STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NO. 2016AP000142 - CRLV

CIRCUIT COURT CASE NO. 2013CF1742

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

ANTHONY ALVARADO,
Defendant-Petitioner.

DEFENDANT-PETITIONER'S REPLY BRIEF

JOHN A. CABRANES
Attorney at Law
State Bar No. 1023311

CABRANES LAW OFFICES, LLC
840 Lake Avenue, Suite 100
Racine, Wisconsin 53403
262-638-0529
Email: cabraneslawoffices@yahoo.com

Attorney for Defendant-Petitioner
Anthony Alvarado

On Appeal from Racine Circuit Court Branch 2
Hon. Eugene Gasiorkewicz
Presiding

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REPLY

THE NOTE FROM THE JURY FOREPERSON WAS A VERDICT ON THE COUNT OF SECOND DEGREE SEXUAL ASSAULT AND IT WAS ERROR TO DECLARE A MISTRIAL ON THAT CHARGE

The State's reply brief brings forth the argument that the Court had not accepted or received the jury's verdict and therefore there is no bar to a re-trial. In support of that argument the State relies on decisions of the Federal Court of Appeals, *United States v. Taylor,* 507 F.2d 166 (5th Cir. 1975) and *United States v. Rastrelli*, 870 F.2d 822 (2nd Cir. 1989) for the proposition that the jury's decision is not final until the deliberations are over and the result announced in open court with no dissent from the jurors.

The State's reliance on *Taylor and Rastrelli* and their progeny is misguided. The issues in each of those cases concerned the death of a juror during deliberations but before a verdict was reached and the central holdings of those cases are whether a verdict may be received from a eleven member jury where there would not be an opportunity for the absent juror to register dissent with the announced verdict.

Similarly, the State relies on decisions *State v. Wery,* 2007 WI App 169, 304 Wis.2d 355, 737 N.W.2d 66 (Ct. App. 2007) and *State v. Knight*, 143 Wis.2d 408, 421 N.W.2d 847 (1988) for the same propositions as the *Taylor* and

Rastrelli decisions. Those decisions are easily distinguishable as well. In *Knight* the issue centered around a jury who that indicated to the Court that they were hung on a number of counts but had reached verdicts in others. The Judge brought the jury into the courtroom reviewed the verdicts that were submitted, gave an *Allen*[1] instruction and sent the jury back to deliberate, after which the jury returned with guilty verdicts on all counts. Of note, the Wisconsin Court of Appeals found that a review of the verdict (which was apparently done outside of the presence of the attorneys and without polling the jury, *Knight*, 143 Wis.2d at 413, 421 N.W.2d at 849) was in fact a verdict, in spite of the fact that the verdict had not received in open court, the results had not been announced and the jury had not been polled. The central issue in Knight was whether the Court's mistake of sending the jury back to deliberations necessitated a re-trial of all charges.

Neither is the issue in *Wery* on point. In *Wery* the defendant had entered a plea of Not Guilty by Reason of Mental Defect or Disease (NGI). After the guilt phase of the trial and during the NGI phase of the trial, the

[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896)

foreperson informed the Judge that one of the jurors had changed their mind, *Wery* 2007 WI App at ¶3, 304 Wis.2d at 362-63, 737 N.W.2d at 69-70. The holding in *Wery* was about the finality of the verdict and not about what constitutes a valid verdict.

Further proof that neither *Taylor, Rastrelli, Wery* nor *Knight* are the final word on the form of a verdict can be found in *Blueford v. Arkansas*, 132 S.Ct. 2044 (2012). As has previously been discussed, the facts in *Blueford* are similar but distinguishable from the facts in the present case. The decision in *Blueford* hinged on whether the jury had actually finished deliberating given the length of time between the note to the Court indicating that they had reached a verdict on some charges but were hung on others. At no point during the *Blueford* decision is there any mention of how a judgment is accepted or received. If that is indeed the law, all Chief Justice Roberts would have had to say in order to reject Blueford's appeal was that the verdict was not received because it was not received in open court, the results had not been announced and there had been no polling of the jury. Instead, the thrust of Chief Justice Roberts opinion was related to time. The time between the final (of two) *Allen* instruction and the time the jury reported to the Court that they had been

unable to reach a verdict on the lesser charges. More importantly, all of the cases cited by the State of Wisconsin, *Taylor* and *Rastrelli*, were in existence at the time of the *Blueford* decision. The Supreme Court's silence on *Taylor* and *Rastrelli* is deafening, and instructive.

In this case a verdict was rendered pursuant to well established United States Supreme Court decisions in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) holding that the jury's statements represented a resolution of some or all of the factual elements of the offense charged. *Martin Linen* at 571. *United States v. Ball*, 163 U.S. 662 (1896) holds that the Double Jeopardy Clause may bar retrial regardless of whether a formal judgment of acquittal has been entered. In this context, not only is *Blueford* an anomaly in the chain of United States Supreme Court Double Jeopardy cases, it is easily distinguishable due to the timing involved. In *Blueford* there was a delay of somewhere around a half hour between the foreperson's note and the Court's declaration of a mistrial, in this case the note was immediately followed by the mistrial.

Lastly, our State Supreme Court has repeatedly has repeatedly stated that it views the prohibitions against Double Jeopardy contained in the Federal and State Constitutions to be identical in scope and purpose and

accepts the decisions of the United States Supreme Court as controlling authority. *State v. Kelty*, 294 Wis.2d 62, 72 (2006) (citing *State v. Davison*, 2003 WI 89 ¶18, 263 Wis.2d 145 (2003)). In their Double Jeopardy decisions the United States Supreme Court has made one thing very clear, substance trumps form. The Jury's decision to acquit Mr. Alvarado should be respected as a Constitutionally protected right.

CONCLUSION

For all of the reasons stated above, Mr. Alvarado prays that this Court uphold the jury's verdict of acquittal on the charge of Second Degree Sexual Assault. Respectfully submitted this 27th day of July, 2016

John A. Cabranes
State Bar No. 1023311
Attorney for Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is produced with a mono-spaced font, 10 characters per inch, double spaced, left margin is set at 1.5 inches and other margins have been set at 1.0 inches.

Dated this 27th day of July, 2016.

John A. Cabranes
Attorney at Law
State Bar No. 1023311

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of §809.19(12).

I further certify this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of the brief filed with the Court and served on all opposing parties.

Dated this 27th day of July, 2016.

John A. Cabranes
Attorney at Law
State Bar No. 1023311

Please Direct Inquiries to:
Attorney John A. Cabranes
Cabranes Law Offices
840 Lake Avenue, Suite 100
Racine, Wisconsin 53403
(262) 638-0529
cabraneslawoffices@yahoo.com