant may be retried for a lesser offense, of which he was convicted at the first trial, after that conviction is reversed on appeal, and this is true even though the first trial also resulted in a verdict of acquittal on a greater offense.

Counsel: ATTORNEY FOR APPELLANT: Michael K. Ausbrook, Bloomington, Indiana; Maurer School of Law Federal Habeas Project, Sarah Brown, Law Student, Ashley Moore, Law Student, Davin Shaw, Law Student, Michael Smyth, Law Student, Elmer Thoreson, Law Student.

ATTORNEYS FOR APPELLEE: Curtis T. Hill, Jr., Attorney General of Indiana; Andrew A. Kobe, Section Chief, Criminal Appeals, Indianapolis, Indiana.

Judges: Bradford, Judge. Brown, J., concurs. Bailey, J, dissents with opinion.

Opinion by: Bradford

Opinion

[*616] Bradford, Judge.

Case Summary

P1 In 2006, Andrew McWhorter was convicted of Class A felony voluntary manslaughter. That conviction was reversed after McWhorter sought post-conviction relief ("PCR") and the matter was remanded for retrial. Following retrial, he was again convicted of Class A felony voluntary manslaughter. McWhorter challenges this conviction, contending that (1) the trial court abused its discretion in admitting certain evidence, (2) his due process rights were violated during his prior trial, and (3) he was subjected to double jeopardy. Concluding that McWhorter's contentions are without merit, we affirm. **[**2]**

Facts and Procedural History

P2 Upon considering McWhorter's first direct appeal, we set forth the relevant facts as follows:

> In December 2005, McWhorter, Amanda Deweese (Deweese), and their baby were living with Barbara Gibbs (Gibbs), McWhorter's grandmother. On December 2, 2005, inside Gibb's home, McWhorter shot Deweese in the head with a twelve-gauge shotgun at close range causing her death.
>
> Earlier that night, both Deweese and McWhorter visited Janis Floyd's (Floyd) home. Floyd observed Deweese acting nervous and crying, and observed that McWhorter smelled of alcohol. Meanwhile, Gibbs attended a Christmas show, arriving home about 10:45 p.m. Shortly after she arrived home McWhorter and Deweese came home as well. The two argued. Just as Floyd observed, Gibbs could tell that McWhorter was intoxicated.
>
> A few moments later, Deweese and Gibbs were sitting in the kitchen and McWhorter came in

carrying a shotgun. He told Gibbs, "I'm going to show you how to use this gun[,] grandma, in case [you ever] need it." (Transcript p. 122). Gibbs told McWhorter to put the gun away. McWhorter placed the gun on the table and began loading and unloading it repeatedly. Eventually McWhorter took the gun **[**3]** out of the room.

Around this time, McWhorter confronted Deweese about her having intercourse with another man while she was pregnant with their baby. McWhorter asked for the return of the engagement ring that he had given Deweese. She took it off and handed it to him. He threw it on the floor and stepped on it. Gibbs picked the ring up, handed it to **[*617]** Deweese, and McWhorter asked for it again. Deweese gave it back and McWhorter threw it again, this time into a bedroom.

McWhorter went into the room where he had thrown the ring and stayed there for a while. During this time, Gibbs was sitting across the kitchen table from Deweese, facing her and McWhorter was standing behind Gibbs facing Deweese. Gibbs and Deweese were talking about whether McWhorter might try to kill himself. "[T]he next thing [Gibbs] knew, [she] heard a boom." (Tr. p. 126). Gibbs could see Deweese and quickly realized Deweese had been shot. Gibbs turned around and saw McWhorter standing close by. Gibbs asked what had happened and McWhorter said "oh no, oh no", and started screaming and carrying on. (Tr. p. 135). While Gibbs called 911, McWhorter said, "I didn't know there was a shell in it," and left the room. (Tr. p. **[**4]** 135).

Henry County Deputy Sheriff Ken Custer (Deputy Custer) was the first officer on the scene. He asked her what had happened and she stated that "[McWhorter] shot [Deweese]." (Tr. p. 168). Supporting officers then arrived. The officers found McWhorter in the house lying behind a baby crib and a shotgun lying inside the crib. After McWhorter was taken into custody, he said on two occasions, "I shot her." (Tr. pp. 174-176).

*McWhorter v. State, 33A01-0701-CR-2, 2007 Ind. App. Unpub. LEXIS 366, *3 (Ind. Ct. App. Aug. 9, 2007)* ("*McWhorter I*"), *trans denied*.

