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Defendant discharged a firearm into the abdomen of a pregnant woman, killing the viable child. Following a manslaughter conviction for the death of the child, the state initiated a second action against the defendant, charging assault with intent to murder the mother. The lower court held that defendant could not be prosecuted on the second charge, as such a prosecution would constitute double jeopardy. The state appealed, contending that the charges in the two informations were separate and distinct and that a conviction on the first did not preclude trial upon the second. Held, reversed. To constitute double jeopardy, the second prosecution must be for the same offense. It is not enough that the second prosecution merely arises out of the same facts as the first prosecution. The test to be applied to determine whether two charges are distinct and separate is whether one of the charges requires proof of an additional fact which the other does not. If so, then the offenses are not the same, and a conviction or acquittal under one does not bar a prosecution under the other on grounds of double jeopardy. State v. Shaw, 219 So. 2d 49 (Fla. 1969).

It appears that West Virginia would follow the result reached in the Shaw case. In addition to the federal prohibition against double jeopardy, U.S. Const. amend. V, our Constitution provides: “nor shall any person, in any criminal case . . . be twice put in jeopardy of life or liberty for the same offense.” W. Va. Const. art. III, § 5. As interpreted by West Virginia courts, this provision does not affect another or different offense; it applies only to the same offense. State v. Taylor, 130 W. Va. 74, 42 S.E. 2d 549 (1943). West Virginia courts have held that two offenses stemming from the same act or transaction may be separately charged and punished. State ex rel. Lovejoy v. Skeen, 138 W. Va. 901, 78 S.E. 2d 456 (1953).

For a discussion of double jeopardy and multiple transgressions from a single act see 65 W. Va. L. Rev. 54 (1962).