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SUPREME COURT NO. 91193-2

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY DALE FULLER,

Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER

DAVID B. KOCH
Attorney for Petitioner

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



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A. SUPPLEMENTAL ISSUE STATEMENT

Petitioner was charged with Assault in the Second Degree for striking the alleged victim once in the arm with a baseball bat. The State theorized petitioner was guilty under two alternative means of committing the crime: he used a deadly weapon or he recklessly inflicted substantial bodily harm. Although there was but a single assault, the State charged each means in a separate count and jurors were instructed on each means separately. The jury acquitted petitioner on one means, unanimously finding him not guilty, but were split on the other. In light of the undisturbed not guilty verdict, is the State now precluded from retrying petitioner for the assault?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Vincent Nix and Robert Scott believed Johnny Fuller had stolen neighborhood bicycles and confronted him about their suspicions. RP 146-149. Fuller ordered Nix and Scott off 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, indicating he was not moving and instructing 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 Fuller intentionally assaulted Scott with a deadly weapon (the bat). CP 51; RCW 9A.36.021(1)(c). Count 2 was based on a theory Fuller intentionally assaulted Scott and recklessly inflicted substantial bodily harm (damage to the ulnar nerve in Scott’s arm). CP 52; RP 617-620; RCW 9A.36.021(1)(a). For assault, 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 the assault as described in count 2 and on both property crimes (counts 3 and 4). CP 116, 118-120.

Jurors deadlocked, however, on that same assault as described in count 1, and the court declared a mistrial on that count. CP 71-72; RP 703. Fuller's motion to dismiss count 1 on double jeopardy grounds was denied. CP 124-131. Fuller appealed. CP 132-134.

The Court of Appeals affirmed, holding that jurors' inability to reach a verdict on the assault as described in count 1, despite an outright and undisturbed acquittal for that same assault in count 2, meant Fuller could be tried again on the "deadly weapon" means of committing the crime. See State v. Fuller, Slip op. (filed November 24, 2014).

C. ARGUMENT

DOUBLE JEOPARDY PROTECTIONS BAR THE STATE FROM RETRYING FULLER ON ASSAULT FOLLOWING HIS ACQUITTAL FOR THAT CRIME.

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."

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."

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)).

Fuller's claim falls under category (1) 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)); see also Green v. United States, 355 U.S. 184, 192, 78 S. Ct. 221, 61 A.L.R.2d 1119 (1957) (noting "uniform adherence" to the "deeply entrenched principle of our criminal law that once a person has been acquitted of an offense he cannot be prosecuted again on the same charge").

The prohibition against multiple prosecutions preserves a defendant's "valued right to have his trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (quoting Wade v. Hunter, 336 U.S. 684, 688-689, 69 S. Ct. 834, 93 L. Ed. 2d 974 (1949)).

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).

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 possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. at 187-188. The prohibition on multiple prosecutions also preserves "the finality of judgments." Yeager v. United States, 557 U.S. 110, 118, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009) (quoting Crist v. Bretz, 437 U.S. 28, 33, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978)).

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

As noted above, although the Pierce County Prosecutor's Office charged Fuller with two counts of Assault in the Second Degree, both counts address the same single assaultive act (swinging the bat and striking Scott in the upper arm). The two theories for this one assault – (count 1) with a deadly weapon and (count 2) recklessly inflicting substantial bodily harm – are merely alternative means by which the assault could have been

committed. See State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) (various statutory alternatives under RCW 9A.36.021(1) are alternative means of committing a single criminal offense).

As this Court explained in Wright:

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 Wn.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"). . . .

State v. Wright, 165 Wn.2d 783, 802, 203 P.2d 1027 (2009).

In Sanabria, the defendant was indicted on one count of violating former 18 U.S.C. § 1955 (1976 ed.),³ which prohibited illegal gambling businesses. Prosecutors alleged two alternative theories of liability – that Sanabria had engaged in “numbers

³ The statute provided, in pertinent part, “Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.” 18 U.S.C. § 1955(a) (1976 ed.).

betting” and that he had engaged in “horse betting.” Sanabria, 437 U.S. at 56-58. The trial court mistakenly dismissed the numbers betting alternative based on a misunderstanding of the law. Id. at 58-59, 62. And, because prosecutors had failed to establish Sanabria’s connection with the operation’s horse betting activities, the trial court entered a judgment of acquittal in his favor. Id. at 59.

