State v. Lovejoy: Hung Juries and Retrial vs. Double Jeopardy and Collateral Estoppel

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I. INTRODUCTION

On September 24, 1997, the Supreme Court of Ohio decided the case of State v. Lovejoy. In Lovejoy, the Supreme Court of Ohio held that when a jury finds a defendant not guilty as to some counts and is hung as to other counts, double jeopardy and collateral estoppel do not apply and the defendant may be retried upon charges for which a verdict was not reached. Lovejoy was acquitted of aggravated murder with prior calculation and design and its lesser-included offenses of murder and involuntary manslaughter. However, the jury was hung as to the felony-murder, aggravated robbery and kidnapping charges; therefore, the trial judge declared a mistrial on those counts. The Defendant was retried and convicted of felony-murder. Upholding the trial court's decision, the Supreme Court of Ohio reasoned that the several counts of an indictment which contain more than one count are not mutually dependent, and an inconsistency within a verdict does not originate from inconsistent responses to different counts, but only arises out of inconsistent responses to the same count. Hence, retrial of related but different crimes does not involve the doctrines of collateral estoppel or double jeopardy. Consequently, there may be a retrial on these charges.

1 683 N.E.2d 1112 (Ohio 1997).
2 Id. at 1115.
4 Id.
5 Id. at *2. Under the Ohio Revised Code 2903.01(B)'felony-murder' is termed 'aggravated murder'; however, to avoid confusion with 'aggravated murder' under part (A), 'aggravated murder' part (B) will be referred to as 'felony-murder' throughout this case comment.
6 Lovejoy, 683 N.E.2d at 1112.
The Supreme Court of Ohio’s decision in *Lovejoy* protects society from criminals who may be allowed to go free whenever there is a hung jury or a mistrial. The purpose of the law would be thwarted if every time there was a hung jury or a mistrial a defendant was allowed to walk free. Citizens would not be protected if the only safeguards built into the criminal justice system were for the accused. Therefore, allowing a defendant to be retried on charges in which the accused was not previously acquitted does not impede justice but instead increases the opportunities for justice. Furthermore, the accused is not placed in jeopardy twice because jeopardy is not terminated in the first trial since there is no final decision with a hung jury or a mistrial.

II. FACTS

On August 16, 1993, Christa L. Curry and her husband, Nathan Curry, were in their apartment, which they shared with Nathan’s brother, Neil Curry. Christa was upstairs preparing to go out, and Nathan was downstairs with the couple’s twin daughters. Christa and Nathan both heard someone kicking the back door. Nathan asked Christa if she was making the noise and she responded, no. She heard Nathan say something to the effect of “wait a minute.” Christa then heard two gunshots.

As Christa came downstairs, she saw Nathan fall to the floor. The intruder put a gun to Christa’s head and forced her to lie on the floor. A second man entered the apartment and went upstairs. After a few minutes the second man came back downstairs and the two intruders fled the scene in a car.

Within twenty minutes of the murder, police apprehended Defendant Mark E. Lovejoy and an accomplice, Darrell Stepherson. Their car had been abandoned and several neighbors had reported seeing two young black men jumping fences and hiding in bushes around houses in the neighborhood.

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7 *Id.* at 1113.
8 *Id.*
9 *Id.*
11 *Lovejoy*, 683 N.E.2d at 1113.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Lovejoy*, 683 N.E.2d at 1113.
17 *Lovejoy*, 1996 WL 52896, at *2. Darrell Stepherson was subsequently identified by Christa as the man with the gun who forced her to the ground.
18 *Lovejoy*, 683 N.E.2d at 1114.
One neighbor saw the men hide two guns under a bush. The guns were located, and tests revealed that one of the guns was the murder weapon. At the time of the Defendant’s arrest, he had in his possession a black bag that contained four pounds of marijuana.

