

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Aug 07, 2015, 2:38 pm
BY RONALD R. CARPENTER
CLERK

NO. 91193-2

by
RECEIVED BY E-MAIL

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNY DALE FULLER, APPELLANT

Review of Court of Appeals # 72431-2-I
Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 12-1-03439-9

Supplemental Brief of Respondent

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

 ORIGINAL

Table of Contents

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

1. Where one crime is charged by different means in separate counts, does a hung jury mistrial on one of the counts result in continuing jeopardy on that count? 1

2. Where one crime is charged by different means in separate counts, does an acquittal on one count terminate jeopardy for both counts? 1

B. STATEMENT OF THE CASE. 1

1 Procedure 1

2. Facts 2

C. ARGUMENT..... 3

1. DOUBLE JEOPARDY DOES NOT BAR THE STATE FROM TRYING THE DEFENDANT A SECOND TIME FOR ONE COUNT OF ASSAULT WHERE A JURY DEADLOCK RESULTED IN MISTRIAL..... 3

D. CONCLUSION. 11

Table of Authorities

State Cases

In re Personal Restraint of Andress, 147 Wn.2d 602,
56 P.3d 981 (2002)9

In re Personal Restraint of Hinton, 152 Wn.2d 853,
100 P.3d 801 (2004)9

State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).....4

State v. Daniels, 160 Wn.2d 256, 265, 156 P.3d 905 (2007), *adhered to on
recons.*, 165 Wn.2d 627, 628, 200 P.3d 711 (2009).....8

State v. Ervin, 158 Wn.2d 746, 752–53, 147 P.3d 567 (2006)8

State v. Fuller, #72431-2-I, noted at 184 Wn. App. 1045 (2014)
(2014 WL 6657534)2

State v. Garcia, 179 Wn. 2d 828, 318 P.3d 266 (2014)8, 9

State v. Glasmann, 183 Wn. 2d 117, 349 P. 3d 829 (2015)8

State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).....4

State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010)4

State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008)4

State v. Kinchen, 92 Wn. App. 442, 452, 963 P. 2d 928 (1998)..... 10

State v. McPhee, 156 Wn. App. 44, 56, 230 P.3d 284 (2010).....11

State v. Noltie, 116 Wn.2d 831, 842, 839 P.2d 190 (1991).....4

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994).....5, 6, 7

State v. Owens, 180 Wn. 2d 90, 95, 323 P. 3d 1030 (2014)6, 7

State v. Ramos, 163 Wn. 2d 654, 660-661, 184 P. 3d 1256 (2008).....10

State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).....7

<i>State v. Strine</i> , 176 Wn.2d 742, 757, 293 P.3d 1177 (2013)	11
<i>State v. Trujillo</i> , 112 Wn. App. 390, 411, 49 P.3d 935 (2002).....	5
<i>State v. Womac</i> , 160 Wn.2d 643, 658, 160 P.3d 40 (2007)	4, 5
<i>State v. Wright</i> , 165 Wn.2d 783, 203 P.3d 1027 (2009)	9
Federal and Other Jurisdictions	
<i>Ball v. U.S.</i> , 470 U.S. 856, 859, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985).....	4
<i>Burks v. United States</i> , 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978).....	10
<i>Cochran v. United States</i> , 157 U.S. 286, 290, 15 S. Ct. 628, 630, 39 L. Ed. 2d 704 (1895).....	6
<i>Green v. United States</i> , 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed.2d 199 (1957).....	7
<i>Illinois v. Somerville</i> , 410 U.S. 458, 461, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973).....	11
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969).....	3
<i>Richardson v. Unites States</i> , 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).....	10
<i>Sanabria v. U.S.</i> , 437 U.S. 54, 66 n. 20, 98 S. Ct. 2170, 57 L. Ed 2d 43 (1978).....	5, 6, 7
<i>Tibbs v. Florida</i> , 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982) ..	9
<i>United States v. Martin Linen Supply Co.</i> , 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed 2d 642 (1977).....	7

Constitutional Provisions

Art. 1, § 9 of the Washington State Constitution.....3

Fifth Amendment of the United States Constitution3

Wash. Const. art. I, § 216

Statutes

RCW 9A.36.021(1).....5

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

1. Where one crime is charged by different means in separate counts, does a hung jury mistrial on one of the counts result in continuing jeopardy on that count?
2. Where one crime is charged by different means in separate counts, does an acquittal on one count terminate jeopardy for both counts?