The First Circuit Court of Appeals reversed. Id. at 62. The prosecution conceded the trial court’s acquittal for insufficient evidence of horse betting activities precluded any retrial on that theory of liability. Id. at 61. The Court of Appeals, however, found no such limitation regarding the numbers theory, which it found improperly dismissed for reasons other than insufficient evidence. Viewing the horse theory and numbers theory as “discrete bas[es] of criminal liability,” the Court remanded for retrial limited to the alleged numbers betting. Id. at 61-62.

The United States Supreme Court reversed, concluding that acquittal for insufficient evidence on any one theory of criminal liability precluded retrial on any other theory because retrial would be on the “same offense” for double jeopardy purposes. Id. at 69. Notably, the Court rejected the notion that, had the prosecution simply charged a separate count for each theory of liability (i.e.,

each alleged activity), the impact of the acquittal would differ. The Court made clear that a single offense should not be divided in that manner: "A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged." Id. at 66 n.20 (citing federal rules). However, even if the alternative means had been divided by count, the Court found, "petitioner here was acquitted for insufficient proof of an element of the crime which both such counts would share – that he was 'connected with' the single gambling business. This finding of fact stands as an absolute bar to any further prosecution for participation in that business." Id. at 72-73 (citation omitted).

These same principles apply in Fuller's case. The State alleged a single assault (striking Scott once in the arm with a bat) established under two alternative means (deadly weapon or reckless infliction of substantial bodily harm). These alternatives should have been charged in a single count rather than two. Regardless, however, jurors found in count 2 that Fuller did not assault Scott (proof required under both counts) and that acquittal is an absolute bar to any further prosecution.

That jurors deadlocked on count 1, resulting in a mistrial, is irrelevant. It does not change the fact of acquittal for that very

same crime. A jury's inability to reach a verdict on one count, where the jury acquits on another, is considered a "nonevent" and does not affect the acquittal's preclusive force under double jeopardy principles. See Yeager v. United States, 557 U.S. at 112, 120-123.

Yeager involved multiple federal charges of fraud and insider trading. The issue before the Court was the preclusive effect of acquittal on the fraud counts where jurors hung on the trading counts and all crimes shared a common element of proof – possession of inside information. Yeager, 397 U.S. at 112-117. Because the Yeager Court examined whether multiple crimes should be treated as the "same offense" for double jeopardy, it applied collateral estoppel analysis under Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), and looked for common issues litigated and decided in the defendant's favor. See Yeager, 557 U.S. at 117-123. Here, instead of multiple crimes, Fuller's case involves one crime artificially divided. Nonetheless, the Yeager Court's holding – that a jury's failure to reach a verdict on one count does not impeach or diminish the preclusive effect of a unanimous acquittal on another – supports Fuller's position that

jeopardy has terminated. The hung jury on count 1 is a "nonevent" in light of the acquittal on count 2.

In nonetheless concluding Fuller's acquittal for assault has no preclusive effect on a future retrial for that same assault, the Court of Appeals relied on decisions involving very different circumstances and legal issues.

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. In Fuller's case, the Court of Appeals reasoned that, under Michielli, jeopardy had not yet terminated based on the hung jury on count 1 and it would be premature to dismiss that count before a jury made a final determination. Slip op., at 4. Michielli, however, adds nothing to whether acquittal on assault predicated on one means precludes a subsequent trial for the same assault based on an alternative means. Sanabria and Yeager establish that jeopardy terminated with Fuller's acquittal on count 2 regardless of the mistrial on count 1. There is nothing premature about a ruling preventing the State from forcing another trial.

In State v. Ramos, 163 Wn.2d 654, 658, 184 P.3d 1256 (2008), jurors returned a general verdict of guilty for Murder in the Second Degree based on two alternative means – felony murder predicated on assault or intentional murder – contained in a single instruction that did not require juror unanimity as to the means on which they relied. Id. at 657-658. By special interrogatory, jurors indicated they unanimously agreed felony murder had been proved beyond a reasonable doubt, but they had not been unanimous with respect to intentional murder. Id. at 658. The felony murder means was later deemed legally insufficient under In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and the defendants' murder convictions were vacated. Id. at 658-659. Following remand, the defendants were convicted of the lesser-included offense of manslaughter and appealed, arguing jurors in the first trial had actually or impliedly acquitted them of murder in the first trial, thereby precluding their subsequent prosecution for manslaughter under double jeopardy protections. Id. at 659-660.