Lovejoy was indicted on five charges. He was charged with aggravated murder with prior calculation and design, felony-murder, aggravated robbery, kidnapping, and having a weapon under disability. The

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19 Id.
20 Id.
21 Id. Both Nathan (the victim), and Neil, his brother, were marijuana dealers. At the time of the murder, Nathan had seven pounds of marijuana in the apartment, and Neil had four. Neil identified the four pounds of marijuana found in Defendant’s possession as the four pounds he was keeping at Nathan’s apartment.
23 Ohio Rev. Code Ann. § 2903.01(A) (Banks-Baldwin 1997). Aggravated Murder. "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy."
24 § 2903.01(B). Felony-Murder. "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."
25 § 2911.01(A). Aggravated Robbery. (A) No person, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; (2) Have a dangerous ordnance on or about the offender's person or under the offender's control; (3) Inflict, or attempt to inflict, serious physical harm on another.
26 § 2905.01. Kidnapping. (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: (1) To hold for ransom, or as a shield or hostage; (2) To facilitate the commission of any felony or flight thereafter; (3) To terrorize, or to inflict serious physical harm on the victim or another; (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will; (5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority. (B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a
aggravated murder and felony-murder charges included the lesser offenses of murder,\textsuperscript{28} and involuntary manslaughter.\textsuperscript{29} The aggravated murder, felony-murder, aggravated robbery and kidnapping charges were tried to a jury, and the having a weapon under disability charge was tried to the bench.\textsuperscript{30}

The jury acquitted the Defendant of the aggravated murder charge, including the lesser included offenses.\textsuperscript{31} The jury was hung as to the felony-murder, aggravated robbery and kidnapping charges.\textsuperscript{32} The court declared a mistrial as to those charges and found the Defendant guilty of having a weapon under disability.\textsuperscript{33}

The Defendant moved to have the felony-murder charge dismissed on double jeopardy and collateral estoppel grounds.\textsuperscript{34} The court denied the

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\item substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:
\begin{itemize}
\item Remove another from the place where the other person is found;
\item Restrain another of his liberty;
\item Hold another in a condition of involuntary servitude.
\end{itemize}
\item Whoever violates this section is guilty of kidnapping, a felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.
\end{itemize}

\textsuperscript{27}§ 2923.13(A)(2). Having Weapons While Under Disability.
(A) Unless relieved from disability as provided in Section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
\begin{itemize}
\item The person is a fugitive from justice.
\item The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
\end{itemize}

\textsuperscript{28}§ 2903.02. Murder. "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy."

\textsuperscript{29}§ 2903.04(A). Involuntary Manslaughter.
(A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.
(B) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of the first, second, third, or fourth degree or a minor misdemeanor.
(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree.
motion and a second trial ensued.\textsuperscript{35} The second jury found the Defendant guilty of felony-murder, and he appealed.\textsuperscript{36}

The Franklin County Court of Appeals reversed the felony-murder conviction and remanded the weapons under disability charge.\textsuperscript{37} The Supreme Court of Ohio allowed a discretionary appeal and cross-appeal.\textsuperscript{38} The Court reversed the appellate court's decision and reinstated the felony-murder conviction.\textsuperscript{39}

\section*{III. THE COURT OF APPEALS DECISION}

The Court of Appeals for Franklin County reversed the felony-murder conviction, holding that the doctrines of collateral estoppel and double jeopardy preclude the state from retrying the felony-murder count.\textsuperscript{40} The court concluded that since the jury previously acquitted the Defendant of the lesser included offense of murder which included the "purposely" intent--an essential element of felony-murder--the Defendant could not be found guilty of felony-murder.\textsuperscript{41} The court reasoned that the felony-murder count required the retrial of factual issues already resolved in the Defendant's favor during the first trial.\textsuperscript{42} Therefore, the doctrines of collateral estoppel and double jeopardy precluded retrial.\textsuperscript{43}

\section*{IV. THE SUPREME COURT OF OHIO'S DECISION}

Justice Lundberg Stratton, writing for the majority, disagreed with the appellate court's holding that the doctrines of collateral estoppel and double jeopardy precluded the state from retrying the felony-murder count.\textsuperscript{44} The court reversed the appellate court's decision holding that these doctrines do not apply when the inconsistency in the jury responses arises out of inconsistent responses to different counts, as opposed to inconsistent responses within the same count.\textsuperscript{45} In addition, the court found that the prosecution could lawfully retry the hung-jury counts.\textsuperscript{46}