P3 The State charged McWhorter with murder and alleged that he was a habitual offender. *2007 Ind. App. Unpub. LEXIS 366, [WL] at *4*. Following trial, the jury found McWhorter guilty of Class A felony voluntary manslaughter and determined that he was indeed a habitual offender. *Id.* He was subsequently sentenced to "forty-five years for voluntary manslaughter, enhanced by thirty years as a Habitual Offender, for an aggregate sentence of seventy-five years." *Id.* His conviction was affirmed on appeal. *2007 Ind. App. Unpub. LEXIS 366, [WL] at *10*.

P4 In 2008, McWhorter filed a PCR petition, alleging that his trial counsel was ineffective for failing to object to the voluntary manslaughter instruction that was given to the jury. On January 24, 2012, the post-conviction court denied McWhorter **[**5]** relief. A panel of this court reversed the denial of PCR, concluding that McWhorter had not received effective assistance of trial counsel and that he could only be retried on a charge of reckless homicide. *McWhorter v. State, 970 N.E.2d 770, 779 (Ind. Ct. App. 2012)* ("*McWhorter II*"), *transfer granted*, *opinion vacated*, *993 N.E.2d 1141 (Ind. 2013)* ("*McWhorter III*").

P5 On transfer, the Indiana Supreme Court agreed that McWhorter was entitled to PCR and accordingly reversed the judgment of the post-conviction court, vacated McWhorter's conviction for voluntary manslaughter, and remanded for retrial. *McWhorter III, 993 N.E.2d at 1148*. The Indiana Supreme Court, however, concluded that "neither the prohibition of double jeopardy nor the doctrine of collateral estoppel preclude retrial for reckless homicide or voluntary manslaughter." *Id.*

P6 On January 25, 2017, the State amended the charging information to include the charge of Class A felony voluntary manslaughter. By the time of McWhorter's retrial, Gibbs was deceased. The videotape of Gibbs's previous trial testimony was played for the jury, over McWhorter's objection. On June 28, 2017, the jury found McWhorter guilty of the Class A felony voluntary manslaughter charge and McWhorter admitted to being a habitual offender. He was subsequently **[*618]** sentenced to **[**6]** an aggregate seventy-five-year sentence.

Discussion and Decision

I. Admission of Evidence

P7 McWhorter contends that the trial court abused its discretion in admitting Barbara Gibbs's testimony from the first trial. ***HN1***[⬆] "The decision to admit former testimony of an unavailable witness is within the sound discretion of the trial court" and we "will not reverse absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial." *Burns v. State, 91 N.E.3d 635, 639 (Ind. Ct. App. 2018)* (internal

citation and quotation omitted).

> While prior testimony is hearsay, *Indiana Rule of Evidence 804* provides an exception to its exclusion if the declarant is unavailable. To be considered unavailable, the declarant must be unable to testify because of death or a then-existing infirmity, physical illness, or mental illness. If a witness is determined unavailable, former testimony given at a trial, hearing, or lawful deposition is not excluded by the hearsay rule.

Id. (internal quotations omitted). The exception applies if the testimony "(A) was given [by] a witness at a trial, hearing or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had ... an opportunity and similar motive **[**7]** to develop it by direct, cross-, or redirect examination." *Ind. Evidence Rule 804(b)(1)*.

P8 McWhorter concedes that Gibbs was unavailable at his second trial and that he had the opportunity to cross-examine her during his first trial. McWhorter claims, however, that he lacked a similar motive to develop Gibbs's testimony during the first trial because his defense was one of accident and he did not interject the issue of sudden heat.

P9 ***HN2***[⬆] The plain language of *Rule 804(b)(1)* requires only that the opponent have had a "similar" motive to develop the former testimony. At McWhorter's trial on the charge of murder, Gibbs was the sole eyewitness testifying. McWhorter was highly incentivized to highlight any problem with her perception and recollection and to elicit from her any evidence that tended to negate or lessen his criminal culpability. Thus, we conclude that McWhorter had a similar motive in both his first and second trials. As such, we cannot say that the trial court abused its discretion by admitting Gibbs's former testimony.

II. Due Process

P10 McWhorter also contends that his "right to federal due process was violated when he was convicted the first time of voluntary manslaughter as a Class A felony, a charge not included **[**8]** in the information in any way and for which neither the State nor McWhorter requested an instruction." Appellant's Br. pp. 29-30. That conviction, which resulted from McWhorter's first trial, was reversed. We agree with the State that McWhorter, in pursuing this particular issue on appeal, "has not alleged let alone shown that he was denied due process in his second trial." Appellee's Br. p. 14.