B. STATEMENT OF THE CASE.

1. Procedure

Originally, the Pierce County Prosecuting Attorney (State) charged Johnny Fuller, the defendant, with one count of assault in the second degree. CP 1. The State later amended the Information to add charges of possession and trafficking in stolen property. CP 3-5. Prior to trial, the State again amended the Information to charge two counts of assault in the second degree, each by different means: with a deadly weapon; and inflicting substantial bodily harm. CP 51-53.

The case proceeded to trial. 1 RP 4. After hearing all the evidence, the jury acquitted the defendant on Count II (assault causing bodily injury), Count III (trafficking in stolen property), and Count IV (possession of stolen property). CP 116, 118, 120. The jury deadlocked

regarding Count I (assault with a deadly weapon). CP 131. The court declared a mistrial on Count I, regarding the hung jury. *Id.*

The case was reassigned to a different judge for a new trial on Count I. 7/11/2013 RP 3. The defendant moved to dismiss Count I, arguing a violation of Double Jeopardy. CP 124-125. After hearing argument, the court denied the motion. CP 131. The trial was stayed pending appeal of the issue. CP 154-156.

The Court of Appeals affirmed the trial court, holding that retrial did not violate Double Jeopardy. *See State v. Fuller*, #72431-2-I, noted at 184 Wn. App. 1045 (2014)(2014 WL 6657534).

2. Facts¹

Vincent Nix and Robert Scott suspected that their neighbor, the defendant, had stolen, or at least acquired, their respective children's bicycles. 2 RP 135, 143. The two men went to the defendant's home to ask about the bikes and to retrieve them. 2 RP 144. The defendant requested that they leave. 2 RP 149. The two men said they would call the police and await their arrival. 2 RP 192.

The defendant went into the house and armed himself with an aluminum baseball bat. 2 RP 150, 192. The defendant came outside brandishing the bat. 2 RP 150, 193. The defendant approached Nix, who

¹ For the purpose of clarity and brevity, these facts have been abridged to contain those which are most relevant to the issues before this Court. Additional facts may be found in the Court of Appeals opinion and in the Respondent's Brief in the Court of Appeals.

backed up. 2 RP 151. The defendant then approached Scott and struck him in the arm with the bat. 2 RP 153, 194. Scott struggled with the defendant and disarmed him. 2 RP 154, 198. Nix called 911 for police and medical aid. 2 RP 156, 199. Scott's injury required medical attention and later surgery. 2 RP 201, 202.

C. ARGUMENT.

1. DOUBLE JEOPARDY DOES NOT BAR THE STATE FROM TRYING THE DEFENDANT A SECOND TIME FOR ONE COUNT OF ASSAULT WHERE A JURY DEADLOCK RESULTED IN MISTRIAL.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." It protects against being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense. *See, North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969). Art. 1, § 9 of the Washington State Constitution has a similar Double Jeopardy Clause. It provides that no person shall "be twice put in jeopardy for the same offense."

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the Double Jeopardy Clause of Article I, section 9 of the Washington Constitution provide the same protection.

State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Claims of double jeopardy are questions of law that are reviewed de novo. See *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Double jeopardy bars retrial on the same crime if three requirements are met: (1) jeopardy previously attached, (2) jeopardy terminated, and (3) the defendant is in jeopardy a second time for the same offense in fact and law. *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).

a. The State properly charged the defendant.

The State may charge a crime by different or alternative means. See *State v. Noltie*, 116 Wn.2d 831, 842, 839 P.2d 190 (1991). The State may charge, and try, multiple counts that may combine, merge, or be dismissed at sentencing. See *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); see also *Ball v. U.S.*, 470 U.S. 856, 859, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). In *State v. Womac*, 160 Wn.2d 643, 658, 160 P.3d 40 (2007), this Court recognized that the State may pursue multiple charges arising from the same criminal conduct, but the State may only obtain one conviction for the same offense. *Womac* dealt with the issue of double jeopardy in the context and form of merger, but the same principle applies in the present case. Where the State charges alternative means by separate counts, it may only obtain one conviction. But the jury need not convict on all alternative means.

