No. 93349-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LEO LAVERN RUBEDEW,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 47183-3-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 13-1-01876-6
The Honorable Garold Johnson, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is LEO LAVERN RUBEDEW, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 47183-3, which was filed on May 10, 2016 and amended upon reconsideration on June 28, 2016. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Should double jeopardy have precluded the State from prosecuting Leo Rubedew for first degree assault, where it is well established that a charge of attempted murder and a charge of assault based on the same factual allegation are the same offense and where a jury already found Rubedew not guilty of attempted murder?

2. Did jeopardy terminate when the jury found Leo Rubedew not guilty of the attempted murder charge but did not reach a verdict on the assault charge, where attempted murder and assault are the same offense in fact and law?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Leo Lavern Rubedew by Amended Information with one count of attempted first degree murder (RCW 9A.32.030) and one count of first degree assault (RCW 9A.36.011).

(CP 5-6) Both charges were based on the allegation that Rubedew pointed a firearm at his ex-wife and tried unsuccessfully to pull the trigger. (CP 3-4, 5-6) The State also alleged that Rubedew was armed with a firearm and that the offenses were domestic violence incidents. (CP 5-6)

Rubedew's first trial ended in a mistrial after Rubedew was hospitalized and his ill health prevented him from attending court proceedings. (1TRP3 310, 361-63, 369)[1] His second trial also ended in a mistrial, after the jury returned a not-guilty verdict on the murder charge but deadlocked on the assault charge. (2RP3 304-06; CP 43)

Rubedew moved to dismiss the assault charge, arguing that both double jeopardy and collateral estoppel principles protect him from subsequent prosecutions for the same offense. (3TRP1 15-24; CP 52-66, 81-85) The trial court disagreed, and allowed the State to retry Rubedew on the first degree assault charge. (3TRP1 35, 40, 41-42)

The third jury found Rubedew guilty of assault, and found that he was armed with a firearm and the offense was a domestic

[1] The transcripts from the different trials will be referred to by the trial number (#T) followed by the volume number (RP#) for that trial. The transcript from the sentencing hearing will be referred to as "SRP."

violence incident. (3TRP3 391; CP 108-10) The trial court imposed the low end of the standard range and a mandatory firearm enhancement, for a total term of confinement of 153 months. (SRP 407-08; CP 130, 133)

Rubedew appealed. (CP 141) The Court of Appeals rejected Rubedew's challenges to his convictions, but ordered that his case be remanded for a hearing on his ability to pay trial legal financial obligations.

B. SUBSTANTIVE FACTS

Charlaine Bramlett and Leo Rubedew were married in 1988 and divorced in 2009. (3TRP2 151) According to Bramlett, the marriage fell apart due to Rubedew's drinking problem. (3TRP2 155) After she and Rubedew divorced, Bramlett purchased a house on her own. (3TRP2 156) But after Rubedew attempted suicide, and because she was having trouble affording the home ownership expenses by herself, Bramlett decided to let Rubedew move in with her. (3TRP2 156-57)

Rubedew slept in the second bedroom and paid rent, and Bramlett paid utilities and food and other expenses. (3TRP2 257) When his health deteriorated and he suffered kidney failure, Bramlett cared for Rubedew and assisted with his daily dialysis

treatments. (3TRP2 158, 189-90) Bramlett testified that Rubedew had a gun when he moved into her house, and that she had placed the gun and its bullets in a box on the shelf of her closet. (3TRP2 160)

On May 7, 2013, Rubedew left the house early to go to church, and Bramlett left later in the morning to go shopping with friends. (3TRP2 163-64) When Bramlett returned that afternoon, Rubedew was not home. (3TRP2 163-64) When Rubedew did arrive home a few hours later, Bramlett could tell he had been drinking. (3TRP2 165) She testified Rubedew was very drunk and was having trouble standing up. (3TRP2165196-97)

Bramlett followed Rubedew to his room, and she saw he had the keys to her van. (3TRP2165) Bramlett picked up the keys and told Rubedew he could never drive her van again. (3TRP2165) Bramlett also told Rubedew that she wanted him to move out. (3TRP2166) According to Bramlett, this made Rubedew very angry, and he started screaming at her. (3TRP2166)

Bramlett went to the living room and sat down. (3TRP2 166) Rubedew continued to yell at Bramlett as he walked back and forth

between the bedrooms and the living room.[2] (3TRP2166) Bramlett testified that Rubedew then walked in the living room and stood with one hand behind his back. (3TRP2167) Rubedew told Bramlett to come outside, but she refused. (3TRP2 167) Then Rubedew turned slightly, and Bramlett could see that he had a gun in his hand. (3TRP2167)