III. Double Jeopardy

P11 McWhorter last contends that because he was acquitted of murder in his first trial, the prohibition against double jeopardy barred his retrial for voluntary manslaughter. We disagree. It is well-settled that ***HN3***[⬆] "a defendant may be retried for a lesser offense, of which he was convicted at the first trial, after that conviction is reversed on appeal, and this is true even though the first trial also resulted in a verdict of acquittal on a greater offense." **[*619]** *Griffin v. State, 717 N.E.2d 73, 78 (Ind. 1999)* (citing *Price v. Georgia, 398 U.S. 323, 326-27, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970))*.

P12 At the conclusion of McWhorter's first trial, the jury found him "not guilty of murder, but guilty of voluntary manslaughter, a Class A felony, as a lesser included offense of murder, a felony." *McWhorter III, 993 N.E.2d at 1143*. In *McWhorter III*, the Indiana Supreme Court found that while McWhorter was "acquitted of murder," "[i]t is clear **[**9]** that traditional federal double jeopardy jurisprudence does not preclude retrying McWhorter for voluntary manslaughter." *Id. at 1146*. The Supreme Court additionally found that the doctrine of collateral estoppel, *i.e.*, issue preclusion, did not bar retrial of a voluntary manslaughter charge. *Id. at 1147-48*. Thus, the Indiana Supreme Court expressly directed that "neither the prohibition of double jeopardy nor the doctrine of collateral estoppel preclude retrial for reckless homicide or voluntary manslaughter."[1] *Id. at 1148*. Given the Indiana Supreme Court's decision in *McWhorter III*, we reject McWhorter's double jeopardy contention.[2]

P13 The judgment of the trial court is affirmed.

Brown, J., concurs.

Bailey, J, dissents with opinion.

Dissent by: Bailey

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[1] McWhorter's double jeopardy arguments have also been rejected by the federal courts. *See McWhorter v. Neal*, 1:14-cv-01098-WTL-DML (7th Cir. July 17, 2015), *cert. denied*.

[2] To the extent that *McWhorter III* only considered McWhorter's arguments in the context of the *Fifth Amendment to the United States Constitution*, we conclude that the principles relied on by the Indiana Supreme Court apply equally to *Article I, § 14, of the Indiana Constitution.* Thus, for the same reasons as are stated above, we further conclude that McWhorter's double jeopardy claim fails under the Indiana Constitution.

Dissent

Bailey, Judge, dissenting.

P14 I fully agree with my colleagues that "a defendant may be retried for a lesser offense, of which he was convicted at the first trial, after that conviction is reversed on appeal, and this is true even though the first trial also resulted in a verdict of acquittal on a greater offense." *Griffin v. State, 717 N.E.2d 73, 78 (Ind. 1999)*. However, voluntary manslaughter, as a standalone charge, is not a "lesser" offense of murder.[3] Our Indiana Supreme Court has made **[**10]** this clear when, after *McWhorter III* was decided, the Court issued its opinion in *Brantley v. State, 91 N.E.3d 566 (Ind. 2018)*. The Court addressed the availability of a standalone charge of voluntary manslaughter and the burden of proof in such an action. Our Supreme Court considered "whether voluntary manslaughter may be brought as a standalone charge" by the State and found that it could. *Id. at 570-71*. Turning to the merits, the Court made three specific observations:

> One, sudden heat is a mitigating factor, not an element. ... Two, there must be **[*620]** some evidence that a defendant acted in sudden heat before a jury may consider voluntary manslaughter. As such, to the extent the State argues it can concede the existence of sudden heat without evidence of such in the record, we disagree. Three, even when voluntary manslaughter is the lead charge, the State must prove the elements of murder: the knowing or intentional killing of another human being.

Id. at 572. In sum, the crime of voluntary manslaughter does not include a unique element of sudden heat.[4] The crime to be alleged and proven in a standalone charge of voluntary manslaughter is murder, albeit a mitigated murder, i.e., a diminished mens rea. Yet because sudden heat is not an element, voluntary **[**11]** manslaughter is lesser only in the degree of punishment not proof.

P15 As an intermediate appellate court, we are bound to follow Indiana Supreme Court precedent and will not declare its decision to be invalid. *Gill v. Gill, 72 N.E.3d 945, 949 (Ind. Ct. App. 2017)*. The *Brantley* Court clarified that, "even when voluntary manslaughter is the lead charge, the State must prove the elements of murder." *91 N.E.3d at 572*. But when McWhorter was tried on the standalone charge of voluntary manslaughter, he had already been tried for murder. *See McWhorter I*, *McWhorter II*, and *McWhorter III*. Upon that charge, "McWhorter was acquitted of murder[.]" *McWhorter III, 993 N.E.2d at 1146*. When the State pursued its standalone charge, McWhorter was again required to defend against the elements of murder. This is a classic example of double jeopardy. An explicit acquittal terminates jeopardy on the acquitted charge and does so "notwithstanding any legal error." *Evans v. Michigan, 568 U.S. 313, 328, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013)*. To the extent that *McWhorter III* and *Brantley* may be seen as conflicting, we should follow the latter guidance of our supreme court specific to a standalone charge.

