

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 10, 2015, 4:07 pm
BY RONALD R. CARPENTER
CLERK

NO. 91193-2

E CRF
RECEIVED BY E-MAIL

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNY DALE FULLER, APPELLANT

Appellant's Petition for Review of Court of Appeals No. 72431-2-1

Appeal from the Superior Court of Pierce County No. 12-1-03439-9

State's Answer to Petition for Review

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400



Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Whether the decision by the Court of Appeals conflicts with a decision of the Supreme Court or another decision of the Court of Appeals? 1

 2. Whether the petitioner raises a significant question of law under the State or federal Constitutions?..... 1

 3. Whether the petitioner raises an issue of substantial public interest that should be determined by the Supreme Court? 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 1

 1. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *STATE V. WRIGHT* OR OTHER SUPREME COURT PRECEDENT 1

D. CONCLUSION.....4

Table of Authorities

State Cases

<i>In re Personal Restraint of Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002)	2
<i>In re Personal Restraint of Hinton</i> , 152 Wn.2d 853, 100 P.3d 801 (2004)	2
<i>State v. Garcia</i> , 179 Wn. 2d 828, 318 P.3d 266 (2014)	2, 3
<i>State v. Kier</i> , 164 Wn. 2d 798, 803, 194 P. 3d 212 (2008)	4
<i>State v. Ramos</i> , 163 Wn.2d 654, 184 P.3d 1256 (2008)	2
<i>State v. Wright</i> , 165 Wn.2d 783, 203 P.3d 1027 (2009)	1, 2, 3

Federal and Other Jurisdictions

<i>Tibbs v. Florida</i> , 457 U.S. 31, 40–41, 102 S. Ct. 2211, 72 L.Ed.2d 652 (1982)	3
---	---

Rules and Regulations

RAP 13.4(b)	1
RAP 13.4(b)(1) and (2)	4
RAP 13.4(b)(3) and (4)	4

A. ISSUES PERTAINING TO PETITIONER'S REQUEST FOR DISCRETIONARY REVIEW.

1. Whether the decision by the Court of Appeals conflicts with a decision of the Supreme Court or another decision of the Court of Appeals?
2. Whether the petitioner raises a significant question of law under the State or federal Constitutions?
3. Whether the petitioner raises an issue of substantial public interest that should be determined by the Supreme Court?

B. STATEMENT OF THE CASE.

The procedural and substantive facts of this case may be found in the Court of Appeals decision, attached as Appendix A.

C. ARGUMENT.

1. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *STATE V. WRIGHT* OR OTHER SUPREME COURT PRECEDENT.

RAP 13.4(b) states what the Supreme Court requires when considering a case for discretionary review:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant

question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In the present case, the Court of Appeals decision is based upon Supreme Court cases, including *State v. Garcia*, 179 Wn. 2d 828, 318 P.3d 266 (2014), *State v. Wright*, 165 Wn.2d 783, 203 P.3d 1027 (2009), and *State v. Ramos*, 163 Wn.2d 654, 184 P.3d 1256 (2008). See *Fuller*, slip op. at 4-5. Appendix A.

The defendant/petitioner asserts that the Court of Appeals *Fuller* decision conflicts with the holding in *Wright*. Pet. at 6-7. This is not true.

In *Wright*, the defendants were each charged with a single count of second degree murder under the statutory alternatives of intentional murder and felony murder based on assault. The jury returned a general verdict of guilt after receiving instructions only on the felony murder alternative. *Id.*, at 788.

The case did not involve an acquittal or finding of insufficient evidence. Instead, following *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), the Court of Appeals had vacated the convictions. On remand, the State sought to retry them on the charge of second degree intentional murder. The defendants contended that the double jeopardy clause barred this. *Wright*, at 788. The Supreme Court

held that the double jeopardy clause did not bar the retrials under the intentional murder alternative. *Id.*

In *Garcia*, 179 Wn. 2d 828, 843-844, the defendant was charged with kidnapping and burglary. The State charged one count of kidnapping under three alternative means. *Id.*, at 836. The kidnapping conviction was reversed because there was insufficient evidence to support two of the three alternative means of kidnapping presented to the jury. The Court remanded for a new trial.

