

No. 91193-2

NO. 45126-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY FULLER,

Appellant.

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

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

FULLER'S ACQUITTAL ON ASSAULT PROHIBITS ANY RETRIAL FOR THAT OFFENSE.

The State does not dispute that the assault charge against Fuller in counts 1 and 2 is the same offense for double jeopardy purposes. Instead, the State primarily relies on three cases to support its argument that Fuller's acquittal for assault does not bar retrial for that offense. None of these cases, however, involves the circumstances at Fuller's trial.

State v. Michielli, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997), 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. The case does not address the issue here: whether outright acquittal on assault predicated on a single means precludes a subsequent trial for assault based on a means that is the same offense for double jeopardy purposes.

State v. Ramos, 163 Wn.2d 654, 184 P.3d 1256 (2008), is addressed at length in Fuller's opening brief. As discussed there, it 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. Id. at 658. 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. Like Michielli, Ramos did not involve the circumstances in Fuller's case. The Supreme Court was not asked to determine, and did not determine, the impact of a unanimous acquittal on any subsequent prosecution for the same crime.

The State's third case is State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014). Garcia was tried and convicted of kidnapping based on three alternative means contained in a single instruction. Garcia, 179 Wn.2d at 836. The 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. Like the State's other cases, Garcia does not involve a unanimous acquittal for a stand-alone charge based on a single means of committing an offense. Nor does it involve the consequences of such an acquittal on retrial for an alternative means that is the same offense for double jeopardy purposes.

The bottom line is that the manner in which jurors are asked to decide a case and render their verdicts has consequences. Had Fuller's jury been asked to consider both means of assault in a single count, they would have simply failed to reach *any verdict* on assault based on their failure to achieve unanimity on the "assault with a deadly weapon" means. The State would then have been free to retry Fuller for assault. But Fuller's jury was asked to unanimously decide his guilt on assault in count 2 and did so, unanimously acquitting him of the charge. This rendered irrelevant for double jeopardy purposes the jury's failure to reach a verdict in count 1 where the charged means was the same offense.

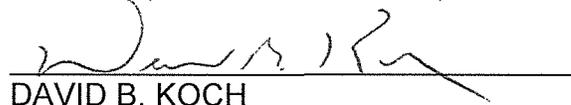
B. CONCLUSION

For the foregoing reasons, and those contained in the opening brief, Fuller is entitled to dismissal of the charge in count 1 with prejudice.

DATED this 12th day of May, 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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COA NO. 45126-3-II

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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 12TH DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** 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 12TH DAY OF MAY 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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