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King County Prosecutor
Appellate Unit

SUPREME COURT NO. 85653-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition Of:

MANSOUR HEIDARI,

Petitioner

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

The Honorable Robert H. Alsdorf, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE STATEMENT

Petitioner was convicted in count IV of Child Molestation in the Second Degree. The State concedes the evidence was insufficient to support the conviction and it must be vacated. Although the State never asked jurors to consider whether petitioner was guilty of Attempted Child Molestation in the Second Degree, the State asks this Court to direct the trial court to enter judgment for that crime. Should this Court decline the request because it is inconsistent with State v. Green,¹ there is no statutory authority for the request, and it would violate constitutional due process, jury trial, and double jeopardy protections?

B. SUPPLEMENTAL ARGUMENT

THIS COURT'S OPINION IN GREEN CONTROLS.

As the Court of Appeals properly recognized, this Court's opinion in State v. Green controls the outcome in Heidari's case. Green's conviction for Aggravated Murder in the First Degree was reversed due to insufficient evidence of one of the aggravating factors (kidnapping) and deficient jury instructions. The State argued that remand for a new trial was unnecessary because this

Court could simply remand for sentencing on “the lesser included offense of murder in the first degree[.]” Id. at 234.

In rejecting the State’s argument, this Court held:

In the case at hand the jury was not instructed on the subject of a “lesser included offense”. In general, a remand for simple resentencing on a “lesser included offense” is only permissible when the jury has been explicitly instructed thereon. Based upon the giving of such an instruction it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense. . . . In addition, it is clear a case may be remanded for resentencing on a “lesser included offense” only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense.

Id. (citations omitted). In Green, neither requirement was met.²

The State has not demonstrated that Green is incorrect or harmful.

Therefore, it should remain the law in Washington under the

¹ State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

² Citing State v. Gilbert, 68 Wn. App. 379, 384-385, 842 P.2d 1029 (1993), the State contends this discussion in Green is dicta. See Motion for Discretionary Review, at 15-16. In fact, however, as the Court of Appeals recognized in Heidari’s case, it is the Gilbert court’s discussion of Green that is dicta. See Heidari, 159 Wn. App. at 610. The discussion in Green explaining why the State’s requested remedy must be rejected – i.e., the jury was never instructed on a lesser offense and the record did not reveal jurors properly found all elements for the lesser offense – was not dicta. Rather, it was necessary to resolve an issue squarely presented in the case.

doctrine of stare decisis. State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

Green's jury instruction requirement obviously does not apply to bench trials. Compare State v. Peterson, 133 Wn.2d 885, 892-893, 948 P.2d 381 (1997) (in a bench trial, the judge "may properly find defendant guilty of any inferior degree crime of the crimes included within the original information.") with State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993) ("To find the accused guilty of a lesser included offense, the jury must, of course, be instructed on its elements."). Thus, Washington appellate courts have properly remanded for imposition of judgment on a lesser included crime where the case was tried to the bench and the trial judge necessarily found all of the elements of the lesser crime. See In re PRP of Heidari, 159 Wn. App. 601, 609-610, 613, 248 P.3d 550 (2011) (citing cases).

Where a case was tried to a jury – consistent with Green – Washington appellate courts also have properly remanded for imposition of judgment on a lesser included crime where jurors were instructed on the lesser crime and necessarily found all of the elements of that crime. See Heidari, 159 Wn. App. at 607-608 (citing cases). In several cases, however, the Court of Appeals

mistakenly remanded for judgment on a lesser included crime where jurors were never instructed to consider that crime. In Heidari's case, the Court of Appeals recognized that these opinions either (1) predated Green, (2) contained no analysis on the propriety of such a remand, (3) or cited to cases involving remands from bench trials. Id. at 608-614.

Ultimately, the Court of Appeals concluded, "No Washington case presents a reasoned analysis in support of the proposition that, in a case tried to a jury, the decision in *Green* should not be followed." Id. at 614. For the reasons discussed below, the Court of Appeals is correct. This Court's decision in Green is proper in light of statutory and constitutional requirements.

1. There Is No Statutory Authority To Find Heidari Guilty Of An Offense Jurors Never Considered.

The Legislature has defined the circumstances in which a defendant, tried by jury for a completed crime, may be found guilty of an attempt to commit that crime:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003. Similarly:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010.

