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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, Cross-Respondent, Respondent on Review, v. JOSEPH R. VENTRIS, Defendant-Respondent, Cross-Appellant, Petitioner on Review.	Columbia County Circuit Court No. 961155 Appellate Court No. A110810 Supreme Court No. S49981

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

On Review from a Decision by Opinion of the Court of Appeals
from a Judgment of the Circuit Court for Columbia County
Honorable STEVEN B. REED, Judge

Court of Appeals Opinion Filed: July 31, 2002
Author of Opinion: Haselton, J.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

The questions presented in defendant's merits brief are at least in some respects argumentative, *see* ORAP 9.17(2)(9b)(i) (questions should not be argumentative or repetitious) and, in the state's view, not all of them need be answered by this court. The state offers the following alternative version of the legal questions presented by this case, as well as the state's proposed rules of law. An initial comment is in order, however. In part because the procedural history of this case is, to put it mildly, an unusual one that is unlikely to occur again, because that procedural history informs and leads to the issues raised in this case, and because the questions presented are thus unusually case-specific for a case taken on review by this court, both the questions presented and the proposed rules of law also may seem atypically case-specific and limited. If broader questions of greater applicability are at issue here, defendant does not seem to have identified them, and neither has the state.[1]

1. The nature of defendant's conviction for murder

In *Ventris I*,[2] was defendant convicted of intentional, or of felony murder? In concluding, in *Ventris II*,[3] that the earlier conviction had been one for felony murder,

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[1] Defendant's merits brief may suggest that broader questions are at issue, such as the "standard of review applicable to findings of historical fact" (Def's Merits Br 1) but, as the settled nature of that inquiry may suggest, no one disputes the answer to that question.

[2] *State v. Ventris*, 164 Or App 220, 991 P2d 54 (1999) (*Ventris I*).

did the trial court "alter history," as the Court of Appeals determined? *State v. Ventris*, 183 Or App 99, 111, 50 P3d 1274 (2002), *rev allowed* 335 Or 355 (2003) (*Ventris II*).

Proposed rule of law:

When a defendant is indicted for the crime of intentional murder, the trier of fact (here the trial court) expressly finds that the defendant committed the murder himself, and when the trier of fact also convicts the defendant of aggravated felony murder, thus determining that the murder was committed intentionally, the fact-finder necessarily has found that the defendant committed intentional murder. Realizing in hindsight that an error that affected and led to the reversal of defendant's aggravated murder convictions, also should have led to the reversal of his murder conviction, cannot alter those facts. As the Court of Appeals noted, here defendant's remedy, if any, lies in post-conviction. *Ventris II,* 183 Or App at 112.

2. Defendant's ability to collaterally attack or alter the Court of Appeals decision in *Ventris I* affirming his conviction for intentional murder

When, in 1999, the Court of Appeals in *Ventris I* specifically "affirmed" defendant's convictions for murder and robbery, *State v. Ventris,* 164 Or App 220, 234, 991 P2s 54 (1999), when the murder conviction necessarily was one for intentional murder, and when defendant never sought clarification or correction of that disposition, did it become final or can defendant challenge it on remand?

(...continued)

[3] *State v. Ventris,* 183 Or App 99, 50 P3d 1274 (2002), *rev allowed* 335 Or 355 (2003).

Proposed rule of law:

Admittedly, when the Court of Appeals concluded in *Ventris I* that the trial court had erroneously excluded evidence, and therefore reversed and remanded defendant's aggravated murder convictions, the court also should have reversed and remanded his murder conviction, which, as noted above, had to be a conviction for intentional murder. The court did not do so, however. Instead, it explicitly and without qualification "affirmed" defendant's conviction for murder. Indeed, defendant had never asked the court to reverse that conviction. Furthermore, he never objected, or sought clarification or correction, after the court "affirmed" that conviction. Having also been convicted of aggravated felony murder – so that he knew the trial court had found that he committed the murder intentionally – defendant was not free to ignore the Court of Appeals affirmance of his murder conviction, and the likelihood, if not the certainty, that it was a conviction for intentional murder that had been affirmed, only to attempt to alter history much later when the case was on remand.