Bramlett was concerned that Rubedew might be planning another suicide attempt, so she immediately reached for her phone and called 911. (3TRP2 169, 170) Bramlett informed the 911 operator that she told Rubedew to move out and "now he does not want to live anymore." (3TRP2 242; Exh. P1)

As she talked with the 911 operator, Rubedew walked out to the side yard and Bramlett followed him. (3TRP2 171) As Bramlett stood in the doorway watching Rubedew, her dogs ran excitedly into the yard. (3TRP2 171-72) Rubedew sat down in a patio chair about two feet away from Bramlett and yelled that she had ruined his life. (3TRP2 172-73, 174, 203) Then, according to Bramlett, Rubedew pointed the gun towards her head and said, "Get off the damn phone or I'm going to shoot you." (3TRP2 174, 203)

[2] Bramlett's and Rubedew's bedrooms are next to each other, and Bramlett did not see whether Rubedew walked into her bedroom or his own when he left the living room. (3TRP2 168)

Bramlett testified that she heard a click, which she believed sounded like the trigger being pulled. (3TRP2 174, 175-76)

The gun did not fire, however, and Bramlett testified that Rubedew fiddled with the gun, then put it into his mouth and tried to pull the trigger again. (3TRP2 176) Concerned for her safety, and for the safety of her dogs, Bramlett went back into the house and then out to the street to wait for the police to arrive. (3TRP2 177) She eventually saw Rubedew walk outside and lay down on the grass in front of the house, which is how the police found him when they arrived a short time later. (3TRP 1 84; 3TRP2 218-19)

Responding officers approached Rubedew with their guns drawn and ordered him to roll onto his stomach and to keep his hands visible. (3TRP1 84, 85) Rubedew complied, and when asked he told the officers that the gun was inside the house on the kitchen table. (3TRP1 86, 87) The officers found a .45 caliber semi-automatic gun on the table. (3TRP1 89) There was a bullet in the chamber but it was facing backwards. (3TRP1 90, 92; 3TRP3 287-88, 293) When the officers removed the magazine from the gun, they noted that the bullets inside the magazine had

also been loaded backwards.[3] (3TRP1 90, 92)

The responding officers noted that Rubedew seemed intoxicated, but was compliant and cooperative. (3TRP1 86; 3TRP2 135-36; 3TRP3 284) Rubedew told the officers that he was not trying to hurt Bramlett, that he was "not a bad guy," and that he only wanted to hurt himself. (3TRP1 88, 109; 3TRP2 134, 136) Bramlett gave a statement to a responding officer as well, and said that Rubedew pointed the gun at her and she heard a click. (3TRP3 263, 264) When the gun did not fire, she saw Rubedew pulling on the slide in an effort to get a bullet in the chamber, then he put the gun into his mouth and pulled the trigger. (3TRP3 265, 272-73)

Firearms expert Kay Sweeney testified that she tried to mimic the condition that the gun was in when it was found by the officers. She loaded the bullets into the magazine backwards and loaded the magazine into the gun. (3TRP3 317, 330-31) With some manipulation, she was able to force a bullet into the chamber, but the gun would not fire. (3TRP3 318, 319) It did, however, make a clicking sound when she pulled the trigger. 3TRP3 325-26,

[3] Bramlett also testified that she later found bullets scattered on her bed. (3TRP2 178-79)

336) This process left markings on the chambered bullet similar to those found on the bullet taken from the chamber after police collected it at Bramlett's house. (3TRP 324-25)

V. ARGUMENT & AUTHORITIES

The issues raised by Leo Rubedew's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

The State charged Rubedew with attempted first degree murder and first degree assault. (CP 5-6) A person commits first degree assault if he, "with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). A person commits first degree murder if, "[w]ith premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a). A person attempts to commit a crime if, "with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

At the second trial, Bramlett testified that Rubedew heard

her talking on the phone, then he pointed the gun at her head and she heard a click, so she assumed that he pulled the trigger. (2TRP2 118) The defense took the position that Bramlett was wrong or mistaken about hearing a click, and that markings on the nose of the bullet were created when Rubedew manipulated the slide before putting it into his own mouth and pulling the trigger. (2TRP2 137-38; 3TRP3 266-67, 270, 273-74)

During closing arguments, the prosecutor explained the ultimate issue to the jury:

> Now, I'm going to boil all this down to you. The entire decision that you're going to have to make, the entire point in contention in this case is does the evidence support Charlaine Bramlett's version of events? That's it.
>
> Because if you believe Charlaine, if you believe that they got into a fight. If you believe he was drunk and he came out with a gun, *if you believe that at some point during that call [Rubedew] pointed that gun at [her] and [he] pulled the trigger*, *if you believe that, then he's guilty of both counts I and II*.
>
> If you have a reasonable doubt about that that [sic] actually happened, then he's not guilty.