P16 Effectively, these decisions suggest that there is a lesser or diminished capacity below knowing and intentional because of the emotional response to a sudden event, i.e., sudden **[**12]** heat. This "sudden heat" arises from provocation which is absent in this case. Yet, given the framework presented to us, "sudden heat" is not an element of murder, rather it is something in addition to murder.

P17 Finally, I observe that the record here is devoid of evidence of "sudden heat" as that has been defined by our Indiana Supreme Court. Sudden heat exists "when a defendant is 'provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection.'"

---

[3] In 2005, when McWhorter killed Deweese, *Indiana Code Section 35-42-1-1* defined murder as the knowing or intentional killing of another human being. *Indiana Code Section 35-42-1-3* provided that "a person who knowingly or intentionally (1) kills another human being ... while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon." *Subsection (b)* stated: "The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under *section 1(1)* of this chapter to voluntary manslaughter." Pursuant to *Indiana Code Section 35-42-1-5*, a person committed reckless homicide when he recklessly killed another human being.

[4] I acknowledge that our supreme court has previously described voluntary manslaughter as an inherently included lesser offense of murder, with a distinguishing element of sudden heat. *See Washington v. State, 808 N.E.2d 617, 625 (Ind. 2004)*.

Brantley, 91 N.E.3d at 572 (quoting *Isom v. State, 31 N.E.3d 469, 486 (Ind. 2015)*). Here, McWhorter was simply not "provoked." *See id.*

P18 The prosecutor urged the jury to consider McWhorter's likely perception that the relationship was ending from Deweese's silence in the face of McWhorter's accusations and his stomping of the engagement ring. Clearly, the record indicates that McWhorter was agitated after dwelling upon events that had apparently happened many months earlier, and he may well have been facing the prospect of a breakup. But even if Deweese's affair constituted "sudden heat," the existence of **[*621]** "sudden heat" can be negated by a showing that a sufficient **[**13]** "cooling off period" elapsed between provocation and homicide. *Morrison v. State, 588 N.E.2d 527, 531-32 (Ind. Ct. App. 1992)*. Here, the conduct which Deweese apparently admitted was long past. Too, sudden heat is not shown by anger alone or by mere words. *Suprenant v. State, 925 N.E.2d 1280, 1282 (Ind. Ct. App. 2010)*, *trans. denied*. In my view, Deweese's mere silence cannot conceivably be considered provocation.

P19 McWhorter admits that he killed a person and that he acted recklessly. For an act of voluntary manslaughter, coupled with enhancements for past conduct, he received a prison sentence of seventy-five years. I would reverse and remand with instructions to enter judgment on criminal recklessness and conduct a new sentencing hearing. On remand, while McWhorter is subject to a lesser sentence for criminal recklessness, this sentence is nevertheless subject to enhancement.[5]

End of Document

[5] McWhorter does not contest the jury's determination that he is a habitual offender.

STATE OF INDIANA	)	IN THE HENRY CIRCUIT COURT I
	) SS:	
COUNTY OF HENRY	)	CAUSE NO. 33C01-0512-MR-0001
STATE OF INDIANA	)	
	)	
VS.	)	
	)	
ANDREW W. McWHORTER DOB: 10-25-1977	)	

INFORMATION

Comes now Ed Manning of the Henry County Sheriff's Department, being duly sworn upon his oath, and states as follows:

VOLUNTARY MANSLAUGHTER, A CLASS A FELONY

On or about December 2, 2005, in Henry County, Indiana, Andrew W. McWhorter did knowingly kill another human being, while acting under sudden heat, by means of a deadly weapon, to wit: shot and killed Amanda Deweese. All of which is against the peace and dignity of the State of Indiana and contrary to the form of the statute made and provided in such case, to-wit: I.C. 35-42-1-3 and constitutes a Class "A" Felony.

Ed Manning
Henry County Sheriff's Department

Subscribed and sworn to before me a Notary Public in and for said State and County this 24th day of January, 2017.

My Commission Expires:

Notary Public
Residing in Rush County, Indiana

ANNETTE KAY COFFIN
Rush County
My Commission Expires
October 29, 2022

APPROVED BY ME:

PHILIP U. CAVINESS - 20059-29
Special Prosecuting Attorney
Term Expires: 12/31/14

STATE OF INDIANA	)	IN THE HENRY SUPERIOR COURT NO. 1
	) SS:	
COUNTY OF HENRY	)	CAUSE NO. 33D01-0512-MR-0001

STATE OF INDIANA	)
	)
vs.	)
	)
ANDREW W. MCWHORTER	)

VERDICT

We, the Jury, find the Defendant, Andrew W. McWhorter, not guilty of murder, but guilty of voluntary manslaughter, a Class A felony, as a lesser included offense of murder, a felony.