3. Defendant's remaining claims

Should this court address any of defendant's remaining claims, only two of which were addressed on their merits by the Court of Appeals?

Proposed rule of law:

No. The Court of Appeals correctly held that it was too late for defendant to seek a new trial on his murder conviction and that his request to withdraw his waiver of a jury trial was of no moment because he would not be retried. *Ventris II,* 183 Or App at 113-14. Although the court perhaps could have considered defendant's

remaining claims regarding whether it would be permissible for the trial court to impose consecutive sentences on his murder and robbery convictions, the court was not required to do so where the trial court had not yet decided whether to impose consecutive sentences. Moreover, even if this court disagreed with the Court of Appeals in that regard, the preferable remedy would be to remand to allow the Court of Appeals to consider those claims in the first instance.

Summary of Argument

In this case, the Court of Appeals concluded, correctly in the state's view, that when the trial court convicted defendant of murder in *Ventris I* the court necessarily found that he had committed the crime of intentional murder. That is so because, at the same time, the court found defendant guilty of two counts of aggravated felony murder, which requires a finding that defendant committed the murder personally and intentionally. Defendant's and the trial court's subsequent attempts to rewrite history, and to challenge that incontrovertible fact, come far too late and cannot serve to alter the necessary implication of the trial court's original verdicts, which is that the court found defendant intentionally murdered the victim, thus committing the crime of intentional murder.

Admittedly, in *Ventris I* the Court of Appeals held that the trial court had erroneously excluded evidence that might have suggested that someone else murdered the victim. If the state is correct, and defendant also had been convicted of intentional murder, then, as a matter of logic, that error should have led to the reversal of his murder conviction too. But defendant never asked the Court of Appeals to reverse that conviction. And he never objected or sought reconsideration or review when the

court explicitly and unambiguously affirmed his murder conviction. Again, defendant's attempt to correct an apparent error made long ago, comes too late. Although the result reached in this case by the Court of Appeals is hardly satisfying to anyone, it is the correct result. The danger in this case is that overarching principles of preservation and finality will be set aside, ignored, or diminished, to remedy a problem that, at this point, properly should be addressed in a post-conviction proceeding.

ARGUMENT

A. Background; overview

The facts of the underlying crime are described in the Court of Appeals decision in *Ventris I,* 164 Or App at 222-26. Those facts may be summarized as follows. The 89 year-old victim was murdered on August 10, 1996. He had been beaten on the head and chest with a rod and stabbed 13 times. His apartment also had been burglarized. 164 Or App at 223. That night defendant was seen committing another burglary. Defendant ultimately admitted that he had committed that burglary, that he had entered the murder victim's apartment, and that he had taken some of the victim's money, but he said that he had two accomplices and that he was not present when the victim was murdered and did not kill him. 164 Or App at 225-26.

Defendant was indicted for six counts of aggravated murder, including two counts of aggravated felony murder, for intentional murder,[4] and for first degree

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[4] Count 7 of the indictment alleged that defendant "unlawfully and intentionally" caused the victim's death. (App Br, ER 4).

robbery and burglary. (App Br, ER 1-6). After a trial to the court, the court found defendant guilty of the two counts of aggravated felony murder, of murder, and of robbery. (App Br, ER 7-9). The court acquitted defendant on the remaining aggravated murder counts and dismissed the burglary charge for want of jurisdiction because defendant, who was 16, had not been waived to adult court on that charge. (App Br, ER 9-10); *Ventris I,* 164 Or App at 227-28.