In *Wright*, the Supreme Court stated that a reversal for insufficient evidence is equivalent to an acquittal, for double jeopardy purposes, because it means that “no rational factfinder could have voted to convict” on the evidence presented. *Wright*, at 792, citing *Tibbs v. Florida*, 457 U.S. 31, 40–41, 102 S. Ct. 2211, 72 L.Ed.2d 652 (1982). Under the reasoning of the current petition, one “acquittal” on an alternative should have barred a second trial. However, the Supreme Court remanded for a new trial under the “surviving” one of three alternatives in *Garcia*.

Here, the State charged separate counts. Therefore, the jury was required to render two unanimous verdicts in order for jeopardy to terminate. The verdict on one count did not affect the verdict on the other. If the verdict on one was guilty and not guilty as to the other, the parties would know which alternative the jury agreed on, and jeopardy terminates. If the verdicts were guilty on both, jeopardy would terminate and the

counts would merge at sentencing. *See State v. Kier*, 164 Wn. 2d 798, 803, 194 P. 3d 212 (2008). Where the verdict is not guilty on one count and deadlocked on the other, all that is known is that one alternative has been eliminated. The State and the defendant know that the new trial is limited to the remaining alternative.

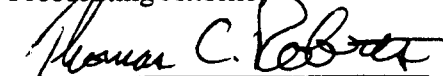
The Court of Appeals decision in *Fuller* does not conflict with Supreme Court precedent, or another Court of appeals decision. Therefore, review should be denied under RAP 13.4(b)(1) and (2). Whether the case presents a “significant” constitutional issue or one of “substantial public interest” under RAP 13.4(b)(3) and (4) is well within the discretion and judgment of the Court.

D. CONCLUSION.

The State respectfully requests that review be denied.

DATED: June 10, 2015.

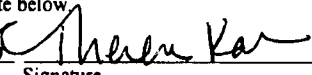
MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-10-15 
Date Signature

APPENDIX "A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 72431-2-1
)
 v.) DIVISION ONE
)
 JOHNNY DALE FULLER,) UNPUBLISHED OPINION
)
 Appellant.) FILED: November 24, 2014

FILED
COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON
2014 NOV 24 AM 9:33

TRICKEY, J. — The principle of double jeopardy protects one from being twice put in jeopardy for the same crime. Here, the defendant was charged in separate counts with two alternative means of committing assault in the second degree. The jury acquitted on one count but failed to reach a verdict on the other count. The trial court declared a mistrial for that count. Because jeopardy did not attach to that charge, the defendant can be retried. Affirmed.

FACTS

Vincent Nix scoured the neighborhood searching for his seven-year-old son's bicycle that was last seen on a landing outside his front door. Several neighbors were also missing children's bicycles, including Robert Scott.

Johnny Fuller lived a few blocks away and had been repairing old bicycles since he was nine years old. He finds abandoned bicycles thrown away or sold at thrift stores. Fuller repairs the bicycles and then sells them.

Based on information received from one of the neighborhood children, Nix went to Fuller's house and pretended that he was interested in purchasing a bicycle for his son. He described the type of bicycle he wanted. Fuller retrieved a bicycle with a Harley Davidson logo that Nix recognized as his son's bicycle. Nix and Fuller agreed on

No. 72431-2-1 / 2

a price of \$10.00 and Nix said he needed to go get money. Instead, Nix went to Scott whose daughter was missing a "princess" bicycle.¹

Nix and Scott then went to Fuller's house. Nix told Fuller that Scott was also interested in a bicycle. Scott began to look under the tarp where Fuller kept his collection of bicycles. Fuller, getting ready to eat his lunch, told Scott he could not show him any bicycles right then. Nix then informed Fuller he did not intend to buy the bicycle with the Harley Davidson logo because it in fact belonged to him. Fuller initially disagreed with Nix, but once Nix described the bicycle as having training wheels, Fuller believed Nix and told him to take the bicycle and leave.