Date: August 3, 2006

Carolyn Colvin
Foreperson

FILED

AUG 0 3 2006

Patricia A. Gaul
CLERK HENRY SUPERIOR COURT NO. 1

STATE OF INDIANA)
) SS:
COUNTY OF HENRY)

IN THE HENRY SUPERIOR COURT I

CASE NO. 33D01- 0512 MR 0001

FILED

DEC 05 2005

CLERK HENRY SUPERIOR COURT NO. 1

FILE STAMP

STATE OF INDIANA)
)
)
)
VS.)
)
)
)
ANDREW W. MCWHORTER)
DOB: 10-25-1977)

INFORMATION FOR:

MURDER
a felony
I.C. 35-42-1-1(1)

The undersigned, being sworn upon his oath, says that on or about December 2, 2005, in Henry County, State of Indiana, Andrew W. McWhorter did knowingly kill another human being, to-wit: Amanda L. Deweese, all of which is contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Indiana.

Butch Baker
Henry County Prosecutor's Office

1 of 6 DOCUMENTS

ANDREW MCWHORTER, Appellant (Petitioner below), v. STATE OF INDIANA, Appellee (Respondent below).

No. 33S01-1301-PC-7

SUPREME COURT OF INDIANA

993 N.E.2d 1141*; *2013 Ind. LEXIS 691

September 12, 2013, Decided
September 12, 2013, Filed

SUBSEQUENT HISTORY: Transfer denied by *Wc Whorter v. State, 2013 Ind. LEXIS 935 (Ind., Dec. 5, 2013)*

PRIOR HISTORY: [**1]
Appeal from the Henry Circuit Court 2, No. 33C02-0806-PC-0001. The Honorable E. Edward Dunsmore, Permanent Judge Pro Tempore. On Petition To Transfer from the Indiana Court of Appeals, No. 33A01-1202-PC-72. *McWhorter v. State, 970 N.E.2d 770, 2012 Ind. App. LEXIS 325 (Ind. Ct. App., 2012)*

COUNSEL: ATTORNEYS FOR APPELLANT: Stephen T. Owens, Public Defender of Indiana; James T. Acklin, Chief Deputy Public Defender, Indianapolis, Indiana.

ATTORNEYS FOR APPELLEE: Gregory F. Zoeller, Attorney General of Indiana; Jodi Kathryn Stein, Deputy Attorney General; Stephen Richard Creason, Deputy Attorney General, Indianapolis, Indiana.

JUDGES: Rucker, Justice. Dickson, C.J., and David, Massa and Rush, JJ., concur.

OPINION BY: Rucker

OPINION

[*1142] **Rucker, Justice**.

Andrew McWhorter appealed the denial of his petition for post-conviction relief arguing trial counsel rendered ineffective assistance for failing to object to a flawed [*1143] voluntary manslaughter jury instruction. On review the Court of Appeals reversed the judgment of the post-conviction court and remanded this cause for retrial on reckless homicide only. On transfer, we also reverse the judgment of the post-conviction court but conclude that on remand there is no prohibition for retrial on either voluntary manslaughter or reckless homicide.

Facts and Procedural History

The [**2] State charged McWhorter with murder in the shooting death of his girlfriend, Amanda Deweese. At close range, McWhorter shot Deweese in the head with a shotgun. Shortly before the shooting McWhorter had confronted Deweese about her sexual infidelity with another man while she was pregnant with their child. McWhorter asked for return of the engagement ring that he had given Deweese. She took it off and handed it to him. He threw it on the floor and stepped on it. After Deweese retrieved the ring, McWhorter asked for it again. Deweese gave it back to McWhorter and he threw it again. At trial, there was no dispute McWhorter was the shooter. His defense was that the shooting was accidental. According to McWhorter the facts supporting an accidental shooting included "that only a single shot was fired, and that immediately after the shot, McWhorter exclaimed in 'horror', '[o]h no, oh no' and said aloud that he didn't know there was a shell in the gun." Br. of Appellant at 3 (quoting Tr. 135, 151, 158-61). He also points to the fact that he "did not flee and waited for authorities to arrive while his grandmother called 911." Id. Despite McWhorter's apparent all-or-nothing defense of accident, [**3] at the close of trial and without objection from defense counsel, the trial court also instructed the jury on voluntary manslaughter and reckless homicide. After deliberating the jury returned the following verdict: "We, the Jury, find the Defendant, Andrew W. McWhorter, not guilty of murder, but guilty of voluntary manslaughter, a Class A felony, as a lesser included offense of murder, a felony." App. at 20. McWhorter was also adjudged a habitual offender. The trial court sentenced McWhorter to forty-five years imprisonment for the voluntary manslaughter conviction enhanced by thirty years for the habitual offender adjudication.