Notably, when a defendant has been charged solely with a completed crime and tried by a jury, both statutes contemplate the jury's consideration of an attempt to commit that crime. RCW 10.61.003 ("the jury may find" the defendant guilty of an attempt); RCW 10.61.010 ("[w]henever the jury shall find" the defendant guilty, it shall specify when the defendant is guilty of an attempt). There is no statutory authority permitting an appellate court to make a finding on an attempted crime, or order the trial court to make such a finding, where the defendant exercised his right to jury trial and jurors were never asked to consider an attempted crime.

Had the Washington Legislature intended to bestow upon Washington appellate courts the authority to amend a jury verdict by finding the defendant guilty of a crime jurors were never asked

to consider, it would have enacted a broader statute similar to that in California:

When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed;

California Penal Code sec. 1181(6). There is no such statutory authority in Washington. Consistent with Green, Washington's statutes contemplate providing the jury with an opportunity to consider any lesser crime.

2. Right to Jury Trial/Due Process

In addition to the above statutory limitations, the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). On this same subject, article 1, section 21 of the Washington Constitution provides, "The right of trial by jury shall remain inviolate." This right includes, as its most important element, the right to have the jury, rather than a judge, reach the requisite

finding of guilty. Sullivan, 508 U.S. at 277. In combination with the Fifth Amendment Due Process Clause, these provisions require the prosecution to prove all essential elements of a criminal offense to a jury beyond a reasonable doubt. Id. at 277-78.

A person is guilty of Child Molestation in the Second Degree “when the person has . . . sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.086(1). A person is guilty of Attempted Child Molestation in the Second Degree if, with the intent to commit Child Molestation in the Second Degree, he does any act that is a substantial step toward the commission of that crime. See RCW 9A.28.020(1). “A ‘substantial step’ is conduct strongly corroborative of the actor’s criminal purpose.” State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995).

Although Heidari’s jury was never instructed on the elements of attempt, the State asks this Court to order the trial court to direct a verdict for attempted molestation. But where a defendant exercises his right to have all elements of an offense proved to a jury beyond a reasonable doubt, “a trial judge is prohibited from entering a judgment of conviction or directing the jury to come

forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) (citations omitted). In State v. Symes, 17 Wash. 596, 598-599, 50 P. 487 (1897), this Court held that where the evidence was insufficient to support the jury's verdict on Murder in the First Degree, the trial court was not authorized to enter judgment for the lesser crime of Murder in the Second Degree.

In nonetheless urging this Court to allow appellate courts to order convictions for crimes the jury never considered, the State claims such a practice has existed for "more than 100 years." Motion for Discretionary Review, at 12. As support – in addition to citing Court of Appeals decisions criticized or distinguished by the Court of Appeals in Heidari's case – the State cites four decisions from this Court. Motion for Discretionary Review, at 12-15.

The first case is State v. Watson, 2 Wash. 504, 27 P. 266 (1891). Watson is a sufficiency of the information case. The prosecutor intended to charge the defendant with Assault with Intent

to Commit Murder, which consists of two elements: (1) an assault and (2) intent to commit murder. Through oversight, the prosecutor only charged Assault, failing to include the second element in the information. Id. at 505-507. Based on the charging deficiency, the Supreme Court reversed Watson's conviction on the greater offense and remanded for sentencing on simple Assault. Id. at 507-08.

Watson was properly decided. Unlike Heidari's case, it did not involve reversal of a conviction for insufficiency of the evidence and remand for conviction on a lesser included offense jurors were never asked to consider. Rather, *Watson was only charged with the lesser offense*. And since the jury instructions for Assault with Intent to Commit Murder expressly required jurors to find that Watson committed an assault, the remedy was fully consistent with the jury's verdict. That remedy also is fully consistent with the requirements of Green. See Green, 94 Wn.2d at 234 (requiring instruction on elements of lesser and express finding by jury on each element of lesser).

The State's second case is State v. Friedrich, 4 Wash. 204, 29 P. 1055 (1892). In Friedrich, this Court found the evidence insufficient to support the jury's guilty verdict on Murder in the First Degree. Citing former § 1429 of Hill's Code, which provided "the

supreme court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had," this Court ordered the trial judge to enter judgment on Murder in the Second Degree.³ Friedrich, 4 Wash. at 222-225.

