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December 23, 2014
Court of Appeals
Division I
State of Washington

SUPREME COURT NO. _____

NO. 72431-2-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY DALE FULLER,

Petitioner.

FILED
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STATE OF WASHINGTON
CRF

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry T. Costello, Judge
The Honorable Stanley J. Rambaugh, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Johnny Fuller, the appellant below, asks this Court to review the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Fuller requests review of the Court of Appeals decision in State v. Fuller, COA No. 72431-2-I, filed November 24, 2014.

C. ISSUES PRESENTED FOR REVIEW

1. Petitioner was charged with Assault in the Second Degree for striking the alleged victim in the arm with a baseball bat, thereby recklessly inflicting substantial bodily harm. The jury acquitted petitioner of that offense. In light of that acquittal, is the State now precluded from retrying petitioner for Assault in the Second Degree, based on the same hit to the alleged victim's arm, on the alternative theory petitioner assaulted the alleged victim with a deadly weapon?

2. Is review warranted, under RAP 13.4(b)(1) and (b)(3), where the Court of Appeals decision permitting petitioner's retrial conflicts with a decision from this Court, and the case presents a significant constitutional question?

D. STATEMENT OF THE CASE

1. Trial Proceedings

Vincent Nix and Robert Scott believed Johnny Fuller had been stealing neighborhood bicycles and confronted Fuller about their suspicions. RP 146-149. Fuller ordered Nix and Scott off of his property, but they refused to leave. RP 149, 175-176, 349-350, 401-402. Fuller grabbed a baseball bat to hasten their departure. RP 150-152. Nix retreated. RP 150-152. Scott took the opposite approach. He indicated he was not moving and instructed Fuller, "hit me." RP 153, 176. Fuller complied, striking the side of Scott's upper left arm. RP 153, 194-196.

The Pierce County Prosecutor's Office filed four charges against Fuller: (count 1) Assault in the Second Degree, (count 2) Assault in the Second Degree, (count 3) Trafficking in Stolen Property in the First Degree, and (count 4) Possession of Stolen Property in the Third Degree. CP 51-53.

Counts 1 and 2 were based on precisely the same act (swinging the bat and striking Scott in the upper arm). See RP 602-602, 624-620. Each, however, involved a different alternative means of committing that one crime. Count 1 was based on a theory that the bat was a deadly weapon. CP 51. Count 2 was based on a

theory that Fuller had recklessly inflicted substantial bodily harm (damage to the ulnar nerve in Scott's arm). CP 52; RP 617-620. For the assault charges, Fuller claimed defense of self and property. RP 644-656; CP 90-94. For the property charges, he denied knowledge that any of the bikes in his possession were stolen. RP 392, 635-638.

Jurors acquitted Fuller of assault in count 2 and on both property crimes (counts 3 and 4). CP 116, 118-120. Jurors deadlocked, however, on the assault charge in count 1, and the court declared a mistrial on that charge. CP 71-72; RP 703. Fuller's motion to dismiss the charge in count 1 on double jeopardy grounds was denied. CP 124-131. Fuller appealed. CP 132-134.

2. Court of Appeals

In the Court of Appeals, Fuller argued that counts 1 and 2 were simply alternative means of committing the same, single crime of assault based on Fuller's one act of striking Scott in the arm and therefore involved a single unit of prosecution for double jeopardy purposes. See Brief of Appellant, at 9-18. Because Fuller had been acquitted in count 2, he argued the State was prohibited from retrying him on the alternative means of committing that same crime alleged in count 1. Id. at 20-22.

The State did not dispute that counts 1 and 2 had simply set forth two alternative means for committing one crime of assault and that both means were based on precisely the same act. See Brief of Respondent, at 6. However, citing cases with very different facts and legal issues, the State argued that so long as jurors had not acquitted on the alternative means in count 1, nothing prevented retrial on that count despite the outright acquittal on count 2. See Brief of Respondent, at 6-10 (citing State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997); State v. Ramos, 163 Wn.2d 654, 184 P.3d 1256 (2008); State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014)); see also Reply Brief of Appellant, at 1-2 (distinguishing each case).

The Court of Appeals agreed with the State, citing substantially the same cases to conclude a second prosecution would not violate double jeopardy. See State v. Fuller, Slip op., at 4-6. Fuller now seeks this Court's review.

E. ARGUMENT

THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT FROM THIS COURT AND PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE THAT SHOULD BE RESOLVED BY THIS COURT.

The double jeopardy clauses of the Fifth Amendment¹ and article I, section 9 of the Washington Constitution² prohibit “being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted for a second time for the same offense after conviction, and (3) punished multiple times for the same offense.” State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)).

As the United States Supreme Court has explained:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that that State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the

¹ The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life and limb.”

² Article 1, § 9 provides, “[n]o person shall be . . . twice put in jeopardy for the same offense.” It provides the same degree of protection as its federal counterpart. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

Whether there has been a double jeopardy violation is a question of law this Court reviews de novo. Turner, 169 Wn.2d at 454.