(2VRP3 255, emphasis added) The jury found Rubedew not guilty of the attempted murder charge, but did not reach a verdict on the first degree assault charge. (2RP3 304-06; CP 43)

At the third trial, Bramlett similarly testified that Rubedew saw her talking on the telephone, then pointed the gun at her and

she heard a click which she assumed meant he pulled the trigger. (3TRP2 174, 175-76) The defense took the same position as was taken in the second trial. (3TRP3 238, 241, 372-73, 375, 376-77)

During closing arguments, the prosecutor again explained the ultimate issue to the jury:

> What does this entire case boil down to? All three of those elements, *the question is did the defendant try to shoot Charlaine on May 7th, 2013*. That's it. Because if you believe that beyond a reasonable doubt, that he did, then that satisfies all three elements.
>
> *If you believe he pointed the gun at her and pulled the trigger, then he assaulted her* with a firearm with intent to inflict great bodily injury.

(3TRP3 361, emphasis added)

Rubedew argued that his acquittal on the attempted murder charge at the second trial barred any subsequent prosecutions for charges relating to whether he pointed the gun at Bramlett and pulled the trigger, both on double jeopardy and collateral estoppel principles. (3VRP1 15-24; CP 52-66, 81-85) The trial court disagreed, and found no double jeopardy or collateral estoppel concerns with a third trial and additional prosecution of Rubedew for first degree assault. (3TRP1 35, 40, 41-42)

The United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life

or limb." U.S. Const. amd. V. The Washington State Constitution further provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." Wash. Const. Art. 1, § 9. The Double Jeopardy Clause embodies three protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (footnotes omitted).

Thus, "courts may not impose more than one punishment for the same offense and *prosecutors ordinarily may not attempt to secure that punishment in more than one trial*." Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (emphasis added).[4] "The primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant." Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 307, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984).

It is well settled in Washington that punishment for both

[4] Issues of double jeopardy are questions of law reviewed de novo. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

assault and murder (or attempted murder), based on the same act committed against the same victim, violates double jeopardy because they are the same offense. See In re Orange, 152 Wn. 2d 795, 100 P.3d 291 (2004); State v. Gohl, 109 Wn. App. 817, 37 P.3d 293 (2001); State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001). It must follow then, that a prosecution for assault, when the defendant has previously been found not guilty of murder or attempted murder, also violates double jeopardy because it represents a subsequent prosecution for the same offense.

For a defendant's double jeopardy right to be violated by a subsequent prosecution, three elements must be met: (a) jeopardy must have previously attached, (b) jeopardy must have previously terminated, and (c) the defendant is again being put in jeopardy for the same offense. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996) (and cases cited therein); State v. McPhee, 156 Wn. App. 44, 56, 230 P.3d 284 (2010). All three requirements were met in this case.

1. *Jeopardy attached when the jury was sworn for the second trial and terminated upon the jury's verdict of acquittal for attempted murder.*

First, jeopardy attaches in a jury trial when the jury is impaneled and sworn in. See State v. Ridgley, 70 Wn.2d 555, 557,

424 P.2d 632 (1967); Illinois v. Somerville, 410 U.S. 458, 467, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973). A jury was sworn in at the start of Rubedew's second trial. (1VRP1 90)

Second, jeopardy terminates with a verdict of acquittal. Corrado, 81 Wn. App. at 646; McPhee, 156 Wn. App. at 56. The jury returned a verdict of acquittal on the attempted murder charge at the conclusion of Rubedew's second trial. (2RP3 RP 305; CP 43) Jeopardy therefore terminated for this offense.

The State argued below that acquittal for the attempted murder charge did not bar retrial on the assault charge because the jury hung on the assault count and jeopardy does not terminate when the jury cannot reach a verdict. (CP 67-80; 3TRP1 25-30) The State is correct that retrial is generally allowed when a jury cannot reach a verdict.[5] It is also true that where a jury returns an acquittal on a greater offense and cannot reach a verdict on the lesser included offense, the State is not barred from retrying a defendant on the lesser offense.[6] But those rules do not apply in this case because there was an acquittal on the same offense, and

[5] See Corrado, 81 Wn. App. at 648; Richardson v. United States, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).
[6] See State v. Ahluwalia, 143 Wn.2d 527, 540-41, 22 P.3d 1254 (2001); State v. Russell, 101 Wn.2d 349, 351, 678 P.2d 332 (1984).

because first degree assault is not a lesser included offense of attempted murder.[7] The court of appeals dismissed this distinction, stating:

> That Rubedew's first degree assault charge was not a lesser included offense to attempted first degree murder is a distinction without a difference. If double jeopardy is not offended by retrial of a defendant for a lesser included offense that is the "same offense" as the greater crime for which the defendant has been acquitted, it follows that double jeopardy is not offended by retrial of a defendant for a non-lesser included offense arising from the same alleged criminal conduct as an offense for which the defendant has been acquitted.