The court explained its findings:

> "I don't believe there were two friends with [defendant]. I believe that [defendant] was the sole intruder into [the victim's] apartment and I believe [defendant] killed [the victim].
>
> * * * * *
>
> "In summary, I believe that [defendant] entered [the victim's] apartment for the purpose of committing theft which amounts to Burglary in the First Degree, when he encountered [the victim] he overcame [the victim's] resistance to that theft by killing [him]. The commission of a killing during the commission of both the burglary and then a robbery.
>
> "I do not believe, based on the evidence, that [defendant] killed [the victim] either for the purpose of concealing his identity or to conceal the commission of burglary or robbery.[5] Count One Aggravated Murder, Short version, a killing committed in the course of committing Robbery in the First Degree, guilty.
>
> "Count Two, Aggravated Murder, killing committed in the course of committing Burglary in the First Degree, guilty.
>
> * * * * *
>
> "Count Seven, Murder, guilty.
>
> "Count Eight, Robbery in the First Degree, guilty."

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[5] Those were the other theories of aggravated murder alleged in the indictment.

Ventris II, 183 Or App at 103 (quoting transcript).

The trial court later entered judgment, concluding that "Count 8 (Robbery In The First Degree) should merge, for purposes of conviction, into Count 1 (Aggravated Murder based on commission of Robbery In The First Degree)" and that "Count 7 (Murder) should merge, for purposes of conviction, into Count 2 (Aggravated Murder based on commission of Burglary In The First Degree)." (App Br, ER 11).

Defendant appealed, contending that the trial court had erred in denying his motion to suppress evidence derived from the seizure of his clothing, and that the trial court had erred in excluding evidence that might have suggested someone other than defendant committed the murder. The Court of Appeals rejected the first of those two claims.[6] With regard to the second, however, the court reversed and remanded, concluding that the trial court had erred in excluding the evidence. *Ventris I,* 164 Or App at 226-34; *Ventris II,* 183 Or App at 104-05.

The relief defendant sought in *Ventris I* was the "'reversal of his convictions for Aggravated Murder and remand to the trial court for a new trial.'" *Ventris II,* 183 Or App at 104, quoting defendant's brief in *Ventris I.* With regard to his first assignment of error (dealing with the denial of his motion to suppress), he again sought the same relief: "'defendant's conviction for two counts of Aggravated Murder must be vacated, and he should be granted a new trial.'" *Id.* He sought the same relief with regard to his second claim of error: "'defendant's conviction for two

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[6] That ruling is also the subject of defendant's cross-appeal in this case.

counts of Aggravated Murder must be vacated, and he should be granted a new trial.'" *Id.* Defendant never suggested that, if he prevailed on his second assignment of error – as he ultimately did – his murder conviction also should be reversed and that charge also should be remanded for a new trial.

In *Ventris I*, the Court of Appeals took defendant at his word. At the outset of the opinion, in describing the parties' positions, the court noted that, "'[*o*]*n appeal, defendant does not challenge either the robbery or murder convictions.*'" *Ventris II*, 183 Or App at 105, quoting *Ventris I*, 164 Or App at 222 n 2 (emphasis added in *Ventris II*). In *Ventris I*, the court ordered the following disposition: "Convictions for murder and robbery in the first degree affirmed; convictions for aggravated murder reversed and remanded for further proceedings." 164 Or App at 234.

As the court noted in *Ventris II*, neither party petitioned for reconsideration or sought this court's review in *Ventris I*. 183 Or App at 105.

> In particular, defendant did not take issue either with [the court's] statement that he was "not challeng[ing] either the robbery or murder convictions," 164 Or App at 222 n 2, or with that aspect of [the court's tagline] that expressly affirmed his convictions for murder and robbery. At no point did defendant ever assert that the trial court's determination of guilt as to murder (as well as robbery) could not properly be denominated as a "conviction." Nor did defendant ever assert that, to the extent the court's determination of guilt on the murder charge explicitly and necessarily rested on its determination that defendant had personally killed [the victim], that "conviction" could not be affirmed given our disposition of the second assignment of error – that is, that by extension of the same reasoning that compelled reversal of the aggravated murder convictions, the "conviction" for murder must similarly be reversed.