Citing certain language found in the Friedrich opinion, the Court of Appeals in Heidari's case surmised that Friedrich's jury had been instructed on the lesser offense of Murder in the Second Degree, making the remedy consistent with Green. Heidari, 159 Wn. App. at 611. Based on the history of the case, this appears correct. Friedrich's conviction for Murder in the First Degree had *previously* been reversed – in an earlier appeal – based on judicial comments on the evidence. See Friedrich v. Territory, 2 Wash. 358, 366-369, 26 P. 976 (1891). In reversing, this Court noted other trial errors. Not only had jurors never been provided the elements of proof for Murder in the First Degree, the trial judge failed to inform jurors that in the absence of deliberation and premeditation, "they could return a verdict of murder in the second

³ Similarly, RAP 12.2 now provides, "The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require."

degree only.” Id. at 369. This Court described this failure as a “great oversight.” Id. at 370. Unless it is assumed that upon remand the trial judge completely ignored this portion of the opinion, it is safe to conclude jurors were expressly instructed on the lesser offense of Murder in the Second Degree at Friedrich’s second trial.

The State’s third case is State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970). Miles, however, involved a bench trial. Id. at 594. Thus, there was no statutory or constitutional prohibition against remanding for conviction on a lesser offense.

The final Supreme Court decision cited by the State is State v. Lillie, 60 Wash. 200, 110 P. 801 (1910). A jury convicted Lillie of Assault with a Deadly Weapon with the Intent to Inflict Bodily Injury. Id. at 200. On appeal, this Court concluded there was insufficient evidence of a deadly weapon and, citing Friedrich, remanded for entry of judgment and sentence for Assault without a deadly weapon. Id. at 203-204. It is unclear from the opinion whether Lillie’s jury was instructed it could find him guilty on the lesser offense of Assault without a deadly weapon. If it was, the decision is consistent with Friedrich and Green. To the extent the decision

is inconsistent with Green, it appears to be an anomaly and does not represent the current rule.

There do not appear to be any cases in which this Court reversed a conviction for a completed crime and ordered conviction for an attempted crime jurors were not asked to consider. Rather, historically, where the trial evidence merely proved an attempt, this Court has simply vacated the defendant's conviction for the completed crime. See State v. Charley, 48 Wn.2d 126, 291 P.2d 673 (1955) (evidence of Sodomy insufficient where State failed to prove penetration; where crime committed was merely an Attempted Sodomy, conviction reversed and dismissed); State v. Swane, 21 Wn.2d 772, 153 P.2d 311 (1944) (trial evidence of Carnal Knowledge revealed only an attempt to commit that crime; conviction reversed and dismissed).

In a thoughtful dissenting opinion in State v. Garcia, 146 Wn. App. 821, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009), Judge Schultheis recently questioned the validity of appellate courts remanding for conviction on a charge the trier of fact was never asked to consider. See Id. at 831 (Schultheis, C.J., dissenting). After reversing Garcia's conviction for Assault in the Third Degree, a majority of the court remanded for conviction on

Assault in the Fourth Degree. Id. at 829-830. Garcia involved a bench trial. Id. at 826. Therefore, the majority's decision to remand in that particular case was not error. As applied to jury trials, however, Judge Schultheis's criticisms are valid:

a sentencing remand effectively rescues the State from a failed trial strategy. At trial, the State chose to proceed on the sole charge of third degree assault, declining to give the judge the option of convicting Mr. Garcia of fourth degree assault. In doing so, it hoped that the judge would convict on the greater offense. However, its failure to give the court the option of convicting Mr. Garcia of the lesser offense increased the risk of an unwarranted conviction. *See Keeble v. United States*, 412 U.S. 205, 212-213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (emphasis added)). Indeed, on appeal, we concluded that the State did not prove all the elements of third degree assault.

Id. at 834.

Judge Schultheis pointed out that appellate judges do not sit as finders of fact and cannot substitute their judgment for that of a jury, noting the "crucial distinction between an appellate court finding evidence in the record sufficient to support a jury verdict and a jury finding the evidence sufficient to prove guilt beyond a reasonable doubt." Id. at 835 (quoting State v. Myers, 158 Wis.2d 356, 366-367, 461 N.W.2d 777 (1990)). He also noted that where

a lesser offense is not tendered below, the defendant never defends against that charge, possibly forgoing strategies, evidence, and arguments relevant to the charge. Id.

Judge Schultheis is correct. Heidari's jury was never instructed on the elements of an attempted crime and never asked to consider them. It is impossible to know what strategies, evidence, or arguments defense counsel would have made had the State asked for instructions on an attempted crime. By not requesting instructions on attempt, the State chose an all or nothing strategy, thereby increasing the chance of Heidari's conviction. It should not be rescued from that strategy – certainly not when it means a violation of Heidari's due process and jury trial rights.