Nix did not leave, stating that he was going to call the police. Scott stayed and continued to look for his daughter's bicycle, saying he was not leaving until the police arrived. Fuller told both men to leave, but they refused. Fuller went inside his house. Neither Scott nor Nix had called the police when Fuller went inside his house.

Fuller came back outside the house with an aluminum baseball bat in this hand. Afraid that he was going to be hit with the bat, Nix backed up far enough so that he would not be hit. Fuller then turned toward Scott who did not retreat.² Scott said he was not going to move and told Fuller, "Hit me."³ Fuller took a swing and hit Scott in the face and shoulder.

Scott became angry and went after Fuller. Scott placed Fuller in a bear hug, causing both men to fall to the ground. Before they fell, Nix tried to get the baseball bat away, but unable to do so he just backed off. When Scott and Fuller fell to the ground, Nix was able to remove the baseball bat. Scott and Nix both denied hitting Fuller.

¹ 2 Report of Proceedings (RP) at 181-82.

² 2 RP at 152.

³ 2 RP at 153, 176.

Fuller testified that after he was tackled to the ground, he was repeatedly punched and kicked. A bystander testified that both Nix and Scott hit Fuller several times when he was on the ground. Nix got the baseball bat away and the fight ended. Police arrived in response to several 911 calls, including Nix's and Fuller's.

Scott suffered a dislocated right shoulder when he fell to the ground after tackling Fuller. He had a rotator cuff injury, although surgery revealed a pre-existing injury to that shoulder. Scott complained of numbness in his left hand and he received surgery on his ulnar nerve. Dr. Spencer Coray, the treating physician, testified that although the nerve can be damaged from compression to the arm, a blow to the outer arm was not likely to cause that injury. Scott had worked in computer technology and the physician testified that the type of injury suffered by Scott occurs with people who work at a desk and on a computer.

The State charged Fuller with four offenses: count 1, second degree assault with a deadly weapon with Scott as the victim; count 2, second degree assault recklessly inflicting substantial bodily harm also with Scott as the victim; count 3, first degree trafficking in stolen property; and count 4, third degree possession of stolen property.

In closing argument, the State maintained that both assault charges were based on the identical act—Fuller striking Scott in the upper arm with a baseball bat. The remaining two counts were based on Fuller's possession of and attempt to steal the bicycle belonging to Nix's son.

Jurors deadlocked on the second degree assault with a deadly weapon and acquitted Fuller on all the other counts. Fuller moved to dismiss the charge in count 1 with prejudice arguing that it was the same offense that jurors had acquitted him on in

count 2 and therefore any prosecution would violate double jeopardy. Fuller appeals the court's denial of his motion.

ANALYSIS

Claims of double jeopardy raise questions of law which this court reviews de novo. State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). Both the federal and state constitutions protect one from being twice put in jeopardy for the same offense. Turner, 169 Wn.2d at 454; U.S. CONST. amend. V; WASH. CONST. art. I, § 9.

Fuller argues that the assault charges in counts 1 and 2 are the same offense for double jeopardy purposes and that his acquittal on count 2 precludes any further prosecution for the assault in count 1. But the mere fact that the counts may merge or be dismissed at sentencing, does not require the dismissal of the charge until the jury has made a final determination. Here, the jury has not made a final determination on assault with a deadly weapon. As noted by the Supreme Court in State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997):

The [merger] doctrine does not prevent the State from *charging* a defendant with multiple crimes, even when those crimes *may* merge. The question of merger arises only after the State has successfully obtained guilty verdicts on the charges that allegedly merge—if the jury acquits on one of the charges, the merger issue never arises. The court cannot use the merger doctrine to dismiss a charge prior to trial because the court cannot predict on which charges the defendant will be convicted.

Here, the jury specifically acquitted Fuller of assault that caused substantial harm (count 2), but was unable to reach a decision on count 1.