Ventris II, 183 Or App at 105-06.

With the case back in the trial court after *Ventris I*, the state sought the imposition of consecutive sentences on defendant's murder and robbery convictions. ORS 137.123. The state elected not to retry defendant for aggravated murder. Defendant responded, in part, that consecutive sentences could not be imposed because, as a matter of law, the convictions for murder and robbery merged. Defendant contended that he had been convicted of felony murder, that robbery was a lesser included offense, and that, therefore, only one sentence could be imposed. *See Ventris II*, 183 Or App at 106-07 (summarizing parties' positions on remand).

Ultimately,

> [t]he sentencing judge – the same judge who had found defendant guilty in the earlier bench trial – agreed with defendant's argument, stating:
>
> > "*I did find, and I still believe, that the homicide that you committed, [defendant] was felony murder.* It occurred in the course of this robbery. As a result, I believe, I firmly believe, that the Robbery in the First Degree conviction that I also found is clearly a lesser included offense of the murder conviction I also reached."

Ventris II, 183 Or App at 107-08 (quoting transcript; emphasis added in court's opinion). The trial judge thus concluded that defendant's convictions for murder and robbery were required to be merged pursuant to *former* ORS 161.062.[7]

The state appealed, arguing that the trial court had erred in merging, as a matter of law, defendant's murder and his robbery convictions. The state contended that the trial court, acting as the trier of fact, had necessarily found that defendant

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[7] ORS 161.062 was repealed in 1999. Or Laws 1999, ch 136, § 1. But the first sentence of *former* ORS 161.062(1) appears in identical form in ORS 161.067(1). *See State v. Barrett*, 331 Or 27, 29 n 1, 10 P3d 901 (2000) (discussing the history of the two statutes).

intentionally murdered the victim when the court found defendant guilty on two counts of aggravated murder. As the Court of Appeals put it, "[g]iven that uncontrovertible reality, the trial court could not 'rewrite history' on remand characterizing the murder conviction as one for felony murder and not intentional murder." *Ventris II,* 183 Or App at 108-09. Because robbery is not a lesser-included offense of intentional murder, the trial court erred in refusing to consider whether to impose consecutive sentences.

The Court of Appeals rejected defendant's "complaints about the 'technical' deficiencies of [that court's] affirmance of his 'convictions,'" as being "the product of much-belated and selective hindsight." *Ventris II*, 183 Or App at 110. The court noted that,

> [a]t no time in the briefing of *Ventris I* did defendant ever seek any relief other than the reversal of the two aggravated murder convictions, much less argue that reversal based on either assignment of error would, necessarily, obviate the court's determination of guilt of intentional murder. Given the vagaries of the law of merger, *that* failure *might* be regarded as the product of understandable oversight. However, there is no excuse for defendant's silence after [the court] issued [its] opinion in *Ventris I.* As noted, defendant never sought reconsideration taking issue with [the court's] explicit statement that he "does not challenge either the robbery or murder convictions," 164 Or App at 222 n 2, or [the court's] disposition that unambiguously affirmed "the convictions for murder and robbery in the first degree." *Id.* at 234. Defendant never sought Supreme Court review of any aspect of *Ventris I.* Finally, after the appellate judgment became final, defendant never asked [the court] to recall [its] appellate judgment to clarify [its] opinion and disposition. *See, e.g., Central Oregon Fabricators, Inc. v. Hudspeth*, 165 Or App 717, 720-21, 998 P2d 740 (2000). If [the court's] disposition was, indeed, incorrect – "technically" or otherwise – defendant had myriad opportunities to seek correction or clarification. Instead, defendant remained silent – and only now argues the "incorrectness" of [the court's] original disposition by way of a partial defense of the trial court's action on remand.

Ventris II, 183 Or App at 110-11 (emphasis in original; footnote omitted).