On appeal McWhorter contended the trial court erred in admitting certain photographs into evidence, and he also argued the evidence was not sufficient to sustain the conviction. In an unpublished memorandum decision the Court of Appeals rejected both claims and affirmed the judgment of the trial court. See *McWhorter v. State, 872 N.E.2d 218, 2007 WL 2264712 (Ind. Ct. App. Aug. 9, 2007)*, trans. denied.

Thereafter on June 12, 2008 McWhorter filed a *pro se* petition for post-conviction relief that was later amended by counsel on September 21, 2011. As amended [**4] the petition essentially alleged that trial counsel rendered ineffective assistance for failing to object to the voluntary manslaughter instruction. More particularly McWhorter contended that the instruction "was structurally flawed, was an incorrect statement of the law, was confusing, and permitted the jury to re-deliberate on the elements of murder (in the context of voluntary manslaughter) after having acquitted McWhorter of murder." App. to Br. of Appellant at 28.[1]

1 The instruction reads:

> The Defendant is charged with murder. Voluntary manslaughter and reckless homicide are lesser included offenses in the charge of murder. If the State proves the Defendant guilty of murder, you need not consider the included crimes. However, if the State fails to prove the Defendant committed murder, you may consider whether the Defendant committed voluntary manslaughter or reckless homicide, which the Court will define for you.
>
> You must not find the Defendant guilty of more than one crime.
> The statute defining the offense of Murder which was in force at the time of the offense charged reads as follows:
>
> *35-42-1-1*. Murder
> A person who: knowingly . . . kills another human being . . . commits murder, a [**5] felony.
> To convict the Defendant, the State must have proved each of the following elements:
>
> 1. The Defendant
> 2. *knowingly*
> 3. killed
> 4. Amanda L. Deweese.
>
> *If the State failed to prove each of these elements beyond a reasonable doubt, you must find*

the Defendant not guilty of murder, a felony, as charged in the Information.

You may then consider any included crime. The crime of voluntary manslaughter is included in the charged crime of murder. Voluntary manslaughter is defined by statute as follows:

A person who knowingly . . . kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony. The offense is a Class A felony if it is committed by means of a deadly weapon.

Sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. The State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under sudden heat.

Before you may convict the Defendant, the state must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. *knowingly*
3. killed
4. Amanda Deweese
5. and the Defendant was not acting under sudden heat
6. and the Defendant killed by means of a deadly [**6] weapon.

If the State failed to prove each of elements 1 through 4 of the crime of murder beyond a reasonable doubt, you must find the Defendant not guilty of murder as charged.

If the State did prove each of elements 1 through 4 and element 6 beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt element 5, you may find the Defendant guilty of voluntary manslaughter, a Class A felony, a lesser included offense of murder. If this is your finding but that the Defendant did not do so by means of a deadly weapon, you may find the Defendant guilty of voluntary manslaughter, a Class B felony, a lesser included offense of murder. If the State proves the Defendant guilty of voluntary manslaughter, you need not consider the next included crime.

If the State did prove each of elements 1 through 5 beyond a reasonable doubt, you may find the Defendant guilty of murder, a felony.

The crime of reckless homicide is defined by law as follows:

A person who recklessly kills another human being commits reckless homicide, a Class C felony.

Before you may convict the Defendant of reckless homicide, the State must have proved each of the following beyond a reasonable doubt:

1. The [**7] Defendant
2. *recklessly*
3. killed
4. Amanda Deweese.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of reckless homicide a Class C felony.

App. 25-27 (emphases added).

[*1144] After a hearing the post-conviction court denied McWhorter's petition for relief. McWhorter appealed raising the same claims he raised before the post-conviction court. Agreeing that counsel rendered ineffective assistance, the Court of Appeals reversed the judgment of the post-conviction court. In so doing the Court remanded this cause concluding McWhorter may be retried on the charge of reckless homicide,[2] but may not be retried on the charge of voluntary manslaughter. See *McWhorter v. State, 970 N.E.2d 770, 778 (Ind. Ct. App. 2012)*. The State sought transfer challenging only this aspect of the Court of Appeals opinion.[3] Having previously [*1145] granted transfer we conclude that McWhorter may be retried on the charge of reckless homicide as well as voluntary manslaughter.