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\textsuperscript{35}Lovejoy, 1996 WL 52896, at *2.
\textsuperscript{36}Id.
\textsuperscript{37}Id. at *9.
\textsuperscript{38}Lovejoy, 683 N.E.2d 1112.
\textsuperscript{39}Id. at 1120.
\textsuperscript{40}Lovejoy, 1996 WL 52896, at *9.
\textsuperscript{41}Id.
\textsuperscript{42}Id.
\textsuperscript{43}Id.
\textsuperscript{44}Lovejoy, 683 N.E.2d at 1119.
\textsuperscript{45}Id.
\end{flushleft}
In reaching its decision, the court first reviewed the history and purpose of collateral estoppel\textsuperscript{47} and double jeopardy.\textsuperscript{48} The court explained that the Double Jeopardy Clause\textsuperscript{49} guards against successive prosecutions for the same offense,\textsuperscript{50} while the doctrine of collateral estoppel precludes a question of fact distinctly at issue and directly determined by a court of competent jurisdiction from being disputed in a subsequent suit.\textsuperscript{51} The court said, however, that "the United States Supreme Court has held that double jeopardy does not apply to cases involving inconsistent verdicts and, by implication, hung juries."\textsuperscript{52} Furthermore, the court explained, "that neither a jury's failure to reach a verdict nor a trial court's declaration of a mistrial following a hung jury is an event that terminates jeopardy so as to bar a second trial on the mistried charges."\textsuperscript{53} Accordingly, the majority noted that nothing in the Federal Constitution barred a retrial after a hung jury.\textsuperscript{54}

Next, the court reviewed several cases in Ohio that addressed this issue.\textsuperscript{55} Again it noted that nothing in Ohio's case law forbids a retrial after a hung jury as long as the inconsistency does not arise out of inconsistent responses to the same count.\textsuperscript{56}

Then the majority explained how a case is sent to a jury, which supported its conclusion that retrying a defendant when the jury is hung does not constitute

\textsuperscript{46}Id. at 1115. Provided that other criteria are met, i.e. sufficiency of evidence.


\textsuperscript{48}Lovejoy, 683 N.E.2d at 1115.

\textsuperscript{49}"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb..." U.S. Const. amend. V. The Fifth Amendment is incorporated in the Fourteenth Amendment and hence applicable to the states.


\textsuperscript{51}Lovejoy, 683 N.E.2d at 1115. (Although first developed in civil litigation, collateral estoppel has been followed in federal criminal law since United States v. Oppenheimer, 242 U.S. 85 (1916)).


\textsuperscript{54}Lovejoy, 683 N.E.2d at 1117.


\textsuperscript{56}Lovejoy, 683 N.E.2d at 1117.
double jeopardy. The court found that the jury was instructed that the case involved two counts. Count one was aggravated murder with prior calculation and design, and count two was felony-murder based on aggravated robbery. The lesser included offenses tracked each count separately and were not dependent upon the findings of the other counts. After the jury concluded that prior calculation and design was not proven, it was logical for the jury to conclude that the defendant was not guilty of the remaining charges in count one. However, the jury was hung as to all charges in count two. Retrying the Defendant on the hung count of felony-murder did not amount to double jeopardy because these were inconsistent verdicts to different charges and not inconsistent responses to the same charge. However, if the jury had acquitted the defendant of aggravated robbery and hung as to the felony-murder charge based on aggravated robbery, it would be double jeopardy to retry the defendant for felony-murder because the same issues of fact that were necessarily decided by the first jury would be at issue again at the second trial.

Finally, the Court explained that because murder and involuntary manslaughter were the lesser included offenses in both counts, it was not the same as a predicate felony (i.e. aggravated robbery) for a felony-murder conviction. For these reasons, the majority concluded that retrying the Defendant on the hung count of felony-murder did not constitute double jeopardy.

V. THE DISSENT

Justice Cook wrote the dissenting opinion, joined by Chief Justice Moyer and Justice Pfeifer. The dissent argued that the majority relied on the wrong line of cases, which involved inconsistent verdicts reached in a single trial, rather than cases in which the state obtains a conviction following successive

84 See State v. Liberatore, 445 N.E.2d 1116 (Ohio 1983) (holding double jeopardy bars retrial of the felony-murder charge when acquitted of the predicate offense); but see Dunn v. United States, 284 U.S. 390 (holding that defendant’s conviction can stand even though he was acquitted of the predicate offense).

85 Lovejoy, 683 N.E.2d at 1119.

86 Lovejoy, 683 N.E.2d at 1120.
prosecutions. The dissent addressed each case the majority and the state relied upon to make their point and found them to be inapplicable to this issue.