Fuller's claim falls under number (1) above and rests on what has been called "the most fundamental rule in the history of double jeopardy jurisprudence": that an acquittal is an absolute bar to retrial for the same offense. State v. Wright, 165 Wn.2d 783, 791-792, 203 P.3d 1027 (2009) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977)). There is no dispute that counts 1 and 2 in Fuller's case are a single offense for double jeopardy purposes. The only dispute is whether his acquittal on count 2 precludes any future prosecution on count 1.

This Court has previously recognized the preclusive effect of a jury acquittal. In Wright, the defendant was convicted at trial and the issue was whether reversal of one alternative means of committing the offense for reasons *other than a lack of proof*

precluded a second prosecution for the same crime based on a different alternative means that could have been prosecuted at trial but was not. This Court answered that question in the negative. Wright, 165 Wn.2d at 788-789. In doing so, however, it made it clear that a failure of proof on an alternative means would be treated differently and has preclusive effect:

A defendant charged and tried under multiple statutory alternatives experiences the same jeopardy as one charged and tried on a single theory. The defendant is in jeopardy of a single conviction and subject to a single punishment, whether the State charges a single alternative or several. See State v. Womac, 160 Wash.2d 643, 658, 160 P.3d 40 (2007) (although State may pursue multiple charges, court may enter only one conviction for the same offense). When a proceeding ends in an undisturbed verdict or verdict equivalent on any alternative, the State may not prosecute the defendant on any other means of committing the same offense. See Sanabria v. United States, 437 U.S. 54, 69, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978) (acquittal on any alternative theory of liability bars reprosecution on "any aspect of the count"). Conversely, when jeopardy continues due to the reversal of a conviction for trial error, the defendant remains in jeopardy of conviction under any appropriate alternative theory of liability. . . .

Wright, 165 Wn.2d at 801-802 (emphasis added).

Under Wright, and established double jeopardy principles, Fuller's acquittal on count 2 should preclude any retrial for the same offense regardless of jurors' inability to reach a verdict on

count 1. In nonetheless concluding Fuller's acquittal has no preclusive effect, the Court of Appeals relied on decisions involving very different circumstances and legal issues.

State v. Michielli, 132 Wn.2d at 238-239, holds that, where a defendant is charged with two offenses and conviction for both would violate double jeopardy, the trial court may not dismiss one of the charges prior to the jury's verdict because the double jeopardy bar is not triggered until verdicts are entered. Michielli does not address the issue here: whether acquittal on assault predicated on one means precludes a subsequent trial for the same assault based on an alternative means.

In State v. Garcia, the defendant was tried and convicted of kidnapping based on three alternative means contained in a single instruction. Garcia, 179 Wn.2d at 836. This Court held that, where the evidence was insufficient to convict on two of the three means, Garcia could be retried on the remaining means. Id. at 843-844. Garcia does not involve a unanimous *acquittal* on a charge or the consequences of such an acquittal on retrial for an alternative means of committing that same offense.

State v. Ramos, 163 Wn.2d at 658, involves a conviction based on two alternative means contained in a single instruction

that did not require juror unanimity as to the means on which they relied. One of those means was later deemed legally insufficient. Id. at 658-659. Under that scenario, there was no bar to retrial on a lesser-included offense of the original charge. Id. at 660. The Ramos Court was not asked to determine, and did not determine, the impact of a unanimous acquittal on any subsequent prosecution for the same crime.

Nor does the final case relied on by the Court of Appeals – State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007), cert. denied, 558 U.S. 819, 130 S. Ct. 85, 175 L. Ed. 2d 28 (2009) – control the outcome here. Daniels was convicted of felony murder predicated on second degree assault or first degree criminal mistreatment. Id. at 260. Her conviction was reversed under In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), because assault could not serve as the predicate to felony murder. Id. at 265. The Supreme Court rejected Daniel's argument that double jeopardy prevented her retrial for murder based on the felony of criminal mistreatment, citing the well-established rule that there is no bar to retrial if a conviction is

reversed for any reason other than insufficient evidence.³ Id. In contrast, Fuller was acquitted of assault based on insufficient evidence.

In summary, not one of the above cases involves a verdict unanimously acquitting the defendant of the crime at issue and then determining the preclusive impact of that acquittal on the State's ability to retry the defendant based on an alternative means of committing that very same offense. Consistent with Wright, this Court should find that Fuller's acquittal terminated his jeopardy for assault and prevents a retrial. Review is appropriate under RAP 13.4(b)(1) and (b)(3).

³ Daniels continued validity is currently before this Court. See State v. Glasmann, No. 88913-1 (argued 10/23/14).

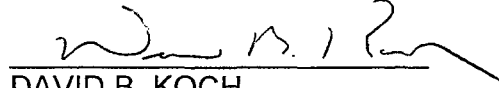
F. CONCLUSION

This Court should grant review and reverse the Court of Appeals.

DATED this 23rd day of December, 2014.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JOHNNY DALE FULLER,)
)
 Appellant.)

No. 72431-2-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: November 24, 2014

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COURT OF APPEALS DIV. 1
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

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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

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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.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JOHNNY FULLER,

Petitioner.

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SUPREME COURT NO. _____
COA NO. 72431-2-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE PETITION FOR REVIEW TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHNNY FULLER
4365 SALISHAN BOULEVARDE
TACOMA, WA 98404

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF DECEMBER 2014.

X Patrick Mayovsky

Sanders, Laurie

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