Opinion at 7. But this is *exactly* what double jeopardy protections are meant to prevent—the retrial of a defendant for a different offense arising from same alleged criminal conduct.

Furthermore, the State charged assault as a separate count for which Rubedew faced conviction, in addition to the charge of attempted murder, based on the same act. (CP 5-6) By charging one count of attempted murder and one count of first degree assault, the State was attempting to obtain two convictions based on the same act. But when the jury acquitted Rubedew of one of the two charges, jeopardy terminated for that offense and any others that are the same offense. Corrado, 81 Wn. App. at 645;

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[7] See State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993).

McPhee, 156 Wn. App. at 56.

2. *Rubedew's charges of attempted murder and first degree assault are the same offense.*

"Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. Orange, 152 Wn. 2d at 815-16; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Brown, 432 U.S. at 165). Where "the relevant statutes do not expressly disclose legislative intent, Washington courts apply a rule of statutory construction that has been variously termed the 'same elements' test, the 'same evidence' test, and the Blockburger test." Orange, 152 Wn. 2d at 816; Calle, 125 Wn.2d at 777; Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

This Court's decision in Orange is instructive here. In that case, the defendant was convicted of both attempted first degree premediated murder and first degree assault for a single shot fired at a single victim. 152 Wn. 2d at 814-15. Orange argued on appeal that these two convictions violated double jeopardy, and this

Court agreed. 152 Wn. 2d at 815, 820.

The Court noted that the relevant statutes did not disclose any legislative intent that the two crimes should be punished separately, and so the Court moved on to the "same elements" test. Orange, 152 Wn. 2d at 816. Under this test, two statutory offenses are the same offense for double jeopardy purposes if they are identical both *in fact* and *in law*. Orange, 152 Wn. 2d at 816; State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The question is whether each offense includes an element not included in the other, and whether proof of one would necessarily prove the other. Orange, 152 Wn. 2d at 816; Baldwin, 150 Wn.2d at 454; Blockburger, 284 U.S. at 304.

The Orange Court applied this test to the charges and facts of the case presented, and held that "the crimes of first degree attempted murder (by taking the 'substantial step' of shooting at [the victim]) and first degree assault (committed with a firearm) were the same in fact and in law. The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault." Orange, 152 Wn.2d at 820.

Similarly, in Valentine, the court was asked to determine whether "[i]t is a double jeopardy violation to punish a stabbing separately as an assault when it is also the substantial step used to prove attempted murder." 108 Wn. App. at 26. The Valentine court concluded that convictions for attempted murder and assault based on the same act violates double jeopardy. 108 Wn. App. at 27. And in Gohl, Division One held convictions for both assault and attempted murder violated double jeopardy because attempted first degree murder and first degree assault convictions are the "same in law and in fact." 109 Wn. App. at 822.

Rubedew was charged with first degree assault and attempted murder. There is no question that the attempted murder and assault charges are the same *in fact* because they are based on the same act (pointing the gun and pulling the trigger), directed at the same victim (Bramlett). (CP 3-4, 5-6; 2TRP2 118; 2TRP3 255; 3TRP2 174; 3TRP3 361) There is no allegation that Rubedew tried to shoot the gun more than once, or that he engaged in any other act alleged to be an assault on or an attempted murder of Bramlett. Both charges are based on the single attempted shot directed at Bramlett, and the evidence used in an effort to obtain convictions for both is identical. This is precisely the fact pattern

this Court addressed in Orange when it held that punishing a single shot as both an attempted premeditated murder and an assault violates double jeopardy. 152 Wn.2d at 817.

The two charges are also the same *in law.* Under the "same evidence" or "same elements" test, the offenses are the same *in law* if proof of one offense would necessarily also prove the other. State v. Read, 100 Wn. App. 776, 791, 998 P.2d 897 (2000); Orange, 152 Wn. 2d at 816, 818, 819.

Obviously, proof of first degree assault does not necessarily prove murder, because a person may assault another person without actually causing death. See Read, 100 Wn. App. at 791. However, "proof of attempted murder committed by assault will always prove an assault." Valentine, 108 Wn. App. at 29; see also Read, 100 Wn. App. at 791. As the Read court stated when comparing first degree assault with second degree intentional murder: "A person who intends to cause death also must intend to inflict great bodily harm; and a person who (with intent) causes a person's death also assaults that person by a means likely to produce death. . . . Therefore, proof of second degree intentional murder necessarily also proves first degree assault." 100 Wn. App. at 791-92. Similarly here, because the evidence used to prove

attempted murder also proves first degree assault, the two crimes are also the same *in law*.