First, the dissent noted that Dunn v. United States was inapplicable because it dealt with inconsistent verdicts instead of multiple prosecutions. Second, the dissent explained, that Richardson v. United States was irrelevant because it did not involve an analysis of whether a jury verdict of acquittal that accompanies a hung jury mistrial on a related count may bar retrial under the Double Jeopardy Clause. Next, the dissent addressed the state’s reliance on Johnson v. Ohio. The dissent concluded that it was also inapplicable because it involved prosecution following a guilty plea that occurred without a trial rather than retrial.

The dissent concluded that an acquittal verdict should terminate jeopardy not only as to the charge for which it is returned, but also as to any charge that would require the state to prove the acquitted charge as a subcomponent. The dissent based its decision on the United States Supreme Court’s recognition that, for purposes of double jeopardy, there is no difference between reprosecuting a criminal defendant on the same count for which he received an acquittal verdict and reprosecuting a criminal defendant on a separate offense involving a common issue of ultimate fact that was decided in the defendant’s favor at an earlier trial. The dissent concluded that since it was necessary for the state to prove every element of the acquitted murder charge at the second trial in order to convict the Defendant on the felony-murder charge, the Double Jeopardy Clause prohibited Defendant’s retrial for felony-murder.

VI. ANALYSIS

The Ohio Supreme Court, in a four to three decision, overturned the Franklin County Court of Appeals decision which reversed Lovejoy’s felony-murder conviction based on the doctrines of collateral estoppel and double jeopardy. The majority of the court concluded that the doctrines did not apply and

68 Id. See Nesbitt v. Hopkins, 86 F.3d 118 (8th Cir. 1996).
69 Id. (citing Dunn, 284 U.S. 390).
70 Id. (citing Richardson, 468 U.S. 317).
71 Id.
72 Lovejoy, 683 N.E.2d at 1120 (citing Johnson, 467 U.S. 493 (1984)).
73 Id.
74 Id.
75 Id. at 1125.
76 Id. at 1124 (citing Ashe v. Swenson, 397 U.S. 436 (1970)).
77 Lovejoy, 683 N.E.2d at 1125.
Lovejoy's felony-murder conviction should be reinstated.\textsuperscript{78} Three dissenting Justices disagreed with the majority's conclusion, as well as the majority's reasoning.\textsuperscript{79}

The majority reasoned that each count of an indictment is independent of each other, and an acquittal as to one count does not terminate jeopardy as to the other counts of the indictment.\textsuperscript{80} Therefore, Lovejoy was not entitled to the protections of collateral estoppel and double jeopardy.\textsuperscript{81} On the other hand, the dissent reasoned that an acquittal verdict terminated jeopardy not only as to the count for which the Defendant was acquitted, but also as to the separate offenses that shared common issues of ultimate fact necessarily determined in the Defendant's favor.\textsuperscript{82} The dissent reasoned that because jeopardy is terminated, the doctrine of double jeopardy bars retrial of mistried counts.\textsuperscript{83} Consequently, the dissent concluded that Lovejoy should not be retried on the felony-murder charge since he was acquitted of aggravated murder in the first trial.\textsuperscript{84} The second trial would necessarily involve retrial of issues already decided in the defendant's favor in the first trial.\textsuperscript{85}

The majority's opinion is well-reasoned and draws a logical conclusion from the statements of law. First, the court explained that jeopardy must be terminated in order for a defendant to utilize the protections of the Double Jeopardy Clause.\textsuperscript{86} Next, the majority emphasized that neither a hung jury nor a mistrial terminates jeopardy.\textsuperscript{87} Therefore, it is natural to conclude that double jeopardy does not apply in Lovejoy's situation because a hung jury does not terminate jeopardy.\textsuperscript{88}