In the present case, for unknown reasons, the prosecuting attorney chose to charge different means of assault in the second degree by

charging separate counts. 7/11/2013 RP 19-20. The assault with the deadly weapon and the assault by injury constituted separate means of committing the crime of assault in the second degree under RCW 9A.36.021(1). By doing so, the prosecutor needed unanimous verdicts per means instead of a unanimous general verdict. *Cf. State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994).

- b. The State's charging decision did not diminish the defendant's right to a unanimous jury verdict.

It is preferable to charge all alternative means in one count. *See Sanabria v. U.S.*, 437 U.S. 54, 66 n. 20, 98 S. Ct. 2170, 57 L. Ed 2d 43 (1978). However, it is not required. If the State charges alternative means in separate counts, a conviction will result only if a unanimous verdict of "guilty" is reached on at least one count. Thus, instead of obtaining a general guilty verdict from alternatives charged in one count, the State risks losing or a hung jury on the counts if the jurors cannot agree on the means with which the crime was committed. Even if the jury unanimously agrees that the crime was committed by both alternative means, only one conviction may stand. *See, Womac*, 160 Wn.2d at 658; *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002).

The manner in which the charging document is worded or structured can be significant regarding possible retrial. An important function of the charging document is to ensure that, "in case any other

proceedings are taken against [the defendant] for a similar offence, . . . the record [will] sho[w] with accuracy to what extent he may plead a former acquittal or conviction.” *Sanabria*, 437 U.S. at 66, quoting *Cochran v. United States*, 157 U.S. 286, 290, 15 S. Ct. 628, 630, 39 L.Ed.2d 704 (1895).

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. I, § 21. The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. See *State v. Owens*, 180 Wn. 2d 90, 95, 323 P. 3d 1030 (2014); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If the alternative means are charged in separate counts, the defendant’s right to a unanimous verdict is protected. His right to express jury unanimity on the means is especially so protected where the verdicts must be per means, and not a general verdict.

If the alternative means are charged in one count, in order to protect the defendant’s right to a unanimous verdict, sufficient evidence must exist to support each of the alternative means presented to the jury. *Ortega-Martinez, supra*. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary because the reviewing court infers that the jury rested its

decision on a unanimous finding as to the means. *Id.* at 707–708; *see also State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

In *Owens*, the defendant was charged, by alternative means, with trafficking in stolen property. He argued that there was insufficient evidence of one of the means; and no expression by the jury of which means it had chosen to convict. 180 Wn. 2d at 95-96. He did not contest the sufficiency of evidence of the other means charged. *Id.*, at 100. If the means had been charged in different counts, as in the present case, Owens would have known upon which means the jury had chosen to convict.

If the alternative means are charged in separate counts, the defendant is informed of which means the jury has made its determination. The verdict must be unanimous and supported by sufficient evidence. The defendant's rights are protected.

c. The defendant was not acquitted of Count I.

An acquittal is “a resolution, correct or not, of some or all of the factual elements of the offense charged.” *Sanabria*, 437 U.S. at 71, quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed 2d 642 (1977).

There are circumstances where, depending upon a state's law and the manner in which the verdict forms are worded, an acquittal may be implied where the jury fails to render a verdict. *See Green v. United States*, 355 U.S. 184, 190–191, 78 S. Ct. 221, 2 L. Ed.2d 199 (1957). However, the implied acquittal doctrine does not apply if the jury fails to

agree and the disagreement is evident from the record. *State v. Ervin*, 158 Wn.2d 746, 752–53, 147 P.3d 567 (2006).

This Court has consistently rejected circumstances where an acquittal was implied. After *Ervin*, the Court discussed the implied acquittal doctrine again in *State v. Daniels*, 160 Wn.2d 256, 265, 156 P.3d 905 (2007) (*Daniels I*), *adhered to on recons.*, 165 Wn.2d 627, 628, 200 P.3d 711 (2009) (*Daniels II*), and most recently in *State v. Glasmann*, 183 Wn. 2d 117, 349 P. 3d 829 (2015). While both of those cases involved the issue of retrial after successful appeal, the “implied acquittal” issue arose where the jury failed to return a verdict- were unable to agree- on the charged crime. Because in each of those cases, the jury was unable to agree, jeopardy continued, permitting the State to retry the defendant on the original charge. *Daniels*, at 264; *Glasmann*, at 833.