It is clear from established case law, and from the application of that law to Rubedew's case, that the attempted murder charge and the assault charge were the same offense. Rubedew was tried to completion and acquitted of the attempted murder charge. The subsequent prosecution for the "same offense" of first degree assault violated double jeopardy. Rubedew was twice put in jeopardy for the same offense. The trial court therefore erred when it refused to dismiss the assault charge after the second trial, and when it allowed the State to prosecute Rubedew in a subsequent third trial. Accordingly, Rubedew's assault conviction must be reversed and dismissed.

VI. CONCLUSION

"The 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[.]"[8]

[8] Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)

The attempted murder and assault charges are the same offense for double jeopardy purposes, and jeopardy attached and was terminated upon the not guilty verdict at Rubedew's second trial. The third trial on the assault charge violated Rubedew's right to be free from successive prosecutions for the same offense, and violated double jeopardy protections enshrined in both our Federal and State constitutions. Double jeopardy prohibited the State from seeking a conviction for assault in a third trial, and Rubedew's conviction must be vacated and dismissed with prejudice.

DATED: June 30, 2016

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Leo L. Rubedew

CERTIFICATE OF MAILING

I certify that on 6/30/16, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Leo L. Rubedew, DOC# 380256, Monroe Correctional Complex, P.O. Box 777, Monroe, WA 98272-0777.

STEPHANIE C. CUNNINGHAM, WSBA #26436

Filed
Washington State
Court of Appeals
Division Two

June 28, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEO LAVERN RUBEDEW, Appellant.	No. 47183-3-II ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING OPINION IN PART

Appellant Leo Rubedew has moved for reconsideration of the opinion in this case. After due consideration, we grant the motion and amend the opinion in part as follows.

On page 12 of this opinion, before the sentence beginning, "A majority. . ." we insert the following language:

APPELLATE COSTS

Rubedew argues that we should decline to impose appellate costs on him because he claims he is indigent. We exercise our discretion and decline to impose appellate costs.

Under former RCW 10.73.160(1) (1995), we have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, ___ P.3d ___ (2016). Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *Sinclair*, 192 Wn. App. at 389.

It appears from the limited trial court record that Rubedew does not have the present ability to pay appellate costs and it is questionable whether he will have the future ability to pay. The trial court found Rubedew indigent at trial, and counsel was appointed to represent Rubedew on appeal. The record does not support that Rubedew's indigent status is likely to change. RAP 15.2(f).

Under the specific circumstances of this case, we decline to impose appellate costs on Rubedew.

We do not amend any other portion of the opinion or the result.

SO ORDERED.

Dated this __28th_____ day of ____June_____, 2016.

Worswick, J.

We Concur:

Bjorgen, C.J.

Lee, J.

Filed
Washington State
Court of Appeals
Division Two

May 10, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEO LAVERN RUBEDEW, Appellant.	No. 47183-3-II UNPUBLISHED OPINION

WORSWICK, J. — A jury found Leo Rubedew guilty of first degree assault against Charlaine Bramlett. Rubedew appeals his conviction and sentence, asserting that (1) his conviction violated the constitutional prohibition against double jeopardy, (2) his conviction was barred by principles of collateral estoppel, and (3) the trial court erred by imposing legal financial obligations (LFOs) without first assessing his ability to pay them. In his statement of additional grounds for review (SAG), Rubedew raises several issues of prosecutorial misconduct and ineffective assistance of counsel. We affirm his conviction, but remand to the trial court to consider Rubedew's ability to pay the LFOs.

FACTS

Bramlett and Rubedew were divorced in 2009. After Rubedew was hospitalized following a suicide attempt, Bramlett allowed him to live in her home.

On May 7, 2013, Rubedew came home drunk. Bramlett and Rubedew began arguing, and Bramlett told Rubedew that he needed to move out of her house. Rubedew became very angry. After approximately 15 minutes of arguing, Rubedew asked Bramlett to go outside with

him, but Bramlett refused. Bramlett saw that Rubedew had one arm behind his back while he kept insisting that she exit the house with him. Rubedew was carrying a gun behind his back and Bramlett called 911, believing that Rubedew would again attempt to commit suicide.

While Bramlett was speaking with the 911 operator, Rubedew walked out to the side yard, and Bramlett followed him. Bramlett saw Rubedew sitting on a patio chair "monkeying" with a gun. Report of Proceedings (RP) (Dec. 8, 2014) at 174. Then, according to Bramlett:

> I was on the phone, and I was just talking to the [911 operator]. And [Rubedew] picked the gun up and pointed it at me and said, ["]Get off the damn phone or I'm going to shoot you.["] And then I heard a click.