\textsuperscript{78}Lovejoy, 683 N.E.2d at 1119.
\textsuperscript{79}\textit{id.}
\textsuperscript{80}\textit{id.} at 1120.
\textsuperscript{81}\textit{id.} at 1117.
\textsuperscript{82}\textit{id.} at 1119.
\textsuperscript{83}Lovejoy, 683 N.E.2d at 1124.
\textsuperscript{84}\textit{id.} at 1125.
\textsuperscript{85}\textit{id.}
\textsuperscript{86}\textit{id.}
\textsuperscript{87}\textit{id.} at 1116 (citing Richardson, 468 U.S. at 325).
\textsuperscript{88}\textit{See also} United States v. Reis, 788 F.2d 54 (1st Cir. 1986) (holding double jeopardy is not violated when defendant convicted in second trial after trial resulted in mistrial because of hung jury); Jones v. Hogg, 732 F.2d 53 (6th Cir. 1984) (holding that double jeopardy does not bar reprosecution of accused after jury deadlock); United States v. Brack, 747 F.2d 1142 (7th Cir. 1984) (emphasizing that it is well established that retrial following mistrial due to a hung jury does not violate double jeopardy clause), \textit{cert. denied}, 486 U.S. 1216 (1985); Walker v. Weldon, 744 F.2d 775 (11th Cir. 1984) (refusing to depart from long established rule that a genuinely deadlocked jury requires defendant to submit to a second trial); United States v. Glover, 731 F.2d 41 (D.C. Cir. 1984)(per curiam).
In addition, the court explained that an inconsistent verdict can stand in Ohio when the inconsistency arises out of inconsistent responses to different counts provided that the inconsistency is not within the same count.\(^8^9\) Considering the fact that in Lovejoy there were no inconsistent responses within the same count, the verdict should stand.\(^9^0\) If Lovejoy had been acquitted of aggravated robbery with a hung jury on the felony-murder charge then retrial on the felony-murder charge would be barred by double jeopardy according to this court's holding in State v. Libenatore.\(^9^1\)

Furthermore, the United States Supreme Court stated that the Double Jeopardy Clause of the Fifth Amendment "does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice."\(^9^2\) Also, "the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts the power to put the defendant to trial again."\(^9^3\) Therefore, the majority draws the only logical conclusion, that double jeopardy does not bar retrial of the mistried counts because otherwise justice would not be served.

The dissent's rationale and conclusion are faulty. First, the dissent criticizes the majority for using the wrong line of cases. The dissent incorrectly asserts that cases involving inconsistent verdicts reached in a single trial are inapplicable to Lovejoy because it does not answer the question presented which is whether Lovejoy's acquittal on the charge of murder prevents his retrial for felony-murder.\(^9^4\)

The dissent agrees that the several counts of an indictment are not interdependent and that an inconsistent verdict can stand, provided that the inconsistency arises in different counts and not within the same count.\(^9^5\) In addition, the dissent agrees that a mistrial following a hung jury does not terminate jeopardy thereby triggering the protections of the Double Jeopardy Clause.\(^9^6\) However, the dissent disagrees that this rule applies in cases where the jury acquits on one count but is hung as to a 'related' count.\(^9^7\) In other words, the dissent is claiming that because Lovejoy was acquitted of the lesser

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\(^8^9\) Lovejoy, 683 N.E.2d at 1117.


\(^9^1\) Id. at 1119.

\(^9^2\) Id. at 1116.

\(^9^3\) Id. at 1116 (quoting Richardson, 468 U.S. at 324-325).

\(^9^4\) Lovejoy, 683 N.E.2d at 1116 (quoting Richardson, 468 U.S. at 324-325).

\(^9^5\) Id. at 1120.

\(^9^6\) Id.

\(^9^7\) Id.
included offense of murder in count one, double jeopardy should bar re-trial of count two, felony-murder, because it is "related" to the murder charge in count one.

This part of the dissent's analysis is flawed because it is impliedly carving out an exception for 'related' counts. The dissent implies that although each count in an indictment is independent of the other counts, somehow two 'related' counts in an indictment should be treated differently. In effect, the 'related' counts are no longer independent of each other. Therefore, the dissent concludes that an acquittal on one 'related' count can terminate jeopardy for the other 'related' count and, as a result, trigger the protections of the Double Jeopardy Clause. Because both the United States Supreme Court and the Supreme Court of Ohio have never made this distinction for 'related' counts and have specifically held that the counts of an indictment are not interdependent, the dissent's conclusion is unsound.