2 McWhorter readily concedes that he is subject to retrial on the charge of reckless homicide. Br. of Appellant at 13 n.4.

3 In its Petition to Transfer, the State does not contest the Court of [**8] Appeals' conclusion that trial counsel rendered ineffective assistance. We summarily affirm the opinion of the Court of Appeals on this point.

Discussion

McWhorter contends and the Court of Appeals agreed that the now-challenged instruction:

> [D]irected the jury to proceed, upon a failure of proof of one or more of the elements of Murder, to consider the lesser charge of Voluntary Manslaughter. However, the only element in dispute was intent. The jury was led by the sequential error of the instruction to, as a practical matter, find that McWhorter did not knowingly or intentionally kill Deweese, but that he did knowingly or intentionally kill Deweese while acting in sudden heat.

McWhorter, 970 N.E.2d at 777.

In support of his argument McWhorter cites the case of *Demontiney v. Montana, 2002 MT 161, 310 Mont. 406, 51 P.3d 476 (Mont. 2002)* for the proposition that the double jeopardy prohibition dictates that he cannot be not be retried for voluntary manslaughter. Br. of Appellant at 13. In that case the jury was instructed on deliberate homicide (knowingly causing the death of another) and mitigated deliberate homicide (knowingly causing the death of another while under the influence of extreme mental or emotional stress). [**9] Similar to the facts here, the jury was instructed "first to consider the charge of deliberate homicide. Only if they reached a verdict of not guilty . . . was the jury then to consider the charge of mitigated deliberate homicide." *Demontiney, 51 P.3d at 479*. The jury returned a verdict of not guilty of deliberate homicide, but convicted the defendant of mitigated deliberate homicide. On appeal he argued the jury's verdict was "legally inconsistent." *Id. at 478* (quotation omitted). The Montana Supreme Court agreed declaring among other things:

> [A] finding of guilty on mitigated deliberate homicide requires a finding of every element of deliberate homicide plus an additional finding of extreme mental or emotional stress. The District Court's jury instructions and verdict form, however, allowed the jury to find Demontiney not guilty of the elements of deliberate homicide yet somehow guilty of those same elements when combined with a finding of extreme mental or emotional stress. The jury exposed *this inconsistency by returning a logically impossible verdict*. This verdict resulted in Demontiney's conviction of mitigated deliberate homicide.

Id. at 480 (emphasis added). Concluding that the [**10] trial court's instruction amounted to reversible error, the Court reversed the conviction and then addressed whether the defendant could be retried on any related or included offenses including mitigated deliberate homicide. The Court declared, "[b]ecause the jury found Demontiney not guilty of deliberate homicide, it cannot logically convict Demontiney of mitigated deliberate homicide. The State thus cannot retry Demontiney on that charge." Id. However the Court appears to have based its decision not on state or federal double jeopardy grounds, but rather on its "supervisory control" over District Courts. See *id. at 478-79, 481*. In fact the Court cited the Montana constitutional prohibition on double jeopardy only for the proposition that the State could not retry the defendant for deliberate homicide -- the offense for which the jury returned a verdict of not guilty. *Id. at 480*.

[*1146] We decline to follow the *Demontiney* Court. In this jurisdiction "[j]ury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable." *Beattie v. State, 924 N.E.2d 643, 649 (Ind. 2010)*. Indeed we tolerate such verdicts under some circumstances [**11] acknowledging that they conceivably could be "due to a compromise among disagreeing jurors, or to expeditiously conclude a lengthy deliberation, or to avoid an all-or-nothing verdict, or for other reasons." Id. (discussing inconsistency between jury returning a verdict of not guilty of dealing in cocaine and possession of cocaine, but guilty of possession of cocaine within 1,000 feet of a family housing complex and possession of marijuana). Because such verdicts are not subject to appellate review, the structural flaw in the challenged instruction here, which gave rise to a "legally inconsistent" and potentially compromised or allegedly "unreliable" verdict, cannot provide a basis for precluding retrial on the voluntary manslaughter charge. This leaves us with McWhorter's more general double jeopardy claim.

The *Double Jeopardy Clause of the Fifth Amendment*, applicable to the states through the *Fourteenth Amendment*, provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." *U.S. Const. amend. V*; *Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)*.[4] The double jeopardy prohibition "bars a defendant from being prosecuted for an offense [**12] after being acquitted for the same offense." *Griffin v. State, 717 N.E.2d 73, 77 (Ind. 1999)* (citing *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)*.