The Court of Appeals acknowledged the "essential tension in this case[.]" "On one hand, everyone agrees that, in the abstract, [the court's] reasoning in *Ventris I* would preclude entry of a conviction for intentional murder without a new trial" because the evidence wrongfully excluded by the trial court, that led to the reversal of defendant's aggravated murder convictions, also would lead "in the abstract" to the reversal of a conviction for intentional murder. *Ventris II*, 183 Or App at 112. "On the other hand, in *Ventris I*, [the court] explicitly – and, without timely exception from defendant, finally – affirmed a 'conviction' of murder that was, necessarily, predicated on a determination of intentional murder." *Id.*

The court did not "pretend that the resolution of that conundrum is clear, or even satisfying." *Id.* "But this [is] not a matter of mere mechanical elevation of form over substance. It is fundamental." *Id.* at 113.

> Just as the trial court could not alter history, neither can we. Just as the trial court actually, historically, found defendant guilty of intentional murder, we actually, historically, affirmed that determination. We cannot conveniently pretend otherwise. Nor can we ignore or bypass transcendent principles of preservation and finality. Defendant had ample opportunity to take issue with our disposition, but he did not. The appellate judgment became final; it is binding.

Id. The Court of Appeals, therefore, reversed the trial court's merger of defendant's murder and robbery convictions. "The state is correct that the intentional murder and the robbery do not merge." *Id.*[8]

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[8] The court also rejected defendants' cross-appeal and some of his cross-assignments of error, including his attempt to argue, once again, that the evidentiary error

Footnote continued...

B. The Court of Appeals was correct – although the result may not be "satisfying," in *Ventris I* the trial court necessarily found defendant guilty of intentional murder, the Court of Appeals explicitly and unambiguously affirmed that "conviction," and defendant's attempt to rewrite history comes far too late.

At the outset, there are several aspects of this case that are not in dispute. On appeal, the state never has contended that defendant could not be found guilty of felony murder based on an indictment charging intentional murder. *See State v Earp*, 250 Or 19, 26-27, 440 P2d 214, *cert den* 393 US 891 (1968); *State v. Reyes*, 209 Or 595, 625-26, 303 P2d 519, 304 P2d 446, 308 P2d 182 (1957). (*See also* App Br 16 n 6, citing those decisions and admitting that point). The state also has never challenged any of the trial court's factual findings. Undoubtedly, the trial court steadfastly believed that it had convicted defendant of felony murder.[9] That belief, however, does not and cannot change the reality that in *Ventris I* the court necessarily found defendant guilty of intentional murder because the court found him guilty of aggravated felony murder, which requires the finding that the murder was committed personally and intentionally. ORS 163.095(2)(d). *See also State v. Wille*, 317 Or 487,

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(...continued)
identified in *Ventris I* "required reversal of his intentional murder conviction," and to contend that the trial court had "erred in determining on remand that his initial waiver of a jury trial remained binding on a retrial of his aggravated murder counts." *Id.* at 114. With respect to the second of those two claims, the court observed that "[a]ny error in that regard obviously was rendered moot by the state's choice not to retry defendant for aggravated murder." The court refused to consider on their merits several of defendant's other cross-assignments of error because the trial court had not indicated whether it would have imposed consecutive sentences "had it not reached the erroneous legal conclusion that the convictions merged" as a matter of law. *Id.*

[9] Some of the trial court's reasoning is nevertheless suspect. The court seems to have viewed felony and intentional murder as mutually exclusive categories, rather than as overlapping, alternative theories. (App Br 20-22).

494, 858 P2d 128 (1993) ("Aggravated murder, then, may be defined as a murder that is committed 'intentionally,' plus something more").