RP (Dec. 8, 2014) at 174.

The gun did not fire. Rubedew then stuck the gun's barrel in his own mouth.

Police officers arrived a short time later, found Rubedew laying on his back in the front yard with his hands off to the side, and then handcuffed him without incident. The gun recovered from the scene was loaded, but the bullet in the chamber was facing backwards, and the bullets in the gun's magazine were also facing backwards.

The State charged Rubedew by amended information with attempted first degree murder and first degree assault with firearm and domestic violence sentencing enhancements. Rubedew's case proceeded to trial three times. Rubedew's first trial ended in a mistrial due to his health issues. At Rubedew's second trial, the jury returned a verdict finding him not guilty of attempted first degree murder, but it could not reach a verdict on the first degree assault charge.

Before the start of Rubedew's third trial, Rubedew moved to dismiss the first degree assault charge, raising double jeopardy and collateral estoppel issues. The trial court denied the motion. The jury in Rubedew's third trial found him guilty of first degree assault. The jury

further found that Rubedew was armed with a firearm during his commission of the offense and that Rubedew and Bramlett were members of the same family or household.

At sentencing, defense counsel asked the trial court not to impose any discretionary LFOs, stating that "Rubedew will probably never be able to pay his fines." RP (Jan. 23, 2015) at 403. The trial court declined defense counsel's request and imposed discretionary LFOs, stating, "I'm fully aware that the odds of [Rubedew being able to pay his fines] is not strong, but the point to raise that issue is when someone tries to collect it as I read the law." RP (Jan. 23, 2015) at 409. Rubedew appeals his conviction and sentence.

ANALYSIS

I. DOUBLE JEOPARDY

Rubedew first contends that the constitutional prohibition against double jeopardy prohibited the State from retrying him for first degree assault after the jury in his previous trial acquitted him of attempted first degree murder but could not reach a verdict on his first degree assault charge. We disagree.

The Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Article I, section 9 of our State Constitution similarly provides that no person shall "be twice put in jeopardy for the same offense." We interpret article I, section 9's protections against double jeopardy coextensively with the protections afforded under the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 102-103, 896 P.2d 1267 (1995).

Among other things, the Fifth Amendment's prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal. *Gocken*, 127 Wn.2d at 100.

The double jeopardy clause prohibits a retrial only if all of the three following elements have been met: (1) jeopardy previously attached, (2) jeopardy previously terminated, and (3) the defendant is again placed in jeopardy for the same offense. *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). But the prohibition against double jeopardy generally does "not bar retrial after a jury is unable to reach a verdict on a charge because there has been no final adjudication on the charge." *State v. Ahluwalia*, 143 Wn.2d 527, 541, 22 P.3d 1254 (2001).

Here, the jury in Rubedew's second trial was unable to reach a verdict on his first degree assault charge and, thus, double jeopardy principles generally would not prevent the State from retrying him on that charge. *Ahluwalia*, 143 Wn.2d at 541. Rubedew argues that the jury's verdict acquitting him of attempted first degree murder prevented the State from retrying him for first degree assault because the two crimes were the same offense. But Our Supreme Court rejected a nearly identical argument in *Ahluwalia*.

In *Ahluwalia*, the defendant was charged with and tried for one count of first degree murder for shooting and killing a taxicab driver. 143 Wn.2d at 529, 532. The jury at Ahluwalia's first trial was instructed on second degree murder as a lesser included offense to the first degree murder charge. 143 Wn.2d at 529. The jury acquitted Ahluwalia of first degree murder but could not reach a verdict on the lesser included offense of second degree murder. 143 Wn.2d at 529. Ahluwalia was then convicted of second degree murder at a second trial. 143 Wn.2d at 528. On appeal, Ahluwalia argued that double jeopardy principles prohibited the State from retrying him for second degree murder based on his acquittal of first degree murder because the crimes were "the 'same offense' and double jeopardy bars retrial when there has been an acquittal of the 'same offense' in violation of the 'same evidence rule.'" 143 Wn.2d at 539.

Our Supreme Court rejected this argument, holding that the same evidence rule did not apply "because there were no prior convictions before Petitioner was brought to trial, after a mistrial was granted in an earlier trial, on the charge of murder in the second degree." 143 Wn.2d at 539. And our Supreme Court recently reiterated this holding in *State v. Fuller*, 185 Wn.2d 30, 37-38, 367 P.3d 1057 (2016), stating:

> For double jeopardy purposes, a lesser included offense is the "same offense" as the greater offense. *See Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Where an individual is acquitted of the greater offense but the jury is declared hung on the lesser included offense, retrial of that lesser included offense is permitted and does not violate double jeopardy.