While it may be tempting to find, for example, that because Heidari's jury found that he had sexual contact with B.Z., jurors would have found (had they been asked) that he attempted sexual contact, this Court is not a fact finder. Moreover, the foundation for this analysis (the jury's finding of guilt on the completed crime) is being reversed because it is incorrect. As the Supreme Court of Wisconsin has recognized:

a jury's verdict reversed for insufficient evidence is too suspect a determination of guilt for an appellate court to use as the basis for ordering conviction on the lesser-included offense for which no instruction had been submitted to the jury.

Myers, 461 N.W.2d at 780 (declining to order conviction for attempted crime where evidence of completed crime insufficient).

Ordering conviction for a crime never expressly considered by Heidari's jury, and never defended against, would violate due process and the right to trial by jury.

3. Double Jeopardy

Double jeopardy prohibitions also prevent this Court from finding Heidari guilty of an attempted crime where jurors were not instructed on that offense.

"The fifth amendment to the United States Constitution and article 1, section 9 of the Washington Constitution prohibit the State from twice putting a person in jeopardy for the same offense."⁴ State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). "Conviction of the crime charged unequivocally terminates jeopardy." Id. at 757 (citing Arizona v. Washington, 434 U.S. 497,

⁴ The Fifth Amendment provides that no person shall "be subject for the same offense to be put twice in jeopardy of life or limb." U.S. Const. Amend. V. Article 1, section 9 provides, "No

503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)). Generally, a successful appeal in which a conviction is vacated for trial error continues jeopardy, allowing for retrial of that offense. Id. The double jeopardy clause bars retrial, however, where a court has vacated a conviction due to insufficient evidence. Id. at 758 (citing Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)); see also State v. Hickman, 135 Wn.2d 97, 104 n.4, 954 P.2d 900 (1998) (remedy for insufficient evidence is reversal and dismissal).

In Burks, the United States Supreme Court reasoned that whether the trial court, the jury, or an appellate court finds the evidence supporting a conviction insufficient, the finding is the same – “criminal culpability had not been established.” Burks, 437 U.S. at 10. A finding of evidentiary insufficiency in the trial court would clearly prohibit retrial for that offense, and the Court found no logical reason to treat a similar decision by a reviewing court differently:

an appellate reversal means that the government’s case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury’s *verdict* of acquittal – no

person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.”

matter how erroneous its decision – it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id. at 16 (emphasis in original). “To hold otherwise would create a purely arbitrary distinction[.]” Id. at 11; see also Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982) (a reversal based on insufficiency of the evidence has the same effect as an acquittal at trial); State v. Wright, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009) (same).

Therefore, once this Court finds (as the State has conceded) that Heidari’s conviction for Child Molestation in the Second Degree must be vacated for a failure of proof, Heidari’s jeopardy for that offense terminates. Not only does this bar another conviction for that crime, it bars conviction for any offense that is considered “the same offense” for double jeopardy purposes. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). “[T]he ‘same elements test,’ also known as the *Blockburger* test, determines whether a defendant presently faces jeopardy ‘for the same offense’ as before. According to that test, two offenses are not the same if each contains an element not contained in the other.” Corrado, 81 Wn. App. at 648-649 (footnotes omitted); see also Blockburger v.

United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (formulating test). Restated, two crimes are the same if the evidence sufficient to prove one would also completely prove the second. State v. Walker, 143 Wn. App. 880, 886, 181 P.3d 31 (2008).

The United States Supreme Court has “often concluded that two different statutes define the ‘same offense,’ typically because one is a lesser included offense of the other.” Rutledge v. United States, 517 U.S. 292, 297, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996) (citing examples); see also Brown v. Ohio, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (greater and lesser offenses are the “same offense” for double jeopardy purposes; a lesser offense “invariably . . . requires no proof beyond that which is required for conviction of the greater”). Once jeopardy has terminated on the greater offense, there can be no prosecution for a lesser included offense. Brown v. Ohio, 432 U.S. at 168-169.

That is the situation here. An attempted crime is a lesser included offense of the completed crime. State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37 (citing RCW 10.61.010), review denied, 119 Wn.2d 1024 (1992). Attempted Child Molestation does not contain any element in addition to those found in the

completed offense; sufficient evidence of the completed crime would also prove an attempt. Therefore, where a trial judge or jury finds the evidence insufficient for the completed crime and jurors were only instructed on that crime, that finding bars any new effort to convict the defendant of an attempt.

Moreover, where a trial judge or jury finds the evidence insufficient, there is no State's appeal and therefore no opportunity for this Court to order a conviction on a lesser offense. See United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (acquittal based on insufficiency of evidence, by jury or trial court, may not be appealed); Smalis v. Pennsylvania, 476 U.S. 140, 145-146, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986) ("[T]he Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" (quoting United States v. Martin Linen Supply Co., 430 U.S. at 570)).