This Court disagreed. Applying Washington's rule for juror unanimity – i.e., unanimity is not required so long as substantial

evidence supports each charged means⁴ – this Court found substantial evidence supporting both the felony murder and intentional murder means of committing Murder in the Second Degree. Id. at 660-661. Moreover, jurors' indication by special interrogatory that they were not unanimous as to intentional murder was of no moment since they were properly instructed they need not be unanimous on either alternative. Id. at 661. Because there was no unanimity violation, much less an express or implied acquittal for murder, there was no bar to retrial on the lesser-included offense of manslaughter. Id. at 661-662.

Although the Ramos Court found no unanimity violation, it noted that, even where an alternative means for committing a crime is ultimately invalidated for insufficient evidence and the record does not establish unanimity on a valid alternative, double jeopardy does not prohibit retrial on the remaining valid alternative. Id. at

⁴ Washington's approach to ensuring unanimous verdicts differs from the federal courts:

Under the federal constitution, a general verdict of guilty on a single count charging the commission of an offense by alternative means is valid when any single means is sustainable. See *Griffin v. United States*, 502 U.S. 46, 50, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). The Washington Constitution provides greater protection of the jury trial right, requiring reversal if it is impossible to rule out the possibility the jury relied on a charge unsupported by sufficient evidence. . . .

Wright, 165 Wn.2d at 803 n.12 (citations omitted).

660-661. This statement does nothing more than acknowledge that, where there is a potential unanimity violation based on insufficiency of the evidence as to one or more means within a single count, Washington courts (unlike their federal counterparts) will not assume jurors unanimously agreed on a means supported by sufficient evidence. Instead, they will assume a violation and remand for a new trial. What they will not do, however, is assume jurors unanimously relied on a means *unsupported* by sufficient evidence, thereby precluding retrial under double jeopardy principles.

No such speculative assumptions are necessary in Fuller's case. In count 2, jurors were asked to determine whether Fuller assaulted Scott and they unanimously found the State had not proved that crime beyond a reasonable doubt. With that acquittal, jeopardy terminated and the State cannot retry Fuller for the same assault on an alternative theory. 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.

In State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014), the defendant was tried and convicted of kidnapping based on three alternative means contained in a single instruction. Garcia, 179

Wn.2d at 836. Once again applying Washington law on juror unanimity, this Court held, where the evidence was insufficient to convict on two of the three means, Garcia was entitled to reversal and a new trial limited to the one means for which there was supporting evidence. Id. at 843-844. Like Ramos, Garcia does not involve a unanimous *acquittal* on a charge or the double jeopardy consequences of such an acquittal on retrial for that same offense. Rather, the concern in Garcia was lack of juror unanimity concerning various means by which the offense could be committed and the proper remedy for such a violation in light of Washington's more protective jury trial guarantees. See id. at 843-844 (Washington Constitution provides greater protection of jury trial right and requires new trial following possibility jury relied on alternative means unsupported by evidence).

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) – does not control, either. Daniels was convicted of Felony Murder predicated on either assault or criminal mistreatment. Id. at 259-260. Her conviction was reversed under Andress because assault could not serve as the predicate to felony murder. Id. at 261. The Supreme

Court rejected Daniel's argument that double jeopardy prevented her retrial for murder based on 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. Her conviction was reversed based on Andress, not a lack of evidence, and there was sufficient evidence to support the predicate of criminal mistreatment. Id. at 265. 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 for that same offense on an alternative theory of liability.

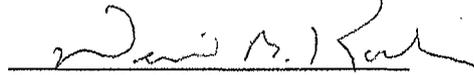
D. CONCLUSION

Consistent with Wright, Sanabria v. United States, Yeager v. United States, and well-established double jeopardy principles, this Court should find that Fuller's undisturbed and unanimous acquittal terminated his jeopardy for assault and prevents a retrial.

DATED this 7th day of August, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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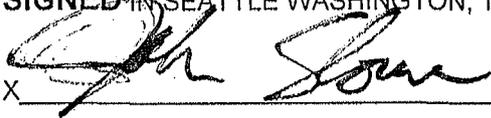
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[X] JOHNNY FULLER
4365 SALISHAN BOULEVARDE
TACOMA, WA 98404

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF AUGUST 2015.

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Cc: PCpatcecf@co.pierce.wa.us; Therese Nicholson-Kahn
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Attached for filing today is a supplemental brief of petitioner for the case referenced below.

- State v. Johnny Fuller

- No. 91193-2

- Supplemental Brief of Petitioner

Filed By:
David Koch
Nielsen, Broman & Koch
206.623.2373
WSBA No. 23789

kochd@nwattorney.net

Thanks

John Sloane
Office Manager
Nielsen, Broman & Koch PLLC
1908 East Madison St.
Seattle, WA 98122

206-623-2373