Rubedew argues that the rule articulated in *Ahluwalia* does not apply here because first degree assault is not a lesser included offense of attempted murder, and he was acquitted "on the same offense." Br. of Appellant at 14. This argument overlooks that double jeopardy jurisprudence does not bar retrial for a lesser included offense that is considered the "'same offense'" as the greater offense for which a defendant was acquitted. *Fuller*, 185 Wn.2d at 38 (quoting *Brown*, 432 U.S. at 168-69).

That Rubedew's first degree assault charge was not a lesser included offense to attempted first degree murder is a distinction without a difference. If double jeopardy is not offended by retrial of a defendant for a lesser included offense that is the "same offense" as the greater crime for which the defendant has been acquitted, it follows that double jeopardy is not offended by retrial of a defendant for a non-lesser included offense arising from the same alleged criminal conduct as an offense for which the defendant has been acquitted. Because jeopardy did not terminate on Rubedew's first degree assault charge in light of the jury's inability to reach a

verdict on that charge, we hold that the State was permitted to retry him on that charge without offending double jeopardy principles.

II. COLLATERAL ESTOPPEL

Next, Rubedew contends that the State was collaterally estopped from retrying him for first degree assault based on his acquittal of attempted first degree murder. Again, we disagree.

"Under the collateral estoppel doctrine, 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *In re Pers. Restraint of Moi*, 184 Wn.2d 575, 579, 360 P.3d 811 (2015) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). The doctrine of collateral estoppel is incorporated within the double jeopardy clause of the Fifth Amendment to the United States Constitution. *In re Moi*, 184 Wn.2d at 579 (quoting *Dowling v. United States*, 493 U.S. 342, 347, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)). As the party asserting collateral estoppel, Rubedew bears the burden of proof. *In re Moi*, 184 Wn.2d at 579. For collateral estoppel to apply, Rubedew must establish, among other things, that the issue decided in the prior adjudication is identical with the one presented in the second. *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997).

Where, as here, "a previous judgment of acquittal was based on a general verdict, courts must 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.'" *Dowling*, 493 U.S. at 350 (alteration in original) (citations omitted in original) (quoting *Ashe*, 397 U.S. at 444).

To convict Rubedew of attempted first degree murder, the jury was required to find that the State proved beyond a reasonable doubt that he (1) took a substantial step toward (2) causing the death of another person, (3) with premeditated intent. RCW 9A.32.030(1)(a)(b); RCW 9A.28.020(1). In contrast, to convict Rubedew of first degree assault, the jury was required to find that the State proved beyond a reasonable doubt that (1) with intent to inflict great bodily harm, he (2) assaulted another with a firearm. RCW 9A.36.011(1)(a). Upon review of Rubedew's second trial, we conclude that a rational jury could have acquitted Rubedew of attempted first degree murder based on issues that would not have foreclosed a subsequent jury from finding him guilty of first degree assault.

The jury at Rubedew's second trial could have acquitted him of attempted first degree murder based on its determination that the State failed to prove beyond a reasonable doubt that Rubedew had *premeditated* intent to kill Bramlett. "Premeditation is 'the deliberate formation of and reflection upon the intent to take a human life' and involves 'thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Allen*, 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006) (internal quotation marks omitted) (quoting *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999)).

The State presented evidence at Rubedew's second trial that he was intoxicated during his encounter with Bramlett. And Bramlett testified at the second trial that after Rubedew heard her talking on the phone, he pointed the gun at her, and then she heard a click. Based on this evidence the jury could have found that, due to Bramlett's intoxicated state and the quick succession in which he pointed the gun at Bramlett and attempted to fire it, he lacked the deliberation and reflection required to form a premeditated intent to kill. Such a finding would

not foreclose a subsequent jury from finding that Rubedew formed an intent to inflict bodily harm, as required to convict him of first degree assault. *See* RCW 9A.08.010(1)(a) ("A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime."). Because the jury at Rubedew's second trial could have grounded its verdict of acquittal on the State's failure to prove premeditated intent, Rubedew cannot meet his burden to show that collateral estoppel barred a subsequent jury from finding him guilty of first degree assault. Accordingly, his collateral estoppel claim fails.

III. LEGAL FINANCIAL OBLIGATIONS

Next, Rubedew contends that the trial court erred by imposing discretionary LFOs without first considering whether he had the present or likely future ability to pay those LFOs. We agree.

In *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), our Supreme Court held that "RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs." The State asserts that the sentencing court judge made this individualized inquiry. The record belies the State's assertion.