There is no logical reason for a different rule where an appellate court finds the evidence insufficient. See State v. Anderson, 96 Wn.2d 739, 742-744, 638 P.2d 1205 (indicating that

had Court reversed murder conviction for insufficient evidence, rather than inapplicability of the charged statute, it would have remanded with directions to dismiss the case with prejudice, precluding prosecution for lesser-included offense), cert. denied, 459 U.S. 842 (1982); Stephens v. State, 806 S.W.2d 812 (Tex. Crim. App. 1990) (where prosecution did not request lesser included instruction at trial and conviction reversed on appeal for insufficient evidence, double jeopardy bars prosecution for any lesser included offense), cert. denied, 502 U.S. 929 (1991).

Since the defendant cannot even face the prospect of a new trial on a lesser offense (where at least he might be acquitted), he certainly cannot simply be ordered convicted of a lesser offense by an appellate court. See Haynes v. State, 273 S.W.3d 183 (Tex. Crim. App. 2008) (nor can an appellate court “reform a trial court’s judgment to reflect a conviction for an unrequested lesser-included offense not submitted to the jury”). Either way, double jeopardy prevents the conviction. To hold otherwise creates a purely arbitrary distinction where only those whose convictions were reversed on appeal for insufficient evidence are subject to conviction for a lesser offense. Those properly acquitted at trial would never face this prospect.

Where a conviction is reversed on appeal for insufficient evidence, but the evidence is sufficient to prove a lesser offense, the Ninth Circuit Court of Appeals has identified three circumstances that must be present to remand for entry of conviction on the lesser offense:

“(1) the lesser offense [is] a lesser-included offense – a “subset” of the greater one; (2) the jury [was] explicitly instructed that it could find the defendant guilty of the lesser-included offense and [was] properly instructed on the elements of that offense; and (3) the government [requested] on appeal that judgment be entered against the defendant on a lesser offense.”

United States v. Dinkane, 17 F.3d 1192 (9th Cir. 1994) (quoting United States v. Vasquez-Chan, 978 F.2d 546, 554 (9th Cir. 1992)).

These circumstances – in particular, requirements (1) and (2) – are rooted in double jeopardy principles:

If no instructions are given on lesser included offenses, the jury's verdict is limited to whether the defendant committed the crime explicitly charged in the indictment. In such cases, an acquittal on the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge. In re Nielsen, 131 U.S. 176, 189-190, 9 S. Ct. 672, 676-677, 33 L. Ed. 2d 118 (1889). An acquittal on the explicit charge therefore bars subsequent indictment on the implicit lesser included offenses. Id.

United States v. Gooday, 714 F.2d 80, 82 (9th Cir. 1983), cert. denied, 468 U.S. 1217 (1984) (cited in Vasquez-Chan, 978 F.2d at 554 n.5). But see Douglas v. Jacquez, 626 F.3d 501 (9th Cir. 2010) (divided panel finds double jeopardy not offended where California statute allows remand for entry of conviction on lesser offense jury never asked to consider). In contrast, there is no double jeopardy prohibition where jurors were instructed on the lesser offenses at trial. Gooday, 714 F.2d at 82-83; see also Morris v. Matthews, 475 U.S. 237, 242, 244, 246-247, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986) (no prohibition against entering conviction for lesser included offense where jurors instructed on lesser and no dispute they found elements of lesser).

Since an appellate reversal for insufficient evidence is the constitutional equivalent of a jury acquittal, such a reversal also necessarily implies an acquittal on all lesser included offenses jurors were never asked to consider. This Court's decision in Green (that a remand for resentencing on a lesser included offense is only permissible when the jury has been explicitly instructed on the lesser *and* the record discloses that the trier of fact expressly found each of the elements of the lesser) is also the required rule for double jeopardy purposes.

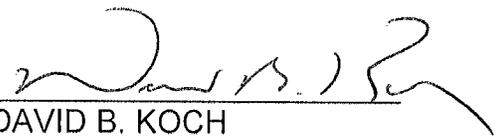
D. CONCLUSION

The statutory authority to convict a defendant of an attempted offense has been given to properly instructed juries, not appellate courts. Moreover, an appellate court's decision that a defendant is guilty of an attempted offense (where jurors were never asked to consider that offense) violates due process, the right to trial by jury, and double jeopardy protections. This Court must simply reverse and dismiss Heidari's conviction on count IV.

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Respectfully submitted,

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