4 A similarly worded provision in the Indiana Constitution provides: "No person shall be put in jeopardy twice for the same offense." *Ind. Const. art. 1, § 14*. McWhorter does not cite or make any claim under the Indiana *Double Jeopardy Clause*. Therefore we do not address the issue here on Indiana constitutional grounds. See *Jackson v. State, 735 N.E.2d 1146, 1150, n.1 (Ind. 2000)* (declining to address an Indiana constitutional claim where appellant referred to the constitutional provision but made no separate argument on that basis).

Here however McWhorter was acquitted of murder, and the State seeks to retry him for the lesser-included offense of voluntary manslaughter. It is true that under principles of double jeopardy a conviction of a greater offense precludes the *conviction* of a lesser-included offense. See *Brown v. Ohio, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)*. But it is well-settled that "a defendant may be retried for a lesser offense, of which he was convicted at the first [**13] trial, after that conviction is reversed on appeal, and this is true even though the first trial also resulted in a verdict of acquittal on a greater offense." *Griffin, 717 N.E.2d at 78* (citing *Price v. Georgia, 398 U.S. 323, 326-27, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970)*). Retrial after reversal of a conviction is prohibited only where the reversal is for insufficient evidence, which is akin to an acquittal. See *Dexter v. State, 959 N.E.2d 235, 240 (Ind. 2012)*. It is clear that traditional federal double jeopardy jurisprudence does not preclude retrying McWhorter for voluntary manslaughter.

McWhorter's double jeopardy argument is premised on the notion that the only matter in dispute during trial "was whether the shooting was knowing or accidental." Br. of Appellant at 3 (citing Tr. at 42-43). Essentially, the argument continues, because the jury found him not guilty of murder, and because murder and [*1147] voluntary manslaughter share the same element of a "knowing" killing, McWhorter insists the jury has already determined that he did not knowingly kill Deweese; and thus the State should not be allowed another opportunity to present this issue. In essence McWhorter contends that the verdict form was the functional equivalent [**14] of not only an acquittal of murder, but also an acquittal of voluntary manslaughter.

This argument is more appropriately framed not as a double jeopardy prohibition but rather as a matter of applying the doctrine of collateral estoppel. Also referred to as issue preclusion, collateral estoppel has been characterized as an "awkward phrase" however, "it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)*. "Collateral estoppel is not the same as double jeopardy, but rather it is embodied within the protection against double jeopardy." *Coleman v. State, 946 N.E.2d 1160, 1165 (Ind. 2011)*. "[T]he traditional bar of jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply

forbids the government from relitigating certain facts in order to establish the fact of the crime." Id. (alteration in original) (internal quotation omitted). "In essence the doctrine of collateral estoppel [**15] 'precludes the Government from relitigating any issue that was *necessarily decided* by a jury's acquittal in a prior trial.'" Id. (quoting *Yeager v. United States, 557 U.S. 110, 119, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009))* (emphasis added). To determine what a jury's verdict necessarily decided, we "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* (quoting *Yeager, 557 U.S. at 120* (quotation omitted)).

In Ashe, a group of armed and masked men robbed each person in a group of poker players. *Ashe, 397 U.S. at 437*. At the defendant's first trial, a jury acquitted him of robbing one poker player, but at his second trial a jury convicted him of robbing another poker player. *Id. at 439-40*. The sole issue in dispute at the first trial was the defendant's identity as one of the robbers. See *id. at 445* ("The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers."). Thus the Court held that the doctrine of collateral estoppel answered [**16] negatively the question of whether the prosecution "could constitutionally hale him before a new jury to litigate that issue again." *Id. at 446*.

By contrast, in the case before us whether McWhorter acted knowingly was not the only "single rationally conceivable issue in dispute before the jury." Also in dispute was whether McWhorter acted under sudden heat. Evidence at trial indicated the shooting took place after McWhorter and Deweese had argued about her involvement with another man. And although we do not decide here whether there was "sufficient" evidence of sudden heat, we note that the question was squarely before the jury. And perhaps most importantly, the jury was instructed on sudden heat. Thus, taking into account the "pleadings, evidence, charge, and other relevant matter," *Coleman, 946 N.E.2d at 1165* (quotation omitted), we conclude that a rational jury could have based McWhorter's acquittal on an issue other than whether he acted knowingly. Particularly [*1148] given the presence of an instruction on voluntary manslaughter (flawed though it may have been), it is certainly conceivable that a rational jury could have determined that McWhorter acted knowingly but did so under mitigating [**17] circumstances.

Conclusion

We reverse the judgment of the post-conviction court, vacate McWhorter's conviction for voluntary manslaughter, and remand this cause for retrial. However, neither the prohibition of double jeopardy nor the doctrine of collateral estoppel preclude retrial for reckless homicide or voluntary manslaughter.

Dickson, C.J., and David, Massa and Rush, JJ., concur.