It also is undisputed that, if the trial court necessarily found defendant guilty of intentional murder, the error in excluding the evidence that someone else may have committed the crime – which led the Court of Appeals to reverse defendant's aggravated murder convictions – also should have led to the reversal of his murder conviction. That is not what happened, however. Defendant never asked the Court of Appeals to reverse that conviction, and it did not, instead expressly affirming his conviction for murder. Despite that express ruling, and although he knew that he had been indicted for intentional murder and found guilty of aggravated (and thus of intentional) felony murder, defendant did nothing. He did not ask the Court of Appeals to reconsider, or this court to review. He did not ask the court to withdraw its appellate judgment. His attempt to rewrite history comes far too late, as the Court of Appeals determined.[10]

It also is not disputed that the result reached by the Court of Appeals, and urged on it by the state, is not a result that is particularly satisfying to anyone. In the state's view, defendant's murder conviction should have been reversed in *Ventris I*. But it was not, and defendant must bear a heavy share of the blame for that apparent

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[10] As defendant notes, after review was granted in this case, this court gave the trial court leave to enter a final judgment, concluding that the judgments in *Ventris I* and *II* had failed to dispose of all the charges. (Def's Merits Br 8 n 4, 19 n 7). That defect in the judgments does not mean that the Court of Appeals lacked jurisdiction in either *Ventris I* or *II*. As this court did in this case, in such circumstances the appellate court retains jurisdiction over the appeal while allowing the trial court to enter an appealable judgment. ORS 19.270(4).

error. He simply never asked the Court of Appeals to do what he now says it should have done. And when the court failed to reverse his murder conviction, and expressly affirmed it, defendant did nothing.

This, thus, is a case in which what the Court of Appeals called "transcendent principles of preservation and finality" are at odds with and may be imperiled by a result that admittedly is not satisfying. The state urges this court not to "ignore or bypass" those principles in order to avert a result that feels awkward at best. In 1999, the Court of Appeals affirmed defendant's conviction for murder. That conviction necessarily was one for intentional murder.[11] Defendant did not challenge the Court of Appeals disposition in any timely fashion. That disposition has long been final. It is too late now to rewrite history, either at the trial or the appellate level. Defendant's remedy, if any, is in post-conviction, not in revisionist history or in an attempt to bypass or ignore important principles of preservation and finality.

C. This court should not consider the other issues raised by defendant.

In his merits brief, defendant "focuses on [what he sees as] the most basic, substantive question presented by this appeal," that is, whether he was found guilty of felony, or of intentional, murder in this case. (Def's Merits Br 20). Nevertheless, he raised several issues before the Court of Appeals, which he included in his petition for review and which he also includes in the questions presented that are in his merits

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[11] The trial court also believed that defendant committed felony murder, but, as noted, the two categories are not mutually exclusive and the court's verdicts on the aggravated murder charges demonstrate that the court found defendant murdered the victim intentionally.

brief. (Def's Merits Br 1-7). In the state's view, this court need not address any of those additional claims. The Court of Appeals did not err in rejecting defendant's cross-appeal (which challenged a ruling affirmed by that court in *Ventris I*), his belated attempt to gain a reversal of his long-final murder conviction, or his attempt to withdraw his waiver of a jury trial – an attempt that is now of no moment since there will be no retrial.

As for defendant's "purported cross-assignments of error [that] concern whether the trial court could, if it so chose, properly impose consecutive sentences on the murder and robbery convictions on remand," while the state does not necessarily agree with the Court of Appeals description of the trial court's comments as being mere "observations," 183 Or App at 114, nonetheless there is no need for this court to consider those claims now. Even if the trial court in fact made "intermediate rulings" subject to review on appeal, this court could remand to the Court of Appeals to allow that court to consider those rulings in the first instance. And, because the trial court might not impose consecutive sentences in any event, the more prudent course might well be to remand to that court to make that decision, assuming that this court agrees with the state and the Court of Appeals that separate convictions and sentences for murder and robbery are not impermissible as a matter of law.

CONCLUSION

For the reasons given here, as well as those set out in the state's briefs filed with the Court of Appeals, the state respectfully asks this court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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1913

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits of Respondent on Review to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on January 27, 2004.

I further certify that I directed the Brief on the Merits of Respondent on Review to be served upon Marc D. Blackman and Kendra Matthews, attorneys for petitioner on review, on January 27, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

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