Here, the defendant was acquitted of Count II, but not Count I. Similar to *Ervin*, *Daniels*, and *Glasmann*, the jury was unable to agree on a verdict on Count I. Because the jury was unable to agree on Count I, jeopardy continues, which permits the State to re-try the defendant on that count.

In *State v. Garcia*, 179 Wn. 2d 828, 318 P.3d 266 (2014), 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. Although double jeopardy prevented retrial on the counts with insufficient evidence, the Court remanded for a new trial under the “surviving” one of three alternatives. *Id.*, at 843-844.

In *State v. Wright*, 165 Wn.2d 783, 203 P.3d 1027 (2009), 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). But the factual and legal context of *Wright* was not lack of evidence; but convictions vacated for legal reasons based on *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). In *Wright*, the Supreme Court held that the double jeopardy clause did not bar the retrials under the intentional murder alternative. *Id.*, at 788.

Under *Garcia* and *Wright*, if a case is charged by alternative means and trial court dismisses one at the close of the State’s case for lack of evidence, the ruling does not control the remaining means, nor bar it, based upon Double Jeopardy. Similarly, here, where the jury acquitted on one count regarding one means of committing the crime, that verdict does not control, or terminate jeopardy of another count charging a separate means of committing the crime.

To further illustrate, the alternative means principle dictates that when a jury renders a guilty verdict as to a single crime, but one of the alternative means for committing that crime is later held to be invalid on appeal and the record does not establish that the jury was unanimous as to the valid alternative in rendering its verdict, double jeopardy does not bar retrial on the remaining, valid alternative mean. *See State v. Ramos*, 163 Wn. 2d 654, 660-661, 184 P. 3d 1256 (2008); *see also State v. Kinchen*, 92 Wn. App. 442, 452, 963 P. 2d 928 (1998). This is the case even when one alternative mean has been reversed on appeal due to a finding of insufficient evidence, a finding that has the same double jeopardy implications as an outright acquittal in other circumstances. *Ramos, supra*, citing *Burks v. United States*, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978).

Therefore, the acquittal in Count I does not control or compel the result in Count II, nor prevent retrial under double jeopardy.

d. Jeopardy has not terminated in Count I.

The Double Jeopardy Clause only applies if “there has been some event, such as an acquittal, which terminates the original jeopardy.” *Richardson v. Unites States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984). As argued above, there was no acquittal terminating jeopardy in Count I.

There is no dispute that jeopardy does not terminate when the trial judge discharges the jury because there was a manifest necessity;

specifically, as here, a hung jury. See *Illinois v. Somerville*, 410 U.S. 458, 461, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); *State v. Strine*, 176 Wn.2d 742, 757, 293 P.3d 1177 (2013); *State v. McPhee*, 156 Wn. App. 44, 56, 230 P.3d 284 (2010). Therefore, the State may retry a defendant for the same crime where a trial ends in a hung jury. *Id.*

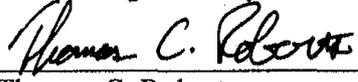
In the present case, there was a mistrial for a hung jury regarding Count I, therefore, jeopardy regarding that count has not terminated, but is continuing.

D. CONCLUSION.

The trial court properly denied the defendant's motion to dismiss Count I because jeopardy has not terminated on that count. The Court of Appeals correctly affirmed that decision. The State respectfully requests that the trial court and Court of Appeals be affirmed and the case proceed to trial.

DATED: August 7, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

OFFICE RECEPTIONIST, CLERK

To: Therese Nicholson-Kahn
Cc: John Sloane
Subject: RE: St. v. Johnny Fuller, No. 91193-2

Received August 7, 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: Friday, August 07, 2015 2:34 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: John Sloane
Subject: St. v. Johnny Fuller, No. 91193-2

Please see attached the State's Supplemental Brief of Respondent in the below matter:

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

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

Thank you,

Therese Kahn
Legal Assistant to T. Roberts