Next, the dissent argues that the Supreme Court of Ohio in Liberatore acknowledged that collateral estoppel is applicable to bar retrial of mistried counts in a criminal case involving partial verdicts of acquittal. Liberatore was indicted on separate counts of aggravated arson and felony-murder, with aggravated arson as the underlying felony. The defendant was acquitted of the aggravated arson charge but the jury was hung as to the felony-murder charge. The Supreme Court of Ohio held that double jeopardy prohibited the retrial of a felony-murder charge when the defendant is acquitted of the underlying felony in a previous trial and hung as to the compound offense of felony-murder. The dissent determined that because Lovejoy was partially acquitted, he should not be retried on the felony-murder charge.

The dissent's conclusion is incorrect because the aggravated murder charge on which Lovejoy was acquitted was not the underlying felony for the felony-murder charge. If Lovejoy had been acquitted on the aggravated robbery charge, applying Liberatore, the acquittal would have barred a subsequent prosecution for felony-murder because aggravated robbery was the underlying felony. Since the jury was hung as to the underlying felony, as well as the compound offense, Liberatore does not apply. Consequently, the


99 Liberatore, 683 N.E.2d at 1122.

100 Liberatore, 445 N.E.2d at 1117.

101 Id. at 1118.

102 Lovejoy, 683 N.E.2d at 1125.

103 Id. at 1114.

doctrines of collateral estoppel and double jeopardy do not protect the Defendant as the dissent suggests.

After determining that the doctrine of collateral estoppel was potentially applicable, the dissent looked to see "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The dissent concluded that the defendant had not carried his burden of establishing that the issue he wished to preclude from relitigation was the same issue the jury previously decided in his favor. The dissent reasoned that it was possible that the jury thought it was not able to consider the evidence related to the robbery charge in connection with the aggravated murder charge and its lesser included offenses. Since the prosecution based its proof of intent on the Defendant's participation in the aggravated robbery, without the benefit of the inferences drawn from the commission of the robbery, the jury had little evidence of Lovejoy's intent. As a result, the dissent concluded that it was logical to acquit Lovejoy on all the charges in count one because the intent element was missing. This argument by the dissent seems to discredit its final conclusion; however, the dissent still concluded that double jeopardy bars a second trial.

Although the state must prove intent again in the second trial, by the dissent's own admission, this element was not necessarily decided in Lovejoy's favor in the first trial. In other words, Lovejoy may not have had the independent intent for aggravated murder in count one, but he may have had the requisite intent for felony-murder which may be inferred from his participation in the aggravated robbery.

Finally, the dissent states that Lovejoy's acquittal of murder in connection with the aggravated murder charge should bar a second trial after a hung jury mistrial on the felony-murder charge based on the Blockburger test. However, the dissent does not discuss how it arrives at this conclusion. The dissent merely states that because the state is required to prove every element of the formerly acquitted murder charge in order to prove felony-murder, retrial is prohibited. Its conclusion is flawed because Blockburger states that "a single...

106 Id. at 1123.
107 Id.
108 Id.
109 Id.
110 Compare with Liberatore, 445 N.E.2d at 1118 (Holmes, J., dissenting) (arguing that since the defendant was not accused of placing the bomb himself, but rather was accused of being part of the murder plan, the jury could have found the defendant not guilty of aggravated arson, but still guilty of being part of the conspiracy to commit murder and hence guilty of felony-murder).
111 Lovejoy, 683 N.E.2d at 1125.
112 Id.
The act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. Since felony-murder requires proof of an underlying felony, and aggravated murder does not, Blockburger does not bar a second trial.

The Supreme Court of Ohio’s decision in Lovejoy was the correct decision. In a society where crime is pervasive, the criminal justice system needs to protect more than just the accused. The Supreme Court of Ohio’s decision makes this possible because it does not allow the release of a criminal when a trial fails to end in a final judgment. This decision protects society as a whole, and will lessen the tremendous amount of pressure on prosecutors to obtain a final judgment every time or risk allowing criminals to go free.

VII. CONCLUSION

The Supreme Court of Ohio’s decision in Lovejoy helps to preserve the purpose of our criminal laws, which is to protect society. Allowing a defendant to be retried on charges in which the accused was not previously acquitted, but rather the jury was hung or there was a mistrial, does not frustrate justice but instead greatly increases the opportunities for justice. In addition, the accused is not placed in jeopardy twice because jeopardy was never terminated in the first trial since there is no final decision with a hung jury or a mistrial. Consequently, allowing a defendant to be retried when a final decision has not been reached will help maintain a safer society for all of us.

NICOLE M. ELLIS