Here, Rubedew's counsel objected to the imposition of discretionary LFOs. The sentencing court acknowledged that the odds of Rubedew being able to pay his fines were not strong but declined to make any finding with regard to his ability to pay, stating that Rubedew must raise the issue when the State seeks to collect the LFOs. Under *Blazina*, this was error, and we remand for consideration of Rubedew's ability to pay LFOs.

IV. SAG

In his SAG, Rubedew raises several issues of prosecutorial misconduct and ineffective assistance of counsel, all of which either lack merit or require examination of matters outside the appellate record.

A. *Prosecutorial Misconduct*

To prevail on a claim of prosecutorial misconduct, a defendant must show that a prosecutor's conduct was both improper and prejudicial in the context of the entire record. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, a defendant must show a substantial likelihood that the misconduct affected the jury's verdict. *Thorgerson*, 172 Wn.2d at 442-43. If a defendant fails to object at trial to the alleged misconduct, the defendant waives the issue on appeal unless he or she can demonstrate that the misconduct was so flagrant and ill-intentioned that the resulting prejudice was incurable by a jury instruction. *Thorgerson*, 172 Wn.2d at 443.

Rubedew first contends that the prosecutor engaged in vindictive prosecution by amending his charges to allege attempted first degree murder and first degree assault based on Rubedew's rejection of an offer to plead guilty to second degree assault and felony harassment. This contention is not properly before us in this direct appeal because the record does not contain any information regarding the State's plea offer. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This issue would be more appropriately raised in a personal restraint petition. We do not further address it.

Next, Rubedew contends that the prosecutor committed misconduct by failing to call a witness at his third trial that the State called in his first two trials. This contention is meritless as

prosecutors have the right to "manage the course and direction of litigation," including the "right to determine the witnesses to be called and utilized by the prosecution." *State v. Hull*, 78 Wn.2d 984, 988-89, 481 P.2d 902 (1971).

Finally, Rubedew contends that the prosecutor committed misconduct during closing argument by misrepresenting the evidence presented at trial. Specifically, Rubedew asserts that the prosecutor lacked any evidentiary basis for stating that Bramlett's 911 call lasted "about 8 minutes and 15 seconds" or that she exited her house about "three minutes and 45 seconds" after placing the 911 call. RP (Dec. 10, 2014) at 361-62. This assertion is meritless. A recording of the 911 call was played to the jury at trial. The recording is 8 minutes and 15 seconds long. Additionally, at 3 minutes and 43 seconds into the recording, Bramlett tells the 911 operator that she is exiting the house. Because the evidence at trial supported the prosecutor's closing argument, Rubedew fails to show that it was improper, and his prosecutorial misconduct claim fails.

B. *Ineffective Assistance of Counsel*

To prevail on an ineffective assistance of counsel claim, the defendant must establish that defense counsel's performance was deficient and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We strongly presume that defense counsel's performance was reasonable, and "[t]o rebut this presumption, the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)), *cert. denied*, 135 S. Ct 153 (2014).

Rubedew first contends that his counsel was ineffective for failing to object to Bramlett's description of the sound she heard coming from Rubedew's gun as a "click," stating that the term was vague. SAG at 5. But Rubedew fails to argue any basis upon which his defense counsel could have objected to this testimony, and we cannot discern of any basis upon which the testimony was objectionable. Moreover, Bramlett testified at trial that the "click" sound that she heard resembled the sound she had heard when her first ex-husband, who was a police officer, dry fired his gun while cleaning it. Accordingly, Rubedew fails to demonstrate that his counsel was ineffective for failing to object to Bramlett's testimony.

Next, Rubedew contends that his counsel was ineffective before trial for failing to have Bramlett's hearing tested and for failing to have the gun tested for the presence of his saliva or other bodily fluids. Again, these contentions require examination of matters outside the appellate record, and are more appropriately raised in a personal restraint petition. We do not further address them. *McFarland*, 127 Wn.2d at 335.

Finally, Rubedew contends that his counsel was ineffective for failing to object to the prosecutor's leading question asking Bramlett, "Were you scared?" in response to Rubedew pointing a gun at her. RP (Dec. 9, 2014) at 233. But, even assuming that the prosecutor's question was objectionable, "[t]he decision of when or whether to object is a classic example of trial tactics" that cannot support an ineffective assistance of counsel claim. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Because Rubedew presents no argument as to how his counsel's decision not to object to the prosecutor's question lacked a legitimate tactical basis, he fails to meet his burden. Accordingly, Rubedew fails to demonstrate that his defense counsel was ineffective.

We affirm Rubedew's first degree assault conviction but remand for resentencing consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bjorgen, C.J.

Lee, J.

CUNNINGHAM LAW OFFICE

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