This case is more like State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014). There, the defendant was charged with first degree burglary and first degree kidnapping. The State charged Garcia with first degree kidnapping under three

alternative means: (1) holding the victim as a shield or hostage; (2) intending to inflict extreme mental distress; or (3) facilitating the commission of a second degree burglary or flight therefrom.⁴ The jury found Garcia guilty. On appeal, the court determined the evidence to be insufficient to support the first two alternative means and remanded for a new trial on the remaining alternative, stating:

Because there is not sufficient evidence to support two of the three alternative means of kidnapping presented to the jury, Garcia's kidnapping conviction must be reversed, and we remand for a new trial consistent with this opinion. See *State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009) ("The Washington Constitution provides greater protection of the jury trial right [than the federal constitution], requiring reversal if it is impossible to rule out the possibility the jury relied on a charge unsupported by sufficient evidence. Significantly, however, a defendant in such a position is entitled only to a new trial, not an outright acquittal, unless the record shows the evidence was insufficient to convict on any charged alternative." (citations omitted)). The trial court may not retry Garcia on the two alternative means for which we hold there is insufficient evidence. See *State v. Ramos*, 163 Wn.2d 654, 660-61, 184 P.3d 1256 (2008); *State v. Joy*, 121 Wn.2d 333, 345-46, 851 P.2d 654 (1993).

Garcia, 179 Wn.2d at 843-44 (alteration in original).

Similarly, here, the jury has found insufficient evidence to convict Fuller of assault by the means charged in count 2. The matter should be remanded for a new trial on the surviving alternative. This is so because the original jeopardy for that assault never terminated. State v. Strine, 176 Wn.2d 742, 746, 293 P.3d 1177 (2013).

The Supreme Court reached a similar conclusion in an analogous situation in State v. Ramos, 163 Wn.2d 654, 184 P.3d 1256 (2008). There, the jury returned a general verdict of guilty for second degree murder, charged in the alternative as intentional murder and felony murder predicated on assault. Ramos, 163 Wn.2d at 657-58. By special interrogatory, the jury indicated unanimous agreement on the felony

⁴ Garcia, 179 Wn.2d at 836.

murder alternative, but no unanimity on intentional murder. The Ramos court rejected the defense argument that the jury impliedly acquitted the defendant of intentional murder. Here, there was no acquittal of assault with a deadly weapon. The jeopardy only attached to the assault causing substantial bodily harm.

Support for this position is found in State v. Daniels, 160 Wn.2d 256, 265, 156 P.3d 905 (2007). The State charged Daniels with felony murder based on alternative predicate offenses—second degree assault and criminal mistreatment—and the jury returned a general verdict of guilt. The Court of Appeals reversed on the invalidity of the assault means and remanded for retrial on the criminal mistreatment means. As here, Daniels argued that retrial was barred by double jeopardy because the jury returned a general verdict and therefore the court “should infer the jury acquitted her of second degree felony murder predicated on criminal mistreatment.” Daniels, 160 Wn.2d at 265. In rejecting this argument, the Supreme Court reiterated the well-established rule that double jeopardy does not bar a prosecution on the same charge if a conviction is reversed for any reason other than insufficient evidence. Daniels, 160 Wn.2d at 265.

Affirmed.

Trickey, J.

WE CONCUR:

Schindler, J.

COX, J.

OFFICE RECEPTIONIST, CLERK

To: Therese Nicholson-Kahn
Cc: 'John Sloane'; 'nielsene@nwattorney.net'
Subject: RE: St. v. Johnny Fuller, No. 91193-2

Received 6-10-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Therese Nicholson-Kahn [mailto:tnichol@co.pierce.wa.us]
Sent: Wednesday, June 10, 2015 4:05 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'John Sloane'; 'nielsene@nwattorney.net'
Subject: St. v. Johnny Fuller, No. 91193-2

Please see attached the State's answer to Petition for Review in the below matter.

St. v. Fuller
No. 91193-2
Submitted by: T. Roberts
WSB # 17442
OID # 91121

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